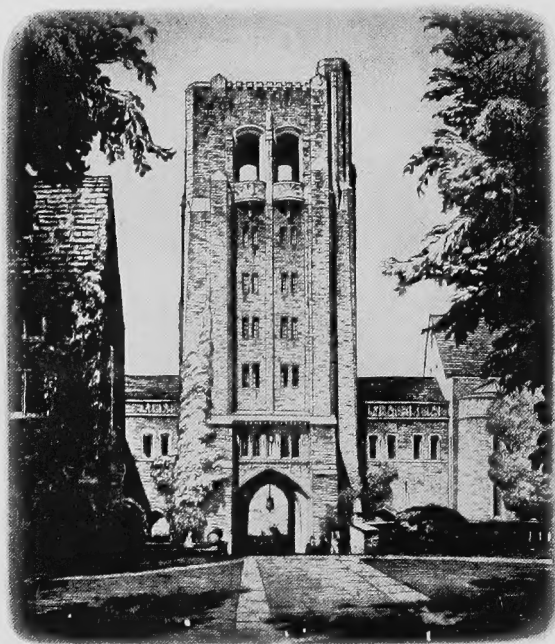




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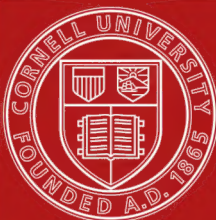
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A TREATISE
ON THE
LAW OF MORTGAGES
OF
REAL PROPERTY
IN
THE STATE OF NEW YORK
WITH OCCASIONAL REFERENCES TO
THE DECISIONS OF THE FEDERAL COURTS, AND OF THE
COURTS OF THE VARIOUS STATES
AND
AN APPENDIX OF FORMS

BY ABNER C. THOMAS, LL.D.
LATE SURROGATE OF NEW YORK COUNTY

THIRD EDITION, BY ABEL CARY THOMAS
OF THE NEW YORK BAR

NEW YORK	ALBANY
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FOREWORD TO THIRD EDITION

THIS revision was undertaken at the suggestion and under the directions of the author. As in the earlier editions the reports of this state have been examined, volume by volume, and decisions bearing on the subject under discussion are cited. The desirability of keeping within the limits of a single volume, as well as the local character of the book, has prevented more than occasional references to foreign cases. No attempt has been made to treat the subject of corporate bonds and mortgages except as illustrative of the general law of mortgages. The editor hopes that the recognized merits of the work as the author left it, have not been obscured by his own failings, and that the inclusion of the statutes enacted and cases decided during the last twenty-six years will be of help to the profession. His thanks are due to many for suggestion and assistance, but mostly to his partner, George G. Reynolds, and to his mother, Lucy C. Thomas, who owned the copyrights of the previous editions, and who has now, for the third time, read manuscript and proof, and gladly performed much of the drudgery connected with the making of the book.

ABEL CARY THOMAS.

2 RECTOR STREET, NEW YORK,
October 4, 1913.

PREFACE TO THE SECOND EDITION

THE first edition of this work was published in 1877. The kind reception which it met with encouraged the author to undertake its enlargement and possible improvement, and this has been his recreation for a number of years during the hours that could be spared from more urgent employment. The general plan of the book will be found not to have been greatly changed, but the matter has been re-arranged in some respects, and revised, and largely added to, and the whole has been divided into sections with an appropriate heading to each. The years which have elapsed since the publication of the first edition have been unusually fruitful of mortgage litigations, and it is believed that every reported decision of the courts of this State, having any bearing on the rights of parties to mortgages of land, has been cited. In addition to this the reports of the decisions of the Courts of the United States and of the Appellate Courts of other States and Territories, have been examined, and the cases based upon principles accepted here, and not resting upon merely local statutes, have been referred to. This examination was made without the aid of any digest or text-book, from the reports themselves, volume by volume.

The Forms in the Appendix have been revised or re-written to conform to the requirements of the Code of Civil Procedure.

It was originally proposed to treat mortgages of personal property as well as mortgages of real estate, in this edition as was done in the first, but as the work progressed it was discovered that no reasonable amount of condensation would permit this to be done within the limits of a single volume, and for this reason the portions of the first edition concerning mortgages of personal property have been omitted, and with additions may some day be published as a separate work.

The author submits the book to his brethren in the profession with the hope that it may prove as useful to them as its preparation has been agreeable to him.

ABNER C. THOMAS.

10' WALL STREET, NEW YORK,

July 1, 1887.

PREFACE TO THE FIRST EDITION

THE fact that mortgages of land are, in the State of New York, almost as common as absolute conveyances, is evidence of the most convincing character that the law which governs the rights and remedies of the parties to them, has been wisely framed and is justly administered. The conclusion which may be reached from so casual an observation of results will be abundantly justified by a study of the law itself; and it is beyond dispute that the law of mortgages of real property in this State is admirably adapted to the business needs of our people.

Mortgages of chattels do not afford such satisfactory security to the mortgagees as do mortgages of real estate; but, as an offset to this, they are regarded with favor by failing debtors who desire to shield their property from the demands of their creditors. They are not so common as mortgages of real estate, but the questions which arise concerning the rights of parties claiming under them, and of those claiming in hostility to them, are numerous and important.

The aim of the author in preparing this work has been to present in a convenient form an intelligible statement of the law governing the rights and remedies of parties to mortgages in this State, and to collate and arrange under appropriate divisions all of the decisions of the courts of this State relative to the topics treated. Decisions of the English courts, and of the courts of the other States of our Union, and of the United States, have also been cited for the purpose of illustrating principles which have received approval here.

The Appendix of Forms was designed to furnish the kind of help which a busy lawyer, unfamiliar with the practice in litigations which specially concern mortgages, could not get from a mere statement of principles. It was, therefore, attempted to avoid inserting forms which were, on the one hand, so common as to be kept for sale by the stationers, or on the other, so unusual as to be but seldom needed.

PREFACE TO THE FIRST EDITION

In thus taking his readers into his confidence as to what he has tried to accomplish, the author expressly disclaims any pretension to having entirely succeeded in his endeavors. He sincerely wishes that the book were more complete and satisfactory, and he sends it out into the world in the hope that, in spite of its defects it may serve to lighten, somewhat, the labors of an overworked profession.

ABNER C. THOMAS.

TRIBUNE BUILDING, NEW YORK,
January 3, 1877.

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MORTGAGES OF REAL PROPERTY

CHAPTER I.

HISTORY OF MORTGAGES AND THEIR NATURE.

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| <p>§ 1. Antiquity of mortgages.</p> <p>2. Mortgages under the civil law.</p> <p>3. Mortgages among the Anglo-Saxons and the Normans.</p> <p>4. Mortgages at common law.</p> <p>5. Welsh mortgages.</p> <p>6. The <i>mortuum vadium</i> or mortgage.</p> <p>7. The mortgage described by Littleton.</p> <p>8. The equity of redemption.</p> <p>9. Once a mortgage, always a mortgage.</p> <p>10. Rights of mortgagor and mortgagee at law and in equity.</p> <p>11. Early cases.</p> <p>12. Definition of a mortgage.</p> <p>13. Not necessary that the grant be executed by person to be treated as mortgagor.</p> <p>14. Personal obligation to pay not a necessary element.</p> <p>15. Form of agreement for redemption.</p> <p>16. Agreement for redemption must enter into original contract.</p> | <p>§17. Trust deeds.</p> <p>18. It is not requisite that the defeasance should be in writing.</p> <p>19. Burden of proof to establish parol defeasance.</p> <p>20. Pleading.</p> <p>21. Sale to <i>bona fide</i> purchaser.</p> <p>22. Remedy against mortgagee for selling property.</p> <p>23. Nature of the estate of the mortgagor.</p> <p>24. Right of mortgagee as to possession.</p> <p>25. A mortgagee is deemed a purchaser <i>sub modo</i>.</p> <p>26. A mortgage is a lien.</p> <p>27. After-acquired title of mortgagor.</p> <p>28. Purchases at tax sales by mortgagee.</p> <p>29. Purchases at tax sales by mortgagor and those claiming under him.</p> <p>30. Purchase of equity of redemption by mortgagee.</p> |
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§ 1. *Antiquity of mortgages.*—In almost every age there have been devices employed by means of which men could obtain credit upon the faith of their property, without entirely parting with title to it. The right to transfer property scarcely became recognized before conditional or qualified transfers followed, and the history of every system of jurisprudence gives some record of regulations by which such transactions were governed and controlled. In tracing the history, therefore, of the present law of mortgages, and in seeking the source from which it sprang, we

are at once embarrassed by its great antiquity, and by the multitude of places in which, at remote periods, similar contracts were known.

It is certain that mortgages of a peculiar nature were known among the Jews, and it is the opinion of some writers that with them the practice of mortgaging lands had origin. Land could not, according to the Jewish law, be aliened beyond the next jubilee, which occurred every fifty years, and the original owner was allowed to redeem at any time on payment of the value to be computed from the time of redemption to the next jubilee. When the day of jubilee arrived, the land returned to the owner discharged of the debt.¹

§ 2. Mortgages under the civil law.—As the Roman Empire absorbed all other kingdoms and nationalities, so the Roman lawyers seized upon the wisdom and learning of the conquered provinces, and whether, as some suppose, they borrowed the idea of mortgage from the Jews, or whether the suggestion came from some other source, they certainly developed a system, the wisdom and equity of which rendered it a potent force in framing the codes of later times, long after the valor of the Roman legions had become mere matter of history.

In the Roman law there were two kinds of transfers as securities for debts: the *pignus* and the *hypotheca*. When the pledge passed into the possession of the creditor, the transaction was termed a *pignus*, while, if the debtor retained possession, it was known as an *hypotheca*.² The distinction between real and personal estate, which prevailed in the common law, was not recognized, but, just as in the common law, the term pledge, though frequently applied to both real and personal property, is more commonly used in reference to a chattel, so the term *pignus* came

¹ Coote on Mortgages, 3. The following is from Nehemiah, chap. V, 1 to 7: "And there was a great cry of the people and of their wives against their brethren, the Jews. For there were that said, We, our sons and our daughters, are many; therefore we take up corn for them, that we may eat and live. Some also there were that said, 'We have mortgaged our lands, vineyards, and houses, that we might buy corn, be-

cause of the dearth. There were also that said, 'We have borrowed money for the king's tribute,' and that upon our lands and vineyards. . . . And I was very angry when I heard their cry and these words. Then I consulted with myself, and I rebuked the nobles and the rulers, and said unto them, Ye exact usury, every one of his brother. And I set a great assembly against them."

² Story's Eq. Jur. § 1005.

to signify in strictness a pledge of a movable, and the word *hypotheca* of an immovable piece of property.³ No title to the thing pledged passed, and, although the debt was not paid at the stipulated time, it did not amount to a forfeiture of the right of property of the debtor therein. The creditor was simply clothed with the authority to sell the pledge and reimburse himself for his debt, interest and expenses, and the residue of the proceeds of the sale then belonged to the debtor. Where it was practicable, notice of the sale was always required to be given to the debtor; provision was made for sales under judicial sanction, and, when the mortgaged property could not conveniently be sold, a decree in the nature of a foreclosure could be obtained, by which the absolute property would be vested in the creditor.⁴ The authority to make the sale was held to arise not from the agreement of the parties, but from the general nature of the contract, and an order of sale would be granted upon application of the creditor, even in a case where a special bargain had been made that there should be no sale. On the other hand, a stipulation providing that, if the debt were not paid at the day, the property should belong to the creditor in lieu of the debt, was held void, as being inhuman and unjust.⁵

§ 3. **Mortgages among the Anglo-Saxons and the Normans.**—It is a matter of doubt as to whether mortgages were known to the Anglo-Saxons. We are in a great degree ignorant of the nature of their law of landed property. The most profound writers are at variance, the one side asserting the law of feuds and tenures to have been acknowledged, the other that it was not. But it seems to be admitted that a right of free alienation of property existed, which implies the right of mortgage or conditional sale; and whether the feudal law was recognized or not, it is manifest that it was not admitted with the burdensome restrictions afterward introduced by the Norman feudists.⁶

After the Norman conquest, mortgages must for a time have become uncommon. The titles of such portions of the kingdom of England as were not portioned out by the Conqueror to his retainers and friends were, soon after that time, surrendered to him, and were regranted on the feudal terms of homage and fealty, and from thenceforth the feudal law prevailed. It was the policy of that system of law to regard the land as the common source of

3 Story's Eq. Jur. § 1006.

4 Story's Eq. Jur. § 1008.

5 Story's Eq. Jur. § 1009.

6 Coote on Mortgages, 4.

wealth and power; it was deemed to be a valuable right of the lord that his tenants should be his friends, and of the tenants that their lord and his heirs, and not a stranger, should continue to rule over them, and the restraints and burdens upon alienation were therefore multiplied, until mortgages of land must have been nearly extinguished.⁷

Another discouragement to the mortgaging of land was found in the fact that the loaning of money at interest was exceedingly unpopular; and while it was lawful for a Jew to lend to a Christian—in analogy to the Jewish law which declared it to be an offense for a Jew to exact usury of a Jew—the taking of usury from a Christian by a Christian was thought to be detestable, and it was punished by the forfeiture of the lands and chattels of the creditor, if he died possessed of the pledge.⁸

The passage of the statute of *Quia emptores terrarum*, in the eighteenth year of the reign of Edward I., simplified the tenure and gave greater freedom to alienations of land, and the restrictions which impeded the conveying of landed property being removed, mortgages became general.⁹

We find that even in Norman England it was not necessary for the pledgee to go into possession of the pledge to protect himself. He could render himself safe by depositing a written contract of pledge in the King's court. Furthermore the possession of the pledgee was but a modified possession, a seisin "*de vadio*" it was called; upon his death the land was subject to dower, not of his, but of the pledgor's widow and his heirs were distinguished from the "*verus haeres*" or heirs of the pledgor.¹⁰

§ 4. **Mortgages at common law.**—The common law recognized two kinds of landed securities, the *vivum vadium* and the *mortuum vadium*. They were both determinable or base fees, with a right of reverter in the feoffor on the payment of a given sum; but they differed in this, that while in the case of a *vivum vadium* the right of the feoffor to redeem continually remained, in the case of a *mortuum vadium* the title to the estate and all interest in it became vested in the feoffee, if the condition were not punctually performed. In the first case, the feoffee took possession, and the rents and profits of the land went to diminish the debt, which the

7 Coote on Mortgages, 5.

8 Coote on Mortgages, 5.

9 Coote on Mortgages, 6.

10 2 Bl. Com. 342, 3; 4 Harv. Law Rev. 1.

feoffor was privileged at any time to pay and resume his possession; in the second, the feoffee did not ordinarily go into possession, but if the condition were not performed, the estate was thereafter forfeited to the feoffee.¹¹ It is not probable that the *vivum vadium* ever passed into general use as a security, and there is no trace of the period when it first fell into disuse.¹²

§ 5. **Welsh mortgages.**—A form of security bearing a resemblance to the *vivum vadium*, and known as a Welsh mortgage, is still recognized in England, though it has almost become obsolete, under which the mortgagee enters and occupies, taking the rents as an equivalent for the interest of the money loaned. The mortgagee cannot enforce the payment of the debt or the redemption of the estate, neither can he foreclose it; and, on the other hand, no matter how large the rents may be, they do not operate to reduce the amount of the claims against the property.¹³

A modification of this is seen in contracts by virtue of which an estate is assured to the mortgagee until, out of the rents and profits, he shall have received the amount of principal and interest. The distinguishing characteristics of all Welsh mortgages were that there was no proviso that the conveyance was to be void on payment of the debt, and there was no covenant, express or implied, for such payment. There was no right to sue for it, and the mortgagee had no remedy whatever therefor, because it admitted of no foreclosure. A contract such as this would doubtless be recognized under our system of law, but presumptions would be against it, and the ordinary remedies of foreclosure and redemption would apply if there was a covenant to pay and a right to sue.¹⁴

§ 6. **The mortuum vadium or mortgage** is, however, the stem from which the modern mortgage has sprung. It is thus described by Littleton: ¹⁵ "Item: if a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day, etc., forty pounds of money, that then the feoffer may re-enter, etc. In this case the feoffor is called tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that

¹¹ 2 Bl. Com. 157; Coote on Mortgages, 10, 11; 2 Wash. R. P. (3d ed.) 39.

¹² Coote on Mortgages, 10.

¹³ Coote on Mortgages, 9; Fisher

on Mortgages, 3; 2 Wash. R. P. (3d ed.) 39.

¹⁴ O'Neil v. Gray, 39 Hun, 566, 568.

¹⁵ Sec. 332.

it is doubtful whether the feoffor will pay at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him forever, and so dead to him upon condition, etc.; and if he doth pay the money, then the pledge is dead as to the tenant," etc. The origin of the name has formed a subject for comment and dispute among writers. Blackstone and some others ¹⁶ follow Littleton; but Mr. Coote ¹⁷ and Mr. Williams ¹⁸ prefer an exposition given by Granville, and claim that an earlier form of the same security existed, by which the rents were received by the creditor in lieu of interest, and the land thus becoming for the time being dead to the feoffor, the security was not inaptly termed a dead pledge.

§ 7. The mortgage described by Littleton was strictly an estate upon condition. By force of it the title instantly vested in the feoffee, subject to the condition; if the condition were performed, the feoffor entered and was in possession of his old estate; but if the condition were not faithfully complied with, the land was forever lost to the feoffor. Where the value of the estate conveyed was large in proportion to the debt, the harshness of such an agreement was manifest, but the common law knew of no better way to treat debtors than to make them live up to their bargains. It relented to the extent of favoring the performance of the condition, and of restoring the debtor to his estate if the condition had been kept in its spirit, as nearly as it could be; ¹⁹ but otherwise the bargain was enforced according to its letter. Men who took usury and who obtained possession of estates by the oppressive enforcement of the conditions of mortgages, were reviled and abused, but the sturdy spirit of the common law refused to interfere between the unfortunate debtor and the consequences of his own act.

§ 8. The equity of redemption.—Happily a jurisdiction was arising under which the harshness of the common law might be softened without an actual interference with its principles, and a system might be established at once consistent with the security of the creditor, and with a due regard for the interests of the debtor.²⁰

Although conditional deeds given as security had been interfered with by the courts at a very early date, probably long before the establishment of any distinct chancery tribunals, it was not

¹⁶ 2 Bl. Com. 157; 2 Wash. R. P. (3d ed.) 39.

¹⁷ Coote on Mortgages, 10.

¹⁸ Williams R. P. 352.

¹⁹ Coote on Mortgages, 13.

²⁰ Coote on Mortgages, 17.

until that development that there was apparent any appreciable modification.²¹

The court of chancery was presided over by men who had studied the enlightened code of the Roman law, and as that court became powerful, the successive chancellors sought, by the introduction of new principles, to moderate the severity with which the common law enforced the breach of the condition. They did not, indeed, make any attempt to alter the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity with the principles of the civil law, declare that the force of the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the debt to secure which it was made; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was "intended as a mere pledge."²² For while the mortgagor, by his default, forfeited his land, he did not pay his debt. The loss of the land was therefore equivalent to a penalty. The only legitimate object of the penalty being to secure the performance of the condition or the payment of the mortgage debt, equity prevented its infliction, even after the "law day," by decreeing a reconveyance upon payment of the debt, interest and costs. This right in the mortgagor was and is known as the *equity of redemption*.

There is no record of the time when this equity was first granted. In the cases of *Wade*²³ and *Goodall*,²⁴ which were decided toward the end of the reign of Queen Elizabeth, the parties do not seem to have entertained the idea of any remedy existing for the mortgagor's relief, if the forfeiture was established at law, although Tothill mentions a case in the thirty-seventh year of Elizabeth's reign,²⁵ in which the equity was decreed, and it must soon after this time have been generally recognized, for there is a case decided in the first year of Charles the First,²⁶ in which the doctrine seems fully admitted. In the intermediate reign of King James the First, the courts of equity became established in power, and

²¹ Glanv. lib. X, c. 8; 3 Bl. Com. 49, 52.

²² Coote on Mortgages, 19.

²³ 5 Coke, 115.

²⁴ 5 Coke, 96.

²⁵ Langford v. Barnard, Tothill, 134.

²⁶ Emanuel College v. Evans, 1 Rep. in Chancery, 10; see also How v. Viguers, 1 Rep. in Ch. 32.

the same period may reasonably be assigned as that in which the doctrine of equity of redemption was fully recognized.²⁷

§ 9. Once a mortgage, always a mortgage.—No sooner, however, was this equitable principle established than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem. It required all the firmness and wisdom of the eminent judges who successively presided in the courts of equity to prevent this equitable jurisdiction being nullified by the artifice of the parties. But those courts, looking always at the intent and not at the form of things, disregarded all the defenses by which the creditor surrounded himself, and laid it down as a plain and undeviating rule that it was inequitable that a creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs. They established as a principle not to be departed from, that “once a mortgage, always a mortgage”; that an estate could not at one time be a mortgage and at another time cease to be so, by one and the same deed; that a mortgage could no more be irredeemable than a distress irrepleviable; that the law will control even an express agreement of the parties, and, by the same reason, equity will let a man loose from his agreement, and even against his agreement admit him to redeem a mortgage; and that whatever clause or covenant there may be in a conveyance, yet if, upon the whole, it appears to have been the intention of the parties that such conveyance shall only be a mortgage, or pass a redeemable estate, a court of equity will always construe it so.²⁸

²⁷ Coote on Mortgages, 20.

²⁸ 21 Harv. Law Rev. 459; Coote on Mortgages, 22; Mooney v. Byrne, 163 N. Y. 86; 57 N. E. 163; Maccauley v. Smith, 132 N. Y. 524; 30 N. E. 997; Lawrence v. The Farmers' Loan & Trust Co., 13 N. Y. (3 Kern.) 209; Conover v. Palmer, 123 App. Div. 817; 108 N. Y. Supp. 480; Henry v. Davis, 7 Johns. Ch. 42.

Even the physical destruction of a defeasance agreement, for a consideration, and with the intent of making a deed absolute on its face but

given as security, a deed in fact, is ineffectual. Conover v. Palmer, 60 Misc. 241; 111 N. Y. Supp. 1074. See Noakes & Co., Ltd., v. Rice [1902] A. C. 24; Bradley v. Carrett [1903] A. C. 253; East India Co. v. Atkins, Comys, 347, 349; Vernon v. Bethel, 2 Eden, 110; Pugh v. Davis, 96 U. S. 332; Bayley v. Bayley, 5 Gray (Mass.), 505; Jackson v. Lynch, 129 Ill. 72; Bradbury v. Davenport, 114 Cal. 593; Stover v. Bounds, 1 Ohio St. 107.

§ 10. Rights of mortgagor and mortgagee at law and in equity.—

Against the introduction of the novel theory of an equity of redemption, the judges of the courts of common law strenuously opposed themselves; and, though ultimately defeated by the increasing power of the court of chancery, they nevertheless, in their own courts, still adhered to the rigid doctrine of forfeiture. The rights of the mortgagor and the mortgagee were, therefore, very different in the courts of law from what they were in the courts of equity.

At law, the mortgagee was treated as being the legal owner, his estate was devisable and descended to his heirs, and he might, after condition broken, oust the mortgagor by an action of ejectment. In equity, the rights of the mortgagee descended to his personal representatives, and the mortgagor was treated as the real owner of the land. Even after the courts of law had recognized the title of the mortgagee as absolute, and had put him into possession, the courts of equity enforced what was termed the mortgagor's right in equity of redemption.

These contradictory and conflicting rulings gave rise to some confusion, more especially while the courts of common law continued to be presided over by men whose early training had led them to regard the interference of the courts of equity as an offensive innovation; but, in the course of time, the rules of equity so commended themselves to the sense of justice of all men, and the power of the chancellors was so vigorously wielded, that the right of a mortgagor, after forfeiture, to redeem by application to equity, was recognized even in the courts of law as a well-defined estate, and was known as an equity of redemption. The mortgagee was, indeed, treated in some respects as the legal owner, and could maintain ejectment against the mortgagor, and had other legal remedies as such, but all these legal rights were held by him subject to the equity of redemption of the mortgagor until, by a decree of the court of chancery, such equity of redemption had been foreclosed. Inasmuch as the legal rights of the mortgagee could only be used to enforce the payment of the debt which the mortgage was made to secure, the mortgagee could not be said by anything more than the shallowest kind of a fiction, to be the owner of the estate, and the judges of the courts of law came, in the course of time, to realize the absurdity of such a proposition.

§ 11. **Early cases.**—The case of *Martin v. Mowlin*,²⁹ decided by the English King's Bench in 1760, illustrates how reasonable a doctrine then prevailed in the courts of law. It was there held that whatever words in a will would carry the money due on a mortgage, would carry the interest in the land. Lord MANSFIELD said: "A mortgage is a charge upon the land, and whatever would give the money would carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts, it will go to the executor, it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt or forgiving it will draw the land after it as a consequence; nay, it would do it though the debt were forgiven only by parol."

So in *King v. St. Michaels*,³⁰ it was remarked by the same judge, that "a mortgagor in possession gains a settlement because the mortgagee, notwithstanding the form, has but a chattel and the mortgage is only a security. It is an affront to common sense to say that the mortgagor is not the real owner."

It will be observed that the doctrine of an equity of redemption was originated by the courts of equity, and that it became part of the law of England because of its own reasonableness, and without the sanction of legislative enactment.³¹

The case of mortgages is, indeed, as has been remarked by Chancellor KENT, "one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law."³²

§ 12. **Definition of a mortgage.**—A mortgage at common law has been defined to be "an absolute pledge, to become an absolute interest, if not redeemed at a certain time,"³³ and again as "a conveyance absolute in its form, but intended to secure the perform-

²⁹ 2 Burr, 978.

³⁰ Doug. 632.

³¹ Blackstone says that "the inconvenience as well as the injustice of putting different constructions in different courts upon one and the same transaction obliged the parliament at length to interfere, and to direct, by the statutes 4 and 5 Anne, c. 16, and 7 Geo. II., c. 20, that in

what had long been the practice of the cases of bonds and mortgages, courts of equity, should also for the future be universally followed in the courts of law, wherein it had before these statutes in some degree obtained a footing." 3 Bl. Com. 435.

³² 4 Kent's Com. 158.

³³ 1 Powell on Mortgages, 7.

ance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance,"³⁴ and still again as "a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed; with a proviso that such conveyance shall be void on payment of the money borrowed within or on a certain day."³⁵

But neither of these definitions is broad enough to include all of the contracts which at this day would be treated as mortgages. A modern mortgage has been defined to be a "debt by specialty secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches,"³⁶ but it has been much more accurately described as "any conveyance of lands intended by the parties at the time of making it to be a security for the payment of money or the doing of some prescribed act."³⁷

§ 13. Not necessary that the grant be executed by person to be treated as mortgagor.—To constitute a mortgage only two things are necessary: a conveyance of property and a contemporaneous agreement that such conveyance shall be a security.³⁸ It is not material that the conveyance should be made by the debtor or by the person in whom the equity of redemption will exist. It is sufficient if the debtor, or he who claims to occupy the position of mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and that the grantee of the legal estate had and acquired such title by the act and assent of the debtor, and as security for his debt.³⁹

Where the grantee advances only a portion of the purchase price in order to assist a person having a contract of purchase, who advances the remainder, and where the title is taken in the name of the grantee, but as security merely for the amount of his advances, the person who incurred the debt is the equitable owner, and courts

34 2 Wash. R. P. (3d ed.), 36.

35 2 Greenl. Cruise, 79.

36 Coote on Mortgages, 139.

37 2 Wash. R. P. 43.

38 *Burnett v. Wright*, 135 N. Y. 543, 32 N. E. 253.

39 *Carr v. Carr*, 52 N. Y. 251; 4 Lans. 314. See *Loomis v. Loomis*, 60 Barb. 22. See also § 77 herein.

of equity find no difficulty in clothing him with all the rights of a mortgagor.⁴⁰ And even if the debtor do not advance any part of the purchase money, if he is instrumental in procuring the title to be placed in the grantee, or if third persons, for his benefit, do or abstain from doing anything toward this end, and the property is received by the grantee because of the action of the debtor or his friends, and upon an agreement to hold it as security, he acquires no higher rights than those of a mortgagee. In an early case, where property was purchased at a foreclosure sale for less than the amount of the debt, and for much less than its value, the owner of the mortgage which was foreclosed, the owner of the equity and all other bidders having been induced to refrain from bidding, because the purchaser represented that he was acting in the interest of the owner, this rule was applied,⁴¹ and it has since been affirmed and enforced.⁴² So, too, where the grantee receives the conveyance from any third person through the efforts of his debtor, and as security for the debt, the transaction is a mortgage, and the right of redemption will vest either in the grantor or the debtor, as the special equities of the case may require.⁴³ And where one loaned money to a judgment debtor to satisfy a judgment, and by parol agreement took the sheriff's deed on execution as security, it was held that his rights were those of a mortgagee only.⁴⁴

In some of the cases cited, the right to redeem is placed upon the ground that it would be a fraud on the part of the grantee to hold as his own what he acquired merely as security, and that a

⁴⁰ Carr v. Carr, 52 N. Y. 251; Stoddard v. Whiting, 46 N. Y. 627; McBurney v. Wellman, 42 Barb. 390; Moore v. Nye, 21 N. Y. Supp. 94; s. c. *sub nom.* Dodge v. Wellman, 43 How. Pr. 427; Tibbs v. Morris, 44 Barb. 138; Sahler v. Signer, 37 Barb. 329; s. c. 44 Barb. 606; Brown v. Jones, 46 Barb. 400; Umfreville v. Keeler, 1 N. Y. Sup. (T. & C.) 486; Hemans v. Lucy, 1 N. Y. Sup. (T. & C.) 523. See also Carey v. Rawson, 8 Mass. 159; Stewart v. Lucy, 120 Ill. 480, 20 N. E. 647; McPherson v. Hayward, 81 Me. 329, 17 Atl. 164; Fessler's Appeal, 75 Pa. St. 483.

⁴¹ Brown v. Lynch, 1 Paige, 147.

⁴² Ryan v. Dox, 34 N. Y. 307, and

cases cited. See also Life Ins. Co. v. Slee, 110 Ill. 35; Ins. Co. v. White, 106 Ill. 67; Davis v. Dresback, 81 Ill. 393; Pensineau v. Pulliman, 47 Ill. 58; Logue's Appeal, 104 Pa. St. 136; Danzeisen's Appeal, 73 Pa. St. 65.

⁴³ Weed v. Stevenson, Clarke, 166; Stoddard v. Whiting, 46 N. Y. 627; Hemans v. Lucy, 1 N. Y. Sup. (T. & C.) 523; Hoile v. Bailey, 58 Wis. 434; Shillaber v. Robinson, 97 U. S. 68; Wright v. Shumway, 1 Biss. 23.

⁴⁴ Beatty v. Brummett, 94 Ind. 76; Smith v. Brand, 64 Ind. 427; Butcher v. Stultz, 60 Ind. 170; Hayworth v. Worthington, 5 Black. 361; 35 Am. Dec. 126.

court of equity will provide relief by declaring the grantee a trustee for the person defrauded. In all of them, however, the right of redemption is declared to exist, and it would be difficult to distinguish the rights of a debtor whose debt was secured by a transfer of property to which he was equitably entitled, by a third person to his creditor, from the rights always conceded to mortgagors. It is a matter of small importance whether we say that the debtor is a *cestui que trust* holding the rights of a mortgagor, or whether we declare him to be, in fact, a mortgagor.

§ 14. Personal obligation to pay not a necessary element.—It is not an essential element in a mortgage, that the debt or obligation which it secures shall be capable of enforcement, otherwise than as a lien upon the land. It is provided by statute, that “a mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.”⁴⁵

Under this statute it was held that an absolute deed intended as security was a mortgage without any personal responsibility to pay the debt on the part of the mortgagor,⁴⁶ and such a security will pass by a mere assignment of the interest in the land.⁴⁷

So, too, a mortgage under seal may be enforced after the debt which it secures, it being by parol, has been barred by the statute of limitations.⁴⁸

§ 15. Form of agreement for redemption not material.—The form in which the contract is expressed is of no importance, if it can be made to appear that the transfer was by way of security. It may be in the form of a conveyance, upon express trusts,⁴⁹ or of

⁴⁵ Real Property Law, § 249; *Conover v. Palmer*, 123 App. Div. 817; 108 N. Y. Supp. 480.

⁴⁶ *Hone v. Fisher*, 2 Barb. Ch. 559; *Gaylord v. Knapp*, 15 Hun, 87. See also *Rice v. Rice*, 4 Pick. (Mass.) 349; *Wharf v. Howell*, 5 Binn. (Pa.) 499; but when three years were given to repurchase and there was no covenant to pay, this with other circum-

stances, was held, to establish the transaction as a conditional sale; *Hillhouse v. Dunning*, 7 Conn. 143.

⁴⁷ *Severance v. Griffith*, 2 Lans. 38.

⁴⁸ *Pratt v. Huggins*, 29 Barb. 277.

⁴⁹ *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb. 613; *Lawrence v. The Farmers' Loan and Trust Co.*, 13 N. Y. (3 Kern.) 200.

a conveyance upon condition, as at common law, or of a grant with a covenant to reconvey.⁵⁰

In that portion of the Consolidated Laws which treats of the recording of deeds, it is enacted that "a deed conveying real property, which, by any other written instrument appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage,"⁵¹ but this was only declaratory of the law, and an absolute transfer will be treated as a mortgage if it can be shown to have been intended by the parties to it as a security.⁵²

§ 16. Agreement for redemption must enter into original contract.—The intent that the transfer shall operate as a security must enter into the original contract. It is a maxim of equity that "once a mortgage, always a mortgage"; but it is no less true that an absolute and unqualified conveyance cannot become a mortgage by subsequent agreement.⁵³

The fact that the conveyance was originally intended as security may be proved by any competent testimony. The conveyance may be under seal, and the defeasance or evidence of the right to redeem may be in a separate instrument,⁵⁴ and it may consist of a simple admission of the grantee, without a seal, and bearing a date subsequent to the conveyance.⁵⁵ But permitting the defeasance to bear

⁵⁰ Peterson v. Clark, 15 Johns. 205.

⁵¹ Real Prop. Law, § 320; People v. Gass, 206 N. Y. 609.

⁵² Lane v. Shears, 1 Wend. 433; Brown v. Dean, 3 Wend. 208; Palmer v. Guernsey, 7 Wend. 248; Roach v. Cosine, 9 Wend. 227; Weed v. Stevenson, 1 Clark, 166.

See also following cases: Cannon v. McNab, 48 Ala. 99; French v. Burns, 35 Conn. 359; Endel v. Walls, 16 Fla. 786; Shays v. Norton, 48 Ill. 100; Love v. Blair, 72 Ind. 281; Overstreet v. Baxter, 30 Kan. 55; Lewis v. Small, 71 Me. 552; Goddard v. Coe, 55 Me. 385; Campbell v. Dearborn, 100 Mass. 130; 12 Am. Rep. 171; Steel v. Steel, 86 Mass. (4 Allen) 417; Cooper v. Brook, 41 Mich. 488; Parsell v. Thayer, 39 Mich. 467; Coles v. Marble, 37 Mich. 158;

Benton v. Nicoll, 24 Mich. 221; Turner v. Kerr, 44 Mo. 429; Vliet v. Young, 34 N. J. Eq. 15; Crane v. De Camp, 21 N. J. Eq. 414; Phillips v. Hulsizer, 20 N. J. Eq. 308; Walcott v. Morris, 1 Murphy (N. C.), 116; 3 Am. Dec. 678; Pearce v. Wilson, 111 Pa. St. 14; Harper's Appeal, 64 Pa. St. 315; Colwell v. Woods, 3 Watts, 188; 27 Am. Dec. 345; Beale v. Ryan, 40 Tex. 399; Territory of Utah v. Golding, 3 Utah, 39; Klinck v. Price, 4 W. Va. 4; 6 Am. Rep. 268.

⁵³ Sturtevant v. Sturtevant, 20 N. Y. 39; Barrett v. Carter, 3 Lans. 68. See § 13 herein.

⁵⁴ Elliott v. Wood, 53 Barb. 285. See also Clark v. Lyon, 46 Ga. 202.

⁵⁵ Dey v. Dunham, 2 Johns. Ch. 182.

See also Harrison v. Phillips Acad-

a later date than the grant concerns the question of evidence only, and a conveyance intended at the time to transfer the absolute title to the grantee cannot be converted into a mortgage by any subsequent agreement between the parties.⁵⁶

§ 17. Trust deeds.—In some States a security in the form of a grant to a third person, as trustee with authority to sell and satisfy the debt, and reserving the estate to the grantor on payment, is used instead of the ordinary mortgage commonly approved here. These trust deeds are mortgages and are governed by the same rules.⁵⁷

The most familiar example is a conveyance by a railroad, or other corporation, to trustees to hold the property conveyed in trust for the benefit of bondholders or other creditors, reserving to the grantor the beneficial enjoyment of the property conveyed until default in the payment of the debt, and with a power in the trustees to sell the property upon the happening of that event, applying so much of the proceeds as may be necessary to the satisfaction of the debt and returning the surplus, if any, to the grantor.

In this jurisdiction it has been held that a conveyance, made in fact to secure the debts of a third person and accompanied by a declaration of trust running from the grantee, is a mortgage.⁵⁸

Where a deed is executed and delivered to a person to secure

emy, 12 Mass. 456; Newhall v. Burt, 7 Pick. 157; Weide v. Gehl, 21 Minn. 449; Littlewort v. Davis, 50 Miss. 403; O'Neil v. Capelle, 62 Mo. 202; Gubbins v. Harper, 7 Phila. 276.

56 Kraemer v. Adelsberger, 122 N. Y. 467; 25 N. E. 859. See also Hall v. Jewell, 7 Greenleaf (Me.) 435; 22 Am. Dec. 212; Bennoch v. Whipple, 12 Me. 346; 28 Am. Dec. 186; Stowe v. Merrill, 77 Me. 550; Payne v. Patterson, 77 Pa. St. 134.

57 Stafford Nat. Bank v. Sprague, 17 Fed. 784; De Wolf v. Sprague Mfg. Co., 49 Conn. 282; Fitch v. Wetherbee, 110 Ill. 475; Fox, Adm'r., v. Fraser, 92 Ind. 265; Yaryan v. Shriner, 26 Ind. 364; Mattix v. Weand, 19 Ind. 151; Dibblee v. Mitchell, 15 Ind. 435; McDonald &

Co. v. Kellogg, 30 Kan. 170; 2 Pac. 507; Bennett v. Wolverton, 24 Kan. 284; Glynn v. Building Assn., 22 Kan. 746; Lenox v. Reed, 12 Kan. 227; Chafee v. Fourth Nat. Bank, 71 Me. 514; State Bank of Bay City v. Chappelle, 40 Mich. 447; Martin v. Alter, 42 Ohio St. 94; Woodruff v. Robb, 19 Ohio St. 217; Hoffman v. Mackall, 5 Ohio St. 124; Lance's Appeal, 112 Pa. St. 456; Union Co. v. Sprague, 14 R. I. 452; Austin v. Sprague Mfg. Co., 14 R. I. 464; Camden v. Alkire, 24 W. Va. 674; New York Central Trust Co. v. Burton, 74 Wis. 324; 43 N. W. 141.

58 Vestell v. Hart, 202 N. Y. 280; 95 N. E. 703; Dodd v. Neilson, 90 N. Y. 243.

loans from a third party and such grantee gives back an instrument to the effect that the deed is to be held in escrow, the grantee will be treated as the trustee of an express trust for the purpose of enabling him to sue and the deed cannot be enforced by a beneficiary who is not a party thereto.⁵⁹

§ 18. It is not requisite that the defeasance should be in writing.

—In the State of New York, whatever the rule may be elsewhere, a conveyance under seal, absolute upon its face, may be shown by parol to have been intended as a security, and to be in reality a mortgage. The earlier cases proceeded upon the ground that it was a fraud on the part of a grantee to attempt to convert a mortgage into an absolute sale,⁶⁰ but the later authorities go so far as to say that fraud or mistake in the preparation or form of the instrument is not an essential element in an action for relief, and to give effect to the intention of the parties.⁶¹ The courts of this State are fully committed to the doctrine, and it is too firmly established to admit of discussion.⁶²

59 *Mutual Life Ins. Co. v. Nicholas*, 144 App. Div. 95; 128 N. Y. Supp. 902, holding that provisions of § 449 of the Code of Civil Procedure are applicable.

60 *Strong v. Stewart*, 4 Johns. Ch. 167.

61 *Horn v. Keteltas*, 46 N. Y. 605; 42 How. Pr. 138.

62 *Brown v. Clifford*, 7 Lans. 46; *Mooney v. Byrne*, 163 N. Y. 86; 57 N. E. 163; *Shields v. Russell*, 142 N. Y. 290; 36 N. E. 1061; *Burnett v. Wright*, 135 N. Y. 543; 32 N. E. 253; *Macauley v. Smith*, 132 N. Y. 524; 30 N. E. 997; *Blazy v. McLean*, 129 N. Y. 44; 29 N. E. 6; *Kraemer v. Adelsberger*, 122 N. Y. 467; 25 N. E. 859; *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1; 17 N. E. 405; *Gilbert v. Deshon*, 107 N. Y. 324; 14 N. E. 318; *Horn v. Keteltas*, 46 N. Y. 605; 42 How. Pr. 138; *Murray v. Walker*, 31 N. Y. 399; *Despard v. Walbridge*, 15 N. Y. 374; *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. (4 Seld.) 416; *Van Dusen v. Worrell*, N. Y. (3 Keyes) 311; *Mumford v. Muller*, N. Y. (1 Keyes)

31; *Conover v. Palmer*, 123 App. Div. 817; 108 N. Y. Supp. 480; *Farmers' & Merchants' Bank v. Smith*, 61 App. Div. 315; 70 N. Y. Supp. 536; *Spencer v. Richmond*, 46 App. Div. 481; 61 N. Y. Supp. 397; *Cook v. Adams*, 32 App. Div. 385; 53 N. Y. Supp. 120; *Richardson v. Beaber*, 62 Misc. R. 542; 115 N. Y. Supp. 821; *Faulkner v. Cody*, 45 Misc. R. 64; 91 N. Y. Supp. 633; *Tibbs v. Morris*, 44 Barb. 138; *McBurney v. Wellman*, 42 Barb. 390; *Ryan v. Dox*, 25 Barb. 440; *Brown v. Dewey*, 1 Sand. Ch. 57; *McIntyre v. Humphreys*, Hoff. 31; *Robinson v. Cropsey*, 2 Edw. Ch. 138, aff'd 6 Paige, 480; *Holmes v. Grant*, 8 Paige, 243; *Van Buren v. Olmstead*, 5 Paige, 9; *Slee v. Manhattan Co.*, 1 Paige, 48; *Whittick v. Kane*, 1 Paige, 206; *James v. Johnson*, 6 Johns. Ch. 417; *Strong v. Stewart*, 4 Johns. Ch. 167; *Marks v. Pell*, 1 Johns. Ch. 594; *Clark v. Henry*, 2 Cow. 324; *Hall v. Van Cleve*, 11 N. Y. Leg. Ok. 281.

Where defeasance clause is void for uncertainty see *Burnett v. Wright*, 135 N. Y. 543; 32 N. E. 253.

The same rule also prevails in other States, and upon no point are the authorities more harmonious than that a deed, absolute upon its face, may be shown by parol to have been intended as a mere security and to be a mortgage.⁶³

A deed may be shown to be a mortgage and void for usury.⁶⁴ And a lease may be shown by parol to be a mortgage⁶⁵ and usurious.⁶⁶

Where a deed absolute on its face is held to be a mortgage, a judgment creditor has a lien upon the premises subject to the mortgage.⁶⁷

§ 19. Burden of proof to establish parol defeasance.—But while parol evidence is admissible to show that a deed, absolute upon its face, was intended as a mortgage, the presumption is, that the writing expresses the true contract between the parties, and the agreement for redemption must be clearly made out by a preponderance of proof.⁶⁸

63 Jackson v. Lawrence, 117 U. S. 679; 6 Sup. Ct. 915; 33 Alb. L. J. 436; Brick v. Brick, 98 U. S. (8 Otto) 514; Lyon v. Powell, 78 Ala. 351; Turner v. Wilkinson, 72 Ala. 361; Moore v. Madden, 7 Ark. 530; 46 Am. Dec. 298; Combs v. Hawes, Cal., 8 Pac. 597; Taylor v. McLain, 64 Cal. 513; 2 Pac. 399; Hall v. Linn, 8 Colo. 264; 5 Pac. 641; Hubbard v. Stetson, 3 MacA. 113; Peugh v. Davis, 2 MacA. 14; Walls v. Endel, 20 Fla. 86; Bailey v. Bailey, 115 Ill. 551; Eames v. Hardin, 111 Ill. 634; Insurance Co. v. White, 106 Ill. 67; Wright v. Gay, 101 Ill. 233; Herron v. Herron, 91 Ind. 278; Sibbett v. Stryker, 62 Ind. 41; Davis v. Eastham, 81 Ky. 116; Warfield v. Fisk, 136 Mass. 219; Haslam v. Barrett, 115 Mass. 256; Saunders v. Stewart, 7 Nev. 200; Phillips v. Hulsizer, 20 N. J. Eq. 308; King v. Warrington, 2 N. M. 318; Perkins v. West, 55 Vt. 265; Hills v. Loomis, 42 Vt. 562; Miller v. Ansenig, 2 Wash. T. 22; Zane v. Fink, 18 W. Va. 694; Kent v. Agard, 24 Wis. 378.

Conveyance void as to creditors.

In New Hampshire a conveyance absolute on its face with a secret agreement to reconvey on payment of a certain sum, is void as to the creditors of the grantor, though no fraud was intended; Stratton v. Putney, 63 N. H. 577.

64 Fiedler v. Darrin, 50 N. Y. 437.

65 Cagliostro v. Galgano, 69 Misc. R. 321; 125 N. Y. Supp. 523; Lamson v. Moffatt, 61 Wis. 153; 21 N. W. 62; 31 Alb. L. J. 275.

66 People ex rel. Ainslee v. Howlett, 13 Hun, 138.

67 Lazarus v. Rosenberg, 70 App. Div. 105; 75 N. Y. Supp. 11.

68 Ensign v. Ensign, 120 N. Y. 655; 24 N. E. 942; Bascombe v. Marshall (No. 1), 129 App. Div. 516; 113 N. Y. Supp. 991; Matter of Holmes (No. 1), 79 App. Div. 264; 79 N. Y. Supp. 592; Murray v. Sweazy, 69 App. Div. 45; 74 N. Y. Supp. 543; Farmers' & Merchants' Bank v. Smith, 61 App. Div. 315; 70 N. Y. Supp. 536; Haussknight v. Smith, 11 App. Div. 185; 42 N. Y. Supp. 611. See Wilson v. Parshall, 129 N. Y. 223; 29 N. E. 297; Thornley v. Thornley, 3 Misc. R. 597; 23

The evidence must be as clear and cogent as that required to reform a deed.⁶⁹

Where the indebtedness from the grantor to the grantee is recited as a consideration for the conveyance, this is a strong indication that an absolute transfer was intended.⁷⁰

The circumstance that the grantor continues in possession imports that the deed is a security and not a sale;⁷¹ but this presumption will be rebutted if it also appears that the vendor agreed to pay rent.⁷² And if the grantee went into possession and made valuable improvements, this will strengthen the presumption that the absolute transfer is what it purports to be.⁷³

The question whether a conveyance is a mortgage is a mixed question of law and fact, and is to be determined in the light of all the surrounding circumstances.⁷⁴

Where the evidence is conflicting the general rule prevails as in other cases that the conclusion of the trial court will not be disturbed.⁷⁵

§ 20. Pleading.—In order that parol evidence shall be admissible to show that a conveyance is given as security merely for an

N. Y. Supp. 337; *Marks v. Pell*, 1 Johns. Ch. 599; *Holmes v. Grant*, 8 Paige, 243–255.

See also following cases: *Cadman v. Peter*, 118 U. S. 76; 6 Sup. Ct. 957; 33 Alb. L. J. 455; *Coyle v. Davis*, 116 U. S. 108; 6 Sup. Ct. 314; *Howland v. Blake*, 97 U. S. 624; *Danner Land & Lumber Co. v. Ins. Co.*, 77 Ala. 184; *Marsh v. Marsh*, 74 Ala. 418; *Turner v. Wilkinson*, 72 Ala. 301; *Parks v. Parks*, 66 Ala. 326; *Phillips v. Croft*, 42 Ala. 477; *Adams v. Adams*, 5 Conn. 544; *Matthews v. Porter*, 16 Fla. 466; *Bentley v. O'Brien*, 111 Ill. 53; *Hancock v. Harper*, 86 Ill. 445; *Price v. Kames*, 59 Ill. 276; *Shays v. Norton*, 48 Ill. 100; *Allen v. Fogg*, 66 Iowa, 229; 23 N. W. 643; *Tilden v. Streeter*, 45 Mich. 533, 539; *Case v. Peters*, 20 Mich. 298, 303; *Albany & S. W. D. Co. v. Crawford*, 11 Oreg. 243; 4 Pac. 113; *Haines v. Thompson*, 70 Pa. St. 434; *Edwards v. Wall*, 79 Va. 321.

The evidence must be clear, unequivocal and convincing beyond a

reasonable doubt. *Richardson v. Beaber*, 62 Misc. R. 542; 115 N. Y. Supp. 821. See *Dean v. Metropolitan Elev. R. Co.*, 119 N. Y. 540; 23 N. E. 1054; *Murray v. Sweasy*, 69 App. Div. 45; 74 N. Y. Supp. 543.

69 *Kent v. Lasley*, 24 Wis. 654.

70 *Eckford v. DeKay*, 26 Wend. 29; *Brown v. Dewey*, 2 Barb. 28.

71 *Wright v. Bates*, 13 Vt. 341.

72 *Danner Land Co., etc., v. Ins. Co.*, 77 Ala. 184.

73 *Woodworth v. Carman*, 43 Iowa, 504.

74 *Cook v. Adams*, 32 App. Div. 385; 53 N. Y. Supp. 120; *Brown v. Clifford*, 7 Lans. 46.

Deed not to be held a mortgage as a matter of law. *Reich v. Dyer*, 180 N. Y. 107; 72 N. E. 922.

Direct testimony not necessary. *Farmers' & Merchants' Bank v. Smith*, 61 App. Div. 315; 70 N. Y. Supp. 536.

75 *Thornley v. Thornley*, 3 Misc. R. 597; 23 N. Y. Supp. 337.

indebtedness of the grantor to the grantee, the pleadings should be so framed as to charge that fact, and this cannot be done without an admission, in some form, that an indebtedness once existed or was contemplated. It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no rights whatever under it, or that he should reconvey to the grantor, on his request, without any consideration.⁷⁶ In an action by a judgment creditor to set aside a conveyance as fraudulent, the conveyance may be declared to be a security, but this cannot be done without appropriate allegations.⁷⁷

In a suit to set aside a conveyance of lands the court after making a finding in the alternative that the deed was given "to pay or secure the payment" of services rendered, should not dismiss the complaint upon the merits even though it was not alleged that the deed was given as security, and the amount due was not tendered by the plaintiff.

In a suit in equity the court should adapt the remedy to the facts before it even if it be necessary to amend the pleading to conform to the proof.⁷⁸

§ 21. **Sale to bona fide purchaser.**—When an absolute conveyance is given as security for a loan of money, the relation between the grantee and grantor is that of mortgagor and mortgagee; but third persons, without knowledge of the secret defeasance, may deal with the grantee as if he were the real owner, and a *bona fide* purchaser from him will be fully protected.⁷⁹

⁷⁶ *Hutchins v. Hutchins*, 98 N. Y. 56, 63.

When, in an action to determine the title to real property, both the plaintiff and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt due the grantee, the court is without power to render judgment that the deed was void as champertous and because given when the property was in the adverse possession of another.

The formal admissions in the pleadings bind the parties making them, and the court is confined to a deter-

mination of the fact that the deed was in fact a mortgage and to the ascertainment of the amount due thereon. *Bradt v. McClenahan*, 118 App. Div. 768; 103 N. Y. Supp. 884.

⁷⁷ *Van Wyck v. Baker*, 16 Hun, 168, reversing 10 Hun, 39.

⁷⁸ *White v. Fromme*, 120 App. Div. 782; 105 N. Y. Supp. 634.

⁷⁹ *Minton v. New York Elevated R. R. Co.*, 130 N. Y. 332; 29 N. E. 319; *Meehan v. Forrester*, 52 N. Y. 277; *Whittick v. Kane*, 1 Paige, 202; *Westfall v. Westfall*, 16 Hun, 541.

One must have paid all of the purchase money to create the relation of

In such a case it is held that the only action is for an account of proceeds.⁸⁰ But if the purchaser from the grantee has notice of the defeasible nature of the title, he will acquire only the rights of an assignee of the mortgage.⁸¹

The actual occupancy of the grantor is notice of his equity to a purchaser from the grantee.⁸²

§ 22. **Remedy against mortgagee for selling property.**—A grantee under a conveyance absolute in form, but which can be shown to be intended as a security, who destroys the equitable right of the grantor to redeem by a conveyance to a *bona fide* purchaser, is guilty of a conversion of the land, and may be held to account to the owner of the title for the amount of the proceeds of the sale received by him over and above the amount of his lien. It will be no defense to him to show that the price which he received was in excess of the market value of the property.⁸³ And if part of the purchase money received by him was secured by a purchase-money mortgage, he may be charged with the amount of money represented by the mortgage as so much cash in hand.⁸⁴

The equitable owner of the land may in such a case at his election require an accounting either for the proceeds of the sale of the land, or its value at the time when his right to such reparation is established.⁸⁵ In one case Chancellor KENT preferred the time of the commencement of the suit as the period at which the value should be ascertained;⁸⁶ but all the cases concede that the plaintiff is not limited to the proceeds of the wrongful disposition.⁸⁷

a bona fide purchaser for value. *Macauley v. Smith*, 132 N. Y. 524; 30 N. E. 997.

See also following cases as to rule in text: *Turner v. Wilkinson*, 72 Ala. 361; *Pico v. Gallardo*, 52 Cal. 206; *Weide v. Gehl*, 21 Minn. 449; *Frink v. Adams*, 36 N. J. Eq. 485; *Hills v. Loomis*, 42 Vt. 562. *

⁸⁰ *Haussknight v. Smith*, 11 App. Div. 185; 42 N. Y. Supp. 611, holding that where the purchaser gave other lands in exchange, the lands so taken were part of the proceeds and that hence it was competent to prove the value of such lands.

⁸¹ *Berdell v. Berdell*, 20 W. Dig. 81.

⁸² *Brown v. Gaffney*, 28 Ill. 149; *New v. Wheaton*, 24 Minn. 406; *contra Pico v. Gallardo*, 52 Cal. 206.

⁸³ *Budd v. Van Orden*, 33 N. J. Eq. 143.

⁸⁴ *Van Orden v. Budd*, 33 N. J. Eq. 564.

⁸⁵ *Meehan v. Forrester*, 52 N. Y. 277, 281. See also *Enos v. Sutherland*, 11 Mich. 338.

⁸⁶ *Hart v. Ten Eyck*, 2 Johns. Ch. 117.

⁸⁷ *Meehan v. Forrester*, 52 N. Y. 277, 281. See also *Peabody v. Tarbell*, 2 Cush. (Mass.) 227, 233; *May v. LeClair*, 11 Wall. 236.

It has been held that in such an action the defendant is entitled to a credit for his reasonable charges for effecting the sale.⁸⁸ He is also entitled to be credited with any sum properly paid for purchasing an outstanding title.⁸⁹ In other respects the accounting between the parties as to rents received and disbursements made, is controlled by the principles applicable to accountings with mortgagees who have been in possession.

If the absolute conveyance has been made upon an agreement that the grantee is to sell the land for the payment of his debt, he can be held to account for the proceeds,⁹⁰ and for nothing more than the proceeds received by him; and such accounting must be made with the person who, pursuant to the agreement, is to receive the balance. If such balance was agreed to be paid to a creditor of the grantor, that creditor may maintain the action.⁹¹

The action to compel a grantee of land under a conveyance intended as security to account for its proceeds or value after a sale to a *bona fide* purchaser, may be maintained by any person having an interest in or a lien upon the equity of redemption. Thus a judgment creditor of the grantor may maintain the action, and if the sale was made after the death of the grantor, it may be brought by his heir or widow, but not by his administrator.⁹² It has been said that such an action will be barred by limitation at the end of six years,⁹³ but under our statute it is believed that the ten years' limitation would apply.

§ 23. *Nature of the estate of the mortgagor.*—Prior to the colonization of this country it was well understood in England that a mortgage of any kind vested the fee in the mortgagee. Theoretically the same rule prevailed here. It was not until after the Revolution, however, that the question appears to have been raised. About that time attempts were made to enforce the law in Massachusetts. To settle the dispute that ensued Judge Trowbridge of the Supreme Judicial Court of that Commonwealth delivered his famous "Reading" which apparently met with the approval of the rest of the bench for it was published in the official reports.⁹⁴ The doctrine there enunciated, and the law in

⁸⁸ Van Dusen v. Worrell, 4 Abb. App. Dec. 473; 36 How. 286.

⁸⁹ Atkins v. Lewis, 5 Oreg. 292.

⁹⁰ Mills v. Mills, 115 N. Y. 80; 21 N. E. 714.

⁹¹ Raynor v. Lyons, 37 Cal. 452.

⁹² Bowery Nat. Bank v. Duncan, 12 Hun, 405.

⁹³ Hancock v. Harper, 86 Ill. 445.

⁹⁴ Trowbridge's Pleading, 2 Mass. 551.

Massachusetts to-day, is that the mortgagee is the legal owner of the fee while the mortgagor has an equitable estate only. So a mortgagee is there entitled to possession even before breach, unless possession is expressly reserved to the mortgagor in the mortgage. Elsewhere in the United States the rigor of the rule has been very largely abated although it may truthfully be said that our present system, in common with the ancient system, purports to give to him who would acquire a lien, an estate.

In this State, as in most of the others, the mortgagor has long, both at law and in equity, been regarded as the owner of the fee, and the mortgage has, for most purposes, been regarded as a mere security of a personal nature.⁹⁵

Under any form of mortgage the mortgagee no longer has an estate,⁹⁶ but a chose in action only, secured by a lien.⁹⁷ As against all persons but the mortgagee, the mortgagor is for all purposes the owner of the land,⁹⁸ and an outstanding mortgage will not even constitute a breach of covenant of seizin.⁹⁹ The interest of the mortgagor in the land, whether in or out of possession, may be sold upon execution, and it has even been held that the mortgagee in possession may procure such sale, and may himself become the purchaser.¹⁰⁰

A grantor who has given deeds absolute on their face but in

95 *Sexton v. Breese*, 135 N. Y. 387; 32 N. E. 133; *Matter of Albrecht*, 136 N. Y. 91; *Merritt v. Bartholick*, 36 N. Y. 44; *Power v. Lester*, 23 N. Y. 527; *Kortright v. Cady*, 21 N. Y. 343; *Packer v. Rochester & Syracuse R. R.*, 17 N. Y. 283, 295; *Waters v. Stewart*, 1 Caines' Cas. 47; *Runyan v. Mersereau*, 11 Johns. 534; *Jackson v. Willard*, 4 Johns. 42; *Astor v. Miller*, 2 Paige, 68; *Astor v. Hoyt*, 5 Wend. 603.

See also following cases: *Mack v. Wetzlar*, 39 Cal. 247; *Fletcher v. Holmes*, 32 Ind. 497; *Carpenter v. Bowen*, 42 Miss. 28; *Woods v. Hildebrand*, 46 Mo. 284; *Gallatin County v. Beattie*, 3 Mont. 173; *McHugh v. Smiley*, 17 Neb. 620; 20 N. W. 296; *Asay v. Hoover*, 5 Pa. St. 21; 45 Am.

Dec. 713; *Williams v. Beard*, 1 S. C. 309.

96 *Barson v. Mulligan*, 191 N. Y. 306, 315.

97 *Becker v. McCrea*, 193 N. Y. 423.

98 *Runyan v. Mersereau*, 11 Johns. 534; *Hitchcock v. Harrington*, 6 Johns. 290; 5 Am. Dec. 229; *Coles v. Coles*, 15 Johns. 319. See also *Harp v. Calahan*, 46 Cal. 222; *Lily v. Dunn*, adm'r, 96 Ind. 220.

Practically the mortgagor's estate is diminished to the extent of the mortgage. *National Bank v. Levy*, 127 N. Y. 549; 28 N. E. 592.

99 *Sedgwick v. Hollenback*, 7 Johns. 376.

100 *Trimm v. Marsh*, 3 Lans. 309; aff'd 54 N. Y. 599; *Ten Eyck v. Craig*, 5 N. Y. Sup. (T. & C.) 65; 2 Hun, 452; aff'd 62 N. Y. 406.

reality mortgages retains the legal title to the premises conveyed.¹ A deed in the nature of a mortgage given by a tenant in common upon his undivided interest in lands leaves in him an estate which entitles him to apply for partition.² The interest of the mortgagor, after his death, passes to his heir, while that of the mortgagee passes to his administrator.³

As between the mortgagor and mortgagee the estate of the mortgagor is, somewhat inaccurately, termed the equity of redemption. Before forfeiture the right to redeem was a legal right, even at common law, and at present the right of the mortgagor to pay the mortgage debt, and hold the estate discharged of the lien, is an inseparable incident to the relation of mortgagor and mortgagee, both at law and in equity, and it cannot be taken away without judicial sentence or a sale under a power or by the consent of the mortgagor, though the remedy for its enforcement may be barred by lapse of time, just as any other right may be forfeited by neglect. But while the right of redemption is the most marked of the rights of the mortgagor as against the mortgagee, it is not the only one. The mortgagor is, for every purpose consistent with the validity of the mortgage as a lien, the legal owner of the estate, and, being in possession, he may maintain trespass even against the mortgagee.⁴

It will not lie in the mouth of the mortgagee to question his mortgagor's title. Lord Chancellor Cottenham has said, "to him it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title."⁵

§ 24. Right of mortgagee as to possession.—At common law, and in this State prior to 1830, the mortgagee, after default, had a right to maintain ejectment against the mortgagor and all claiming under him to obtain possession of the mortgaged premises.⁶

¹ Macauley v. Smith, 132 N. Y. 524; 30 N. E. 997; Rich v. Dyer, 91 App. Div. 240; 86 N. Y. Supp. 544; Mowbay v. Mowbay, 3 App. Div. 227; 38 N. Y. Supp. 459; aff'd 157 N. Y. 712; 53 N. E. 1128; Graves Elevator Co. v. Seitz, 54 Misc. R. 552; 104 N. Y. Supp. 852.

The grantee acquires only a lien for the security of his debt. Shat-

tuck v. Bascom, 105 N. Y. 39; 12 N. E. 283.

² Kline v. McGuckin, 24 N. J. Eq. 411.

³ Bird v. Keller, 77 Me. 270.

⁴ Runyan v. Mersereau, 11 Johns. 534; 6 Am. Dec. 393; Bryan v. Butts, 27 Barb. 503.

⁵ Mylne & Craig, 63, 70.

⁶ Jackson v. Dubois, 4 Johns. 216.

But this right was taken away from him by the Revised Statutes,⁷ and the only right he now has in the land before foreclosure is to take possession of it, with the consent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid.⁸ This right to retain possession is protected by the courts just as the similar right of the pledgee of personal property is protected, but the mortgagee acquires no estate from his possession.⁹ The possessory right continues only so long as the relation of debtor and creditor subsists, and when the debt is discharged, the right of possession ceases with it.¹⁰ While the mortgagee cannot get into possession without the consent of the mortgagor, still, if he gets into possession, he may defend his possession upon the title conveyed by the mortgage, and cannot be removed by an action of ejectment, but the only remedy is by an accounting in equity,¹¹ the title of the mortgagee being sufficient to enable him to maintain his possession at law.¹²

Ejectment will not lie in favor of a grantee under an absolute deed given as security,¹³ and such a deed does not deprive the grantor of the right to recover for the rents and profits of the land between the date of the deed and the reconveyance to him.¹⁴

Where the grantee has wrongfully gone into possession the same rule would of course apply.¹⁵

An assignee of a mortgage has the same rights as to the possession of the mortgaged property as the mortgagee.¹⁶

§ 25. A mortgagee is deemed a purchaser sub modo; he is so regarded every day under the statute respecting fraudulent sales,

See also Coffey v. Hunt, 75 Ala. 236; McMillan v. Otis, 74 Ala. 561; Ferris v. Huston, 74 Ala. 163; Erskine v. Townsend, 2 Mass. 493.

72 R. S. 312, § 57; Code of Civ. Proc., § 1498. See Chard v. Holt, 136 N. Y. 30; 32 N. E. 740.

Same rule adopted in other states. See Bostwick v. McEvoy, 62 Cal. 496; Tyler v. Granger, 48 Cal. 259; Fogarty v. Sawyer, 17 Cal. 589; McMillan v. Richards, 9 Cal. 365; Pueblo & A. V. R. Co. v. Beshoar, 8 Colo. 32; 5 Pac. 639; Cox v. Ratcliffe, 105 Ind. 374; 5 N. E. 5.

8 Waring v. Smyth, 2 Barb. Ch. 135.

9 Packer v. The Rochester & Syracuse R. R., 17 N. Y. 295.

10 Kortright v. Cady, 21 N. Y. 365; Trimm v. Marsh, 54 N. Y. 606.

11 Hubbell v. Moulson, 53 N. Y. 225.

12 Mickles v. Townsend, 18 N. Y. 584, and cases cited.

13 Berdell v. Berdell, 33 Hun, 535. See also Beatty v. Brummett, 94 Ind. 76, and cases cited; Cox v. Ratcliffe, 105 Ind. 374; 5 N. E. 5.

14 Haworth v. Taylor, 108 Ill. 275.

15 Shelley v. Cody, 187 N. Y. 166; 79 N. E. 997.

16 Jackson v. Minkler, 10 Johns. 480; Fountain v. Bookstaver, 141 Ill. 461; 31 N. E. 17.

and protected within the saving clause in favor of subsequent purchasers in good faith,¹⁷ and if he obtains his mortgage for a present and valuable consideration, he holds, to the extent that it may be necessary to protect his debt, all of the rights of a *bona fide* purchaser.¹⁸ So, too, a mortgage is an estate for the purpose of entitling a mortgagee who had received a release of the premises from the mortgagor, to insist that, to the extent of the mortgage, the wife of the mortgagor could not claim dower.¹⁹

§ 26. A mortgage is a lien, and it is a mere shadow of the debt which it was made to secure. A transfer of the debt carries with it the mortgage, but a transfer of the mortgage without the debt is a nullity.²⁰ Before foreclosure the mortgagee has no interest in the land capable of being conveyed or mortgaged, for it is impossible to separate the debt from the pledge, so that the latter shall reside in one person, while the debt shall reside in another.²¹ The interest of the mortgagee in the land cannot be sold on execution, neither is he bound before entry, by a covenant running with the land.²²

A mortgage is a lien, if it be nothing more, and a warranty against incumbrances will estop a grantor from setting up a mortgage as against his grantee, which existed at the time of the warranty.²³

A mortgage under seal is a "deed" so as to permit an officer authorized to take acknowledgments of deeds to certify as to its execution.²⁴

§ 27. After acquired title of mortgagor.—A mortgage is also treated as a conveyance when questions arise relative to the amount of interest upon which it is a charge,²⁵ or relative to the effect of the covenants contained in it. So a mortgage without covenants creates a lien only upon the interest of the mortgagor

17 Per NELSON, Ch. J., in *Frisbee v. Thayer*, 25 Wend. 399; *Ledyard v. Butler*, 9 Paige, 137. See also *National Bank v. Levy*, 127 N. Y. 549; 28 N. E. 592.

18 *James v. Johnson*, 6 Johns. Ch. 417; s. c. *sub nom. James v. Morey*, 2 Cow. 246. See also *Whealan v. McCreary*, 64 Ala. 319; *Steadman v. Hayes*, 80 Mo. 319.

19 *Van Dyne v. Thayer*, 19 Wend 162.

20 *Merritt v. Bartholick*, 36 N. Y.

21 *Jackson v. Willard*, 4 Johns. 41; *Aymar v. Bill*, 5 Johns. Ch. 570.

22 *Morris v. Mowatt*, 2 Paige, 586; *Astor v. Hoyt*, 5 Wend. 603.

23 *Mickles v. Townsend*, 18 N. Y. 575.

24 *Canandaigua Academy v. McKechnie*, 19 Hun, 62.

25 *Hiscock v. Phelps*, 49 N. Y. 97.

in the land at the time of its execution, and he is not estopped from showing what that was as against one claiming under the mortgage,²⁶ and he is not precluded from subsequently acquiring and claiming under an outstanding and paramount title.²⁷ But a warranty of title contained in a mortgage will estop the mortgagor from questioning that, at the date of the mortgage, he had title, and if he subsequently acquires the paramount title, it will inure to the benefit of the mortgagee and his legal representatives.²⁸

A mortgage, without covenants for title, will transfer all of the interests, both legal and equitable, of the mortgagor, and if the mortgagor thereafter acquires a legal claim to what, at the time of executing the mortgage, he had an equitable title, this will inure to the benefit of the mortgagee. Thus, where the owners of land fronting on a highway executed a mortgage thereon, extending to the centre of the highway, but the description in their deed extended only to the exterior line, and afterward a quitclaim deed to the centre of the highway was made to the mortgagors, it was held that this title inured to the benefit of the purchaser at a foreclosure sale under the mortgage.²⁹

Where a grantor takes a mortgage for part of the purchase money, the covenants for title operate only upon the estate derived from the mortgagee, and the mortgagor is not precluded from purchasing and setting up a hostile claim.³⁰

§ 28. **Purchases at tax sales by mortgagee.**—The weight of American authority holds that there is no such relation of trust between a mortgagor and a mortgagee, not in possession, as prevents the later from acquiring an adverse claim or lien to or upon the mortgaged premises and enforcing the same with like effect as any stranger could. The mortgage is a mere security for a debt, and imposes no duty upon the mortgagee to protect the interests of the mortgagor, unless there is some special covenant creating such a duty. The mortgagee, therefore, if he be not

²⁶ *Donovan v. Twist*, 85 App. Div. 130; also 105 App. Div. 171; *National Fire Ins. Co. v. McKay*, 5 Abb. N. S. 445.

²⁷ *Jackson v. Littell*, 56 N. Y. 108; *Power v. Lester*, 23 N. Y. 532.

²⁸ *Tefft v. Munson*, 57 N. Y. 97.

²⁹ *Smyth v. Rowe*, 33 Hun, 422.

³⁰ *Hubbard v. Norton*, 10 Conn. 422; *Randall v. Lower*, 98 Ind. 255; *Smith v. Cannell*, 32 Me. 123; *Brown v. Phillips*, 40 Mich. 264; *Sumner v. Barnard*, 12 Mich. 459; *Connor v. Eddy*, 25 Mo. 72; *Haynes v. Stephens*, 11 N. H. 28; *Lot v. Thomas*, 2 N. J. 407.

in possession, may purchase the mortgaged property at a sale for taxes, and may set up this title as against the mortgagor;³¹ the mortgagee may also acquire any other outstanding and hostile title, and set it up against the mortgagor, if nothing else than the relation of mortgagor and mortgagee existing between the parties, prevents.³²

If the mortgagee elects to pay a tax imposed upon the mortgaged property for his own protection and that of the mortgagor, he may add the amount so paid to the mortgage indebtedness and collect it in his capacity of mortgagee, and the right to do this depends upon equitable principles alone, and not upon the presence of a "tax clause" or other stipulation in the mortgage.³³ But if he elects to assume the rights of a purchaser at a tax sale, he must proceed as any other similar purchaser would, and he will gain nothing from his position as mortgagee.³⁴ And a person who holds an equitable mortgage upon an undivided share in real property cannot, in the absence of an authorization or legal liability, pay the taxes assessed against the entire property, and thereby obtain a lien against the land to the extent of the money so paid which may be enforced by a sale.³⁵ Claiming as mortgagee to add the amount paid to his debt will operate as a waiver of the tax title.³⁶

A mortgagee in possession, who is receiving the rents of the property or enjoying its use, owes a duty to the mortgagor to apply those rents in paying taxes or other incumbrances prior to the mortgage, and, while he may demand a credit for such pay-

31 *Cornell v. Woodruff*, 77 N. Y. 203, 206; *Williams v. Townsend*, 31 N. Y. 415; *Hill v. Hill*, 4 Barb. 419. See also *Bettison v. Budd*, 17 Ark. 546; *Waterson v. Devoe*, 18 Kan. 223; *Bush v. White*, 85 Mo. 339; *Summers v. Kanawha*, 26 W. Va. 159. *Contra*, *Hall v. Westcott*, 17 R. I. 504; 23 Atl. 25; 15 R. I. 373; 5 Atl. 629; 34 Alb. L. J. 227; *Morfield v. Willey*, 46 Mich. 252. Here *COOLEY*, J., allowed a mortgagor to treat such a title as valid or not at his option, saying "neither party to a mortgage can, against the will of the other, buy at a tax sale and cut off the other's interest." The theory upon which this line of cases go is

that, whether the title or lien theory prevails, a mortgagee is a fiduciary to return his security on recovering his debt, and ought not to compete with his mortgagor, or put himself in a position where he can refuse to carry out his obligation.

32 *Bush v. White*, 85 Mo. 339.

33 *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163. See also *infra* Ch. VIII.

34 *Williams v. Townsend*, 31 N. Y. 411.

35 *Koehler v. Hughes*, 4 Misc. R. 236; 24 N. Y. Supp. 760, *aff'd* 73 Hun, 167; 25 N. Y. Supp. 1061.

36 *Strong v. Burdick*, 52 Iowa, 630; 3 N. W. 707.

ments, he cannot allow the land to be sold for taxes in violation of his duty and set up against the mortgagor a tax title acquired while thus in possession.³⁷

§ 29. Purchases at tax sales by mortgagor and those claiming under him.—As a general rule it may be said that a person who is under any obligation either moral or legal to pay a tax upon land cannot omit to pay such tax and then set up a purchase under it.³⁸ A mortgagor cannot permit the estate to be sold for taxes, and by purchasing it on such sale acquire a title against the mortgagee;³⁹ the same rule will apply to a grantee of the mortgagor or to any other person claiming under the mortgagor who is in possession of the property.⁴⁰

A second mortgagee is under no obligation to protect the lien of the first mortgagee by payment of the taxes or by purchasing the premises for his benefit at a tax sale; but if he does pay or purchase, the act constitutes a protection to the first mortgagee, for the reason that his interest is in the equity of redemption and his rights rest upon those of the mortgagor. He may add the sum paid to his claim as against the mortgagor, but he cannot thus acquire a title superior to the prior lien.⁴¹ And a person who obtains title through the foreclosure of a second mortgage cannot gain any benefit as against the prior mortgagee either by paying or by purchasing at a sale for taxes.⁴²

37 Ten Eyck v. Craig, 62 N. Y. 406, 422. See also Schenck v. Kelley, 88 Ind. 444; Maxfield v. Willey, 46 Mich. 252; 9 N. W. 271; Hall v. Westcott, 17 R. I. 504; 23 Atl. 25; 15 R. I. 373; 5 Atl. 629; 34 Alb. L. J. 227.

38 Moss v. Shear, 25 Cal. 38; Christy v. Fisher, 58 Cal. 256.

39 Snoddy v. Leavitt, 105 Ind. 357; 5 N. E. 13; Cooper v. Jackson, 99 Ind. 566; Fair v. Brown, 40 Iowa, 209; Dunn v. Snell, 74 Me. 22; Varney v. Stevens, 22 Me. 331; Fells v. Barbour, 58 Mich. 49; 24 N. W. 672; Connecticut Mut. L. Ins. Co. v. Buttee, 45 Mich. 113, 120; 7 N. W. 707; Allison v. Armstrong, 28 Minn. 276; 9 N. W. 806; 41 Am. Rep. 281; Bush v. Cooper, 26 Miss. 599; Downer v. Smith, 38 Vt. 464.

40 Cooper v. Jackson, 99 Ind. 566; Travellers' Ins. Co. v. Patten, 98 Ind. 209; Morrison v. Bank of Commerce, 81 Ind. 335; Fair v. Brown, 40 Iowa, 209; Phinney v. Day, 76 Me. 83.

41 Baker v. Whiting, 3 Sumner, 476; Goodrich v. Kimberly, 48 Conn. 395; Middletown Savings Bank v. Bacharach, 46 Conn. 513; Gorton v. Paine, 18 Fla. 117; Chickering v. Faile, 38 Ill. 342; Anson v. Anson, 20 Iowa, 55; Connecticut Mut. L. Ins. Co. v. Bultee, 45 Mich. 113; 7 N. W. 707; Woodbury v. Swann, 59 N. H. 22; Phelan v. Boylan, 25 Wis. 679.

42 Snoddy v. Leavitt, 105 Ind. 357; 5 N. E. 13; Cooper v. Jackson, 99 Ind. 566.

§ 30. **Purchase of equity of redemption by mortgagee.**—A mortgagor and mortgagee may at any time after the creation of the mortgage and before foreclosure make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. It will be sustained only when *bona fide*; that is, when in all respects fair and for an adequate consideration.⁴³

An agreement to waive or extinguish the right of redemption cannot be made contemporaneously with the execution of the mortgage,⁴⁴ and if made afterward the burden of proof will rest upon the mortgagee to show its fairness.⁴⁵

If a purchase is made by the mortgagee from the mortgagor, the title of the mortgagor will only pass out of him by a deed under seal containing words of grant, and an agreement evidenced in any other way will not suffice, however just the bargain may be, even if the mortgage be in form an absolute conveyance.⁴⁶

The only other way to extinguish the mortgagor's right of redemption is by foreclosure in one of the forms permitted by law.

43 Odell v. Montross, 68 N. Y. 499, 504; Holridge v. Gillespie, 2 Johns. Ch. 30. See also following cases: Jones v. Franks, 33 Kan. 497; 6 Pac. 789; Patterson v. Yeaton, 47 Me. 306; Trull v. Skinner, 17 Pick.

213; Ford v. Olden, L. R. 3 Eq. Cas. 461.

44 Palmer v. Palmer, 74 Ala. 285; Bearss v. Ford, 108 Ill. 16.

45 Jones v. Franks, 33 Kans. 497; 6 Pac. 789.

46 Odell v. Montross, 68 N. Y. 499.

CHAPTER II.

CONDITIONAL SALES.

§ 31. Conditional sales are valid.

32. A mortgage and a conditional sale are in some respects quite similar.

33. The chief and most obvious distinction between a mortgage and a conditional sale.

34. Absence of a covenant to pay debt is not conclusive.

35. Remedies reserved by the contract.

36. Inadequacy of price.

§ 37. The subsequent dealings of the parties with relation to the transaction.

38. Each case must stand on its own special circumstances.

39. The mere fact that a conveyance with an agreement to reconvey was recorded as a mortgage.

40. Examples of conditional sales and mortgages.

§ 31. Conditional sales are valid.—It is entirely competent for the grantor of an estate to require, as part of the consideration upon which he parts with his property, that the grantee shall agree to resell it to him within a certain time for a stipulated price. Such an agreement is not in any sense a mortgage, and there is no principle of law which forbids it from being made.¹ To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to purchase the same land at a fixed price and at a specified time, would be to transfer to courts of equity in a considerable degree the guardianship of adults as well as of infants.² Such a contract is known as a conditional sale, and is enforced according to its terms. The grantor must regain his estate, if at all, under his contract. If a time is named under which he must repur-

¹ Fullerton v. McCurdy, 55 N. Y. 637; Hill v. Grant, 46 N. Y. 496; Saxton v. Hitchcock, 47 Barb. 220; Glover v. Payn, 19 Wend. 518; Whitney v. Townsend, 2 Lans. 249. See also Henley v. Hotaling, 41 Cal. 22; Buse v. Page, 32 Minn. 111; 19 N. W. 736; 20 N. W. 95; Jeffery v. Rob-

bins, 167 Ill. 375; 47 N. E. 725; Bigler v. Jack, 114 Iowa, 667; 87 N. W. 700.

² Conway's Executors v. Alexander, 7 Cranch (U. S.) 237; Cornell v. Hall, 22 Mich. 377; Turner v. Kerr, 44 Mo. 429.

chase, it is of the essence of his contract, and he cannot be relieved on the ground that a penalty or a forfeiture is incurred. A court of equity will not vary the express terms of his contract, or give him the benefit of an extension in point of time for which he has not stipulated.³

§ 32. A mortgage and a conditional sale are in some respects quite similar.—They are both conveyances, and both contain provisions for the revesting of title in the grantor, and the great mark of difference between them is that a right of redemption is an inseparable incident to a mortgage, incapable of destruction or extinguishment, save by the judgment of a court of equity, a sale under a power, or the free consent of the mortgagor given for a valuable consideration; while in the case of a conditional sale the rights of the vendor are those expressly reserved to him by the agreement, and those only. Ever since the doctrine of an equity of redemption was first declared, the ingenuity of greedy lenders and of anxious borrowers has been taxed to evade it, and their contracts, though really intended as securities in the nature of mortgages, have frequently been clothed in the form of contracts of conditional sale. To distinguish the true nature of such transactions is, therefore, not always easy.

§ 33. The chief and most obvious distinction between a mortgage and a conditional sale is that a mortgage is always collateral to a debt, and the existence of a debt has been said to be the decisive test upon this point.⁴ A mortgage being a conveyance made as security, it is plain that a mortgage can have no existence unless it be accompanied by a debt or obligation which it is made to secure, but in the case of a conditional sale the grantor is free

³ Robinson v. Cropsey, 2 Edw. Ch. 147; aff'd 6 Paige, 480; Henley v. Hotelling, 41 Cal. 22.

⁴ Randall v. Sanders, 87 N. Y. 578, aff'g 23 Hun, 611; Horn v. Keteltas, 46 N. Y. 605; Hill v. Grant, 46 N. Y. 496; Stoddard v. Whiting, 46 N. Y. 627; Mooney v. Byrne, 1 App. Div. 316; 37 N. Y. Supp. 388; Pardee v. Treat, 18 Hun, 298; Holmes v. Grant, 8 Paige, 243; Morrison v. Brant, 5 Daly, 40.

See also following cases: Turner v. Wilkinson, 72 Ala. 361; Harman v. May, 40 Ark. 146; Montgomery v.

Specht, 55 Cal. 352; Reading v. War-ton, 7 Conn. 143; 18 Am. Dec. 89; Bearss v. Ford, 108 Ill. 16; Evert v. McBee, 27 Kan. 232; McNamara v. Culver, 22 Kan. 661; Edrington v. Harper, 3 J. J. Marsh, 353; 20 Am. Dec. 145; Klein v. McNamara, 54 Miss. 90; Bethlehem v. Annis, 40 N. H. 35; Budd v. Van Orden, 33 N. J. Eq. 143; Judge v. Reese, N. J. Eq. (9 C. E. Green.) 387; Robinson v. Willoughby, 65 N. C. 520; Calhoun v. Lumpkin, 60 Tex. 185.

Story's Eq. Jur., § 1018b.

to avail himself of the option to repurchase the property or not, as he may see fit. It was remarked by MARSHALL, Ch. J., in *Conway's Executors v. Alexander*,⁵ "the inquiry must be whether the contract in the specific case is a security for the repayment of money or an actual sale. If a security in the nature of a mortgage is intended, it is necessary that the mortgagee should have a remedy against the person of his debtor; if this remedy really exists, its not being reserved in terms will not affect the case; but the remedy must exist in order to justify a construction which overrules the express words of the instrument."⁶

§ 34. **Absence of a covenant to pay debt is not conclusive.**—If the existence or the non-existence of any evidence of debt were the only distinction between mortgages and conditional sales, a wide latitude would be offered for oppression in cases where the value of the security is so great that the creditor would seek to conceal the fact of indebtedness rather than to incorporate it in the evidence of the agreement. While, therefore, the fact that there is no promise on the part of the grantor to pay the debt is a circumstance entitled to considerable weight, as tending to show that the conveyance was not intended as a mortgage, and that the relation of debtor and creditor did not exist, it is only one of several circumstances to be considered, and is not conclusive.⁷ As was remarked by MARSHALL, Ch. J., in the case already cited: "The want of a covenant to repay the money is not conclusive evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance."

§ 35. **Remedies reserved by the contract.**—Another means of determining whether a contract is a conditional sale or a mortgage, though this may perhaps be almost identical with the one just considered, is to inquire as to which class of contracts the mutual rights and remedies which are reserved by it to the parties belong. In the case of a mortgage, the mortgagee is restricted to his debt and interest, but, as an offset to this, he has the personal responsibility of the debtor; if the security be greater in value

⁵ 7 Cranch (U. S.) 218.

⁶ Robinson v. Cropsey, 3 Edw. Ch. 138; Glover v. Payn, 19 Wend. 518.

Personal obligation to pay not a necessary element in a mortgage. See § 14.

⁷ Morris v. Budlong, 78 N. Y. 543,

rev'g 16 Hun, 570; Matthews v. Sheehan, 69 N. Y. 585; Horn v. Ketteltas, 46 N. Y. 605; Brown v. Dewey, 1 Sandf. Ch. 56. See also Dougherty v. McColgan, 6 Gill & J. (Md.) 275; Flagg v. Mann, 14 Pick. (Mass.) 467.

than the debt, the mortgagor receives the benefit of it; but if it be less, he must respond for the difference. The mortgagor has the right of redemption, but the mortgagee has the right of foreclosure, and the remedies are mutual and reciprocal. In the case of a conditional sale, on the contrary, the debt is extinguished by the conveyance, and unless the grantor avails himself of the privilege granted by the contract, the loss from the decrease in value, or the profit from an increase, must belong to the grantee.⁸ But this test cannot be relied upon with safety, because the right to foreclose and to redeem do not depend upon each other, and do not always co-exist,⁹ and there may be a loan or a debt without personal liability.¹⁰

§ 36. **Inadequacy of price.**—Among the circumstances which are of weight in this class of cases, may also be noted the value of the property as compared with the consideration, and great inadequacy of price will be an indication that a security was intended and not a sale.¹¹ But where the price paid at the time of the conveyance is inadequate, it will not become a mortgage if the grantee also covenants to pay a further sum in case the grantee does not call for a reconveyance, for a credit may be given to the grantee for the price, without affecting the nature of the transfer as an absolute sale.¹² The following is the language of Chancellor WALWORTH, in *Holmes v. Grant* (8 Paige, 243, 258): “There is frequently great difficulty in determining whether a conveyance was intended by the parties as a mortgage or mere security for money, or as a conditional sale. But, as a general rule, where the contract and conveyance are made upon an application for a loan of money, this court, for the purpose of preventing usury and extortion, will construe it to be a mortgage, whenever the person to whom the application for the loan is made agrees to receive back the money advanced, with legal interest, or a larger amount, and to reconvey the property within a specified time thereafter, whatever may be the form of the written contract, if it

⁸ *Randall v. Sanders*, 87 N. Y. 578, 583, aff’d 23 Hun, 611.

⁹ *Coote on Mortgages*, 50.

¹⁰ *Brown v. Dewey*, 1 Sandf. Ch. 56.

¹¹ *Robinson v. Cropsey*, 2 Edw. Ch. 138; s. c. 6 Paige, 480; *Holmes v. Grant*, 8 Paige, 243, 258; *Brown*

v. Dewey, 2 Barb. 28; *Coburn v. Anderson*, 62 How. Pr. 268. See also *Turner v. Wilkinson*, 72 Ala. 361; *Reed v. Reed*, 75 Me. 264; *McKinney v. Miller*, 19 Mich. 142; *Wharf v. Howell*, 5 Binn. (Pa.) 499.

¹² *Baker v. Thrasher*, 4 Den. 493; *Quirk v. Rodman*, 5 Duer, 285.

is apparent that the real transaction was a loan of money. And gross inadequacy of price is always a strong circumstance in favor of the supposition that a sale of the property was not intended.¹³ On the contrary, if the consideration paid is about the fair cash value of the property, the fact that there was no contract for the repayment of the purchase money and interest which was binding upon the person making the conveyance, so as to make his general right to redeem as a mortgagor, and the corresponding right of the grantee to recover back his money instead of keeping the land, mutual and reciprocal, is a strong circumstance in favor of construing the contract to be a conditional sale and not a mortgage.”¹⁴

§ 37. The subsequent dealings of the parties with relation to the transaction, in recognizing the existence of a debt or otherwise, may be shown to characterize their own understanding of their contract, but it must be remembered that the bargain received its character at its inception, and no subsequent event short of a new agreement can change a security into a sale or convert a sale into a security.¹⁵

So also the relative position of the parties before and after the bargain may be considered. If the negotiation which preceded was for a loan,¹⁶ and if the grantor retained possession afterward, these would be circumstances tending to show that a mortgage was intended, while, if the grantee first made application to purchase, and entered immediately into possession, the presumption would be in favor of treating the transaction as a sale, and the agreement for repurchase as enforceable only according to its terms.¹⁷

§ 38. Each case must stand on its own special circumstances.—It will be observed that the line of distinction between what con-

13 *Brown v. Dewey*, 2 Barb. 28. See also *Klein v. McNamara*, 54 Miss. 90; *Critcher v. Walker*, 1 Murphy (N. C.) 488; 4 Am. Dec. 576; *Wharf v. Howell*, 5 Binn. (Pa.) 499.

14 See also opinion of McCoun, V. C., in *Robinson v. Cropsey*, 2 Edw. Ch. 138, aff'd 6 Paige, 480; *Randall v. Sanders*, 87 N. Y. 578, aff'g 23 Hun, 611.

15 *Kearney v. Macomb*, 16 N. J. Eq. 189.

16 *Fiedler v. Darrin*, 59 N. Y. 441; s. c. 59 Barb. 651; *Holmes v. Grant*, 8 Paige, 243; *Tibbs v. Morris*, 44 Barb. 139; *Marvin v. Prentice*, 49 How. 385. See also *Klein v. McNamara*, 54 Miss. 90.

17 *Coburn v. Anderson*, 62 How. Pr. 268; *Holmes v. Grant*, 8 Paige, 243; *Decker v. Leonard*, 6 Lans. 264. See also *Russell v. Southard*, 12 How. (U. S.) 139; *Hopper v. Smyser*, 90 Md. 363; 45 Atl. 206; *Rich*

stitutes a mortgage and what a conditional sale, is not very clearly defined, and each case may be said to stand upon its own special circumstances.¹⁸ In some cases it is said that where there is a doubt, the instrument will be construed to be a mortgage, because in this way the grantee, who is repaid the amount of his advances and interest, cannot be grievously injured,¹⁹ while in others the grantor is required to furnish ample proof before an instrument which is absolute upon its face is adjudged to be subject to a right of redemption;²⁰ and where the grantor endeavors to show, not only that the instrument is a mortgage, but also that it is void for usury, the proof is required to be clear and convincing.²¹

No general rule of universal application can be found, except that where the evidence is such as to create a doubt in the mind of the court, the transaction is held to be either a mortgage²² or a conditional sale, according as the rules governing the one relation or the other will serve the ends of substantial justice and prevent fraud or oppression.

Each case must be decided in view of the peculiar circumstances which belong to it and mark its character; the only safe criterion is the intention of the parties, and this is to be determined from all of the facts under which the instrument was executed, as well as from the written memorials of the transaction.²³

v. Doane, 35 Vt. 125; O'Reilly v. Donoghue, Ir. Rep., 10 Eq. 73.

18 Saxton v. Hitchcock, 47 Barb. 220.

19 Matthews v. Sheehan, 69 N. Y. 585; Conover v. Palmer, 123 App. Div. 817; 108 N. Y. Supp. 480.

See also Locke v. Palmer, 26 Ala. 312; Turnipseed v. Cunningham, 16 Ala. 501; 50 Am. Dec. 190; Jeffery v. Robbins, 167 Ill. 375; Hughes v. Schraff, 19 Iowa, 342; Trucks v. Lindsey, 18 Iowa, 505; Edrington v. Harper, 3 J. J. Marsh. 353; 20 Am. Dec. 145; Honore v. Hutchings, 8 Bush. 687; Cornell v. Hall, 23 Mich. 377; Weathersley v. Weathersley, 40 Miss. 469; Ketchum v. Johnson, 3 Green. Ch. 370; Crane v. Bonnell, 1 Green. Ch. 264; Reddy v. Brick, 42 N. J. Eq. 218; 6 Atl. 806; Robertson v. Campbell, 2 Call. 421; King v. Newman, 2 Munf. 40; Rockwell v.

Humphrey, 57 Wis. 410; 15 N. W. 394.

20 Fullerton v. McCurdy, 55 N. Y. 637. See also Chase's Case, 1 Bland Ch. (Md.) 206; 17 Am. Dec. 277.

21 Brown v. Dewey, 2 Barb. 28.

22 Stephens v. Allen, 11 Oreg. 188; 3 Pac. 168.

See also Peugh v. Davis, 96 U. S. 336; Wilkinson v. Roper, 74 Ala. 140; Eiland v. Radford, 7 Ala. 724; Pierce v. Robinson, 13 Cal. 116; Campbell v. Dearborn, 109 Mass. 130; Cornell v. Hall, 22 Mich. 377, 383.

23 Horn v. Keteltas, 46 N. Y. 608; Brant v. Robertson, 16 Mo. 143; Crane v. Bonnell, 1 Green. Ch. 264; Wilhelm v. Woodcock, 11 Oreg. 518; 5 Pac. 202; Stephens v. Allen, 11 Oreg. 188; 3 Pac. 168; Wheeland v. Swartz, 1 Yeates, 579; Hickman v. Cantrell, 9 Yerg. 172; 30 Am. Dec. 396; Bennett v. Holt, 2 Yerg. 6; 24

Where a dispute arises as to whether a transaction is really a conditional sale or a mortgage, the grantee has the same right to bring an action to have it adjudged absolute as the grantor has to have a right of redemption established.²⁴

§ 39. The mere fact that a conveyance with an agreement to reconvey was recorded as a mortgage will not impress that character upon it. The object of the recording act was to protect subsequent purchasers and incumbrances; but an omission to comply with its provisions in recording a conveyance would not invalidate such conveyance as between the parties, nor would an erroneous recording thereof impair any existing right.²⁵

§ 40. Examples of conditional sales and mortgages.—In *Macaulay v. Porter* (71 N. Y. 173), a conveyance of property was made which was accompanied by the following agreement, executed by the grantee: "In consideration of a sale and conveyance of a house and lot by T to me (describing it), I, P, agree to take said property, subject to a mortgage of \$1,200; all other incumbrances and taxes to be paid off by T; and I will pay her in cash, \$1,300, and I will sell the property, at her discretion and mine, within the year, and divide the property equally. I will loan her \$500 and take her note, to be paid within the year, or sooner, if the property is sold. If the property shall be sold within four months, I will cancel the note and surrender it to her. The premises may be sold at the option of either party for not less than \$4,000. If not sold within one year from date, all interest of T in the premises shall cease." It was held that the defendant, P, under his deed, took the fee of the land, subject to no other condition than that he should account for one-half of the profits on a sale thereof, if made within a year, and the deed was properly recorded among absolute conveyances. The agreement was not a defeasance, which was to render the deed void on the payment of any sum of money, nor was there anything in the transaction in the nature of a mortgage. The grantee, P, was not a creditor taking the land to secure any debt. No debt existed, or was created in respect to the \$2,500 paid for the property. If the land had depreciated, the grantee would

Am. Dec. 455; *Rockell v. Humphrey*, 57 Wis. 410; 15 N. W. 394.

²⁴ *Rich v. Doane*, 35 Vt. 124.

²⁵ *Morrison v. Brand*, 5 Daly, 40;

Jackson v. Phillips, 9 Cow. 94; *Jackson v. Richards*, 6 Cow. 617, 619; *Jackson v. Burgott*, 10 Johns. 457; *Jackson v. West*, 10 Johns. 466.

have had no claim for reimbursement, nor was any privilege reserved to the grantor to redeem on payment of any sum. These circumstances were declared by RAPALLO, J., to be of great importance in determining the character of the transaction.

In *Palmer v. Gurnsey* (7 Wend. 248) there was an existing debt. The land was conveyed, in consideration of the debt, which was evidenced by a note. The note was surrendered. An agreement which was held to be a defeasance, was to the effect that if the land should sell for enough to pay the amount of the debt, and the prior mortgages on the premises, and the trouble of the grantee, he would pay back to the grantor all the overplus. There was no limit of time for the sale, nor was the grantee to get anything out of it but his debt and the trouble of collecting it. The court held that this agreement showed that it was not the intention of the grantor to part with any more of his interest than enough to satisfy the plaintiff's debt and the prior mortgages, and therefore it was intended only as security for the debt. This ruling would have led to the conclusion that the grantor might have redeemed, and it was applied to the case, by holding that the debt was not extinguished by the conveyance, though the note was surrendered, and that the payee could recover on the note, the whole value of the property having been consumed by the prior mortgages.

That case was, however, disapproved in the subsequent case of *Baker v. Thrasher* (4 Den. 493). In that case, an absolute deed was accompanied by a covenant, reciting that the deed had been given for the purpose of paying a debt, and agreeing that if the grantor could find a purchaser within a year, the grantee would convey to such purchaser for the amount of the debt and interest; but that if the sale should not be made within a year, the grantee would pay for the land such additional sum as might be fixed by appraisers. It was held that this agreement did not make the deed a mortgage, there being no condition under which the title could ever be revested in the grantor, but it being intended to remain in the grantee, or the person to whom he might convey.²⁶

In *Conway v. Alexander* (7 Cranch, 218), land had been conveyed to a third person in trust, to reconvey to the grantor, if he should repay the purchase money before a day named, and, if not, then to convey to the purchaser. The money was not tendered at

²⁶ Per RAPALLO, J., in *Macaulay v. Porter*, 71 N. Y. 173, 179. See

also *Rue v. Doll*, 107 Ill. 275; *Eckert v. McBee*, 27 Kans. 232.

the time provided. There was no bond or other evidence of debt, and the court held the transaction to be a conditional sale and not a mortgage.

Where a person negotiated with the owner of land for its purchase, but, being unable to pay the price, induced a third person to become the purchaser, who, at the time, stated if he would make certain payments at a specified time, he would convey the property to him, it was held that the transaction was an absolute purchase with a parol conditional agreement of sale and not a mortgage.²⁷

The owner of a farm contracted with a person to procure a purchaser upon the agreement that he should have all he could obtain over \$2,000 for his trouble. To give effect to this agreement, the farm was conveyed to the person intending to act as a broker, who reconveyed on condition that the reconveyance was to be void on repayment of \$2,000. The reconveyance was held to be a conditional sale and not a mortgage.²⁸

A conveyance of a leasehold and personal property made by a creditor to a debtor, upon the terms that the indenture is to be void if the grantee, his executors or assigns, should omit to pay certain debts, is not a mortgage, but a conveyance upon condition to be avoided by proof of the omission to pay the debts.²⁹

27 Hill v. Grant, 46 N. Y. 496.

29 Hagthorp v. Veale, 7 Gill & J.

28 Porter v. Nelson, 4 N. H. 130.

(Md.) 13; 26 Am. Dec. 594.

CHAPTER III.

EQUITABLE MORTGAGES AND IMPLIED LIENS FOR PURCHASE MONEY.

EQUITABLE MORTGAGES.

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EQUITABLE MORTGAGES.

§ 41. **Definition of an equitable mortgage.**—There is a class of liens which are known by the name of “Equitable Mortgages.” They differ from mortgages in the fact that there is no conveyance of the land, either absolute or conditional, and the lien arises under the contract or agreement of the parties. An absolute conveyance with a parol defeasance is, properly speaking, a mortgage, and is governed by all of the rules which apply to a mortgage in any other form; but such contracts are often spoken of as equitable mortgages, in order to distinguish them from mortgages in which the defeasance is incorporated in the conveyance. A better term to apply to such securities might be to designate them as conveyances which are equitably mortgages; but the ordinary term of equitable mortgages is convenient and need not be misunderstood.

An equitable mortgage of the kind which it is now proposed to discuss is a lien upon real estate, not created by a conveyance from the mortgagor, of such a character that it is recognized in equity as a security for money, and is treated in equity in some respects as a mortgage.¹

Equitable mortgages are simply securities by which no legal interest in the property mortgaged passes to the creditor, and thus include those transactions in which property, or the evidences of property, come into the hands of the creditor, upon a written or verbal, express or implied, agreement that such property shall be answerable for the debt, as well as those transactions in which the intention or duty of creating a charge on property is held to arise from an express or implied contract to render that property liable.²

EQUITABLE MORTGAGES BY DEPOSIT OF TITLE DEEDS.

§ 42. **English rule.**—A common mode of creating such a lien in England is by a deposit of title deeds as security for a loan of money. In the absence of a recording act, and where a vendor or mortgagor of land is required to produce the evidences of his title on every transfer or mortgage of his property, such a pledge may be a convenient and safe way for securing a loan. It has

¹ Bouvier's Law Dict.

N. E. 269; *Preston v. D'Ambrosio*,

² Fisher on Mortgages, 51. See *Dyke v. Spargur*, 143 N. Y. 651; 38

46 Misc. R. 523; 95 N. Y. Supp. 70.

been held not to be an invasion of the statute of frauds, and the English courts of equity have sustained the right of the lender to retain the deeds until the loan was repaid, and have enforced the lien by a sale of the land.³ In the absence of proof to the contrary, evidence of an advance of money and the finding of title deeds of the borrower in the possession of the lender have been held to establish an equitable mortgage.⁴

§ 43. **Rule in this State.**—Where a recording act is in full force, and where, consequently, the possession of title deeds is a matter of small importance, their deposit would constitute but a slight security;⁵ and in this State the doctrine of equitable mortgage by deposit of title deeds is almost unknown, because we have no practice of creating liens in this manner.⁶ The mere fact that title deeds were found in the possession of the creditor would certainly afford no presumption of lien, and it is a question fairly open for dispute as to whether the doctrine can exist under our statutes.⁷

§ 44. **The case of Rockwell v. Hobby**⁸ goes farther toward sustaining the doctrine of equitable lien by deposit of title deeds than any other reported decision in this State. In that case a son paid a mortgage incumbrance on his mother's property with his own money, and took a receipt in his own name; the mortgage was not cancelled or discharged. There were strong equitable considerations in his favor, and though the evidence was vague, it appeared to be probable that an assignment of the mortgage either was made, or was intended to have been made. The parties to the transaction were dead, but the mother's unrecorded title deed to the property was found in the possession of the son's representatives; and as one ground for doing justice in the case, the vice-chancellor held that this was evidence sufficient to sustain the lien. The decision was plainly a fair and just one, but no sub-

³ Coote on Mortgages, 248; Fisher on Mortgages, 51 *et seq.*

⁴ Rockwell v. Hobby, 2 Sandf. Ch. 9, and cases cited; Day v. Perkins, 2 Sandf. Ch. 359; Ray v. Adams, 4 Hun, 332; James v. Morey, 2 Cow. 246; Carpenter v. O'Dougherty, 67 Barb. 397.

⁵ Berry v. Mutual Ins. Co., 2 Johns. Ch. 603.

⁶ Stoddard v. Hart, 23 N. Y. 561. See also Berry v. Mutual Ins. Co., 2 Johns. Ch. 603.

⁷ It does not exist in Tennessee. Meador v. Meador, 3 Heisk. (Tenn.) 562; nor in Massachusetts, Ahrend v. Odiorne, 118 Mass. 261.

⁸ 2 Sandf. Ch. 9.

sequent case has followed it to the extent of its full claims. It is criticised in *Bowers v. Johnson* (49 N. Y. 432), and, in that case, where an advance of money was shown, coupled with the possession by the lender of a mortgage belonging to the borrower, it was held that there was no presumption that the mortgage had been deposited with him as collateral security. It was observed by the court that the case of *Rockwell v. Hobby* (*supra*) might well stand upon its own special circumstances, but that since mortgages are, in this State, rarely transferred by an agreement and delivery without writing, in the absence of written evidence there is a presumption against any transfer.

§ 45. In *Hackney v. Vrooman*,⁹ a bond and mortgage were found, after the mortgagor's death, in a tin box, containing paid notes, papers of old dates, bills of goods, old outlawed notes due him, and other miscellaneous papers; and this fact, with proof of a declared intention of the mortgagee to give the bond and mortgage to his daughter, who was the wife of the mortgagor, was held to be sufficient to establish such gift.

The delivery of a contract for the purchase of lands by the purchaser to a third person as security for becoming a guarantor for such purchaser, and without any written assignment, constitutes an equitable mortgage.¹⁰ So, an assignment of a certificate of entry upon lands of the United States as security for a debt has been held to create an equitable lien upon the land.¹¹

§ 46. When an agreement for a lien upon land is enforced in equity as a lien.—It has been said that an agreement for a mortgage is, in equity, a specific lien upon the land.¹²

An equitable mortgage may be established by any writing from which the intention to mortgage may be gathered.¹³

In an early case in this state it was decided that such a contract, to be valid, must be in writing and that the advancing of

⁹ 62 Barb. 650.

¹⁰ *Allen v. Woodruff*, 96 Ill. 11.

¹¹ *Hill v. Eldred*, 50 Cal. 398; *Storer v. Bounds*, 1 Ohio St. 107.

¹² *Payne v. Wilson*, 74 N. Y. 348; *In the matter of Howe*, 1 Paige, 125, 130; 19 Am. Dec. 395; *White v. Carpenter*, 2 Paige, 264; *People v. Woodruff*, 75 App. Div. 90, 722; 77 N. Y.

Supp. 722, holding that failure to demand execution of mortgage at once only affects the right as against a bona fide purchaser; *Burdick v. Jackson*, 7 Hun, 488. See also *Bloom v. Noggle*, 4 Ohio St. 45.

¹³ *Payne v. Wilson*, 74 N. Y. 348, aff'g 11 Hun, 302.

money is not such a part performance as will take the case out of the statute of frauds.¹⁴

Exceptions to this rule were found in cases where there was an element of accident, fraud or mistake, and where, upon the well established principles of courts of equity, relief might be given.¹⁵

Subsequently in the case of *Sprague v. Cockran*,¹⁶ decided by the court of appeals in 1893, the contrary doctrine was clearly enunciated, the court saying "The doctrine of equitable mortgages is not limited to written instruments intended as mortgages, but which by reason of formal defects cannot have such operation without the aid of the court, but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transactions or agreements as to lands should be in writing in order to take them out of the operation of the Statute of Frauds for two reasons, first, because they are completely executed by at least one of the parties and are no longer executory, and, secondly, because the statute by its own terms does not affect the power which courts of equity have always exercised to compel specific performance of such agreements."

Thus an agreement to give a lien upon land to secure money to be expended in improving it, followed by an actual expenditure of the money, and the improvement contemplated, is so far performed that equity does not regard the Statute of Frauds as a defense to an action to enforce the agreement.¹⁷

An agreement in writing, upon a valuable consideration, to give a mortgage,¹⁸ or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a lien in equity, the rule being founded upon the maxim that a court of equity looks upon things agreed to be done as actually performed.¹⁹ A

¹⁴ *Marquat v. Marquat*, 7 How. Pr. 417. See *Price v. Cutts*, 28 Ga. 142; *Dean v. Anderson*, 34 N. J. Eq. 496, and cases collected by reporter in note.

¹⁵ *Ray v. Adams*, 4 Hun, 332.

¹⁶ 144 N. Y. 104; 39 N. E. 1000.

¹⁷ *Smith v. Smith*, 125 N. Y. 224; *Perry v. Board of Missions*, 102 N. Y. 99.

¹⁸ *Burdick v. Jackson*, 7 Hun, 488; *Lynch v. Utica Ins. Co.*, 18

Wend. 236; *Kendall v. Mebuhr*, 45 N. Y. Super. Ct. 542; *Whiting v. Eichelberger*, 16 Iowa, 422; *Hamilton v. Hamilton*, 162 Ind. 430; 70 N. E. 535; *Chadwick v. Clapp*, 69 Ill. 119; *Whitney v. Foster*, 117 Mich. 643; 76 N. W. 114; *In re Hurley*, 1 Ir. 488.

¹⁹ *Sprague v. Cochran*, 144 N. Y. 104; 39 N. E. 1000; *Atlantic Trust Co. v. Tilden*, 167 N. Y. 532, aff'd 50 App. Div. 623; 60 N. E. 1106; *Payne*

contract, however, to give a mortgage upon the happening of some possible event in the future is an executory contract and not an equitable mortgage,²⁰ although upon the occurrence of the event specified the existence of an equitable lien is recognized.²¹

§ 47. If the agreement for a lien be in writing, a court of equity will not be embarrassed by its being in a form somewhat unusual, and when it is plain that the parties intended to impose a charge upon land as a security for the performance of their engagements, the agreement will be treated as conferring rights similar to those ordinarily evidenced by a mortgage.²² So an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity.²³ The same rule will hold where the parties do not explicitly so contract, but it is manifestly equitable that the land should be charged. For example, in a case where two owners of adjoining parcels of land mortgaged both parcels to secure the debt of one, who gave his bond to the other, conditioned to pay the whole debt, it was held that this bond created an equitable mortgage and might properly be recorded.²⁴

It has been said that an agreement for a lien or charge *in rem*, constitutes a trust, and is governed by the general rules applicable to trusts.²⁵

§ 48. Examples of Equitable Liens.²⁶—Where a married woman purchased land and gave her note therefor, in which she said: "For the payment of which I hereby pledge my sole and separate estate, being 514 West Forty-third Street," the lien of the vendor was enforced by a sale.²⁷

v. Wilson, 74 N. Y. 348; *National Bank of Norwalk v. Lanier*, 7 Hun, 623; *Burdick v. Jackson*, 7 Hun, 488; *Burger v. Hughes*, 5 Hun, 180; *Stewart v. Hutchinson*, 29 How. Pr. 181.

20 *Mathews v. Damainville*, 100 App. Div. 311; 91 N. Y. Supp. 524; reversing 43 Misc. 546; 89 N. Y. Supp. 493.

A contract for alterations of a building which provides that the contractor is to take a second mortgage in lieu of final payment is not an equitable mortgage. *Davidson v. Fox*, 65 App. Div. 262; 73 N. Y. Supp. 533.

21 *People ex rel. Mathews v. Woodruff*, 75 App. Div. 90; 77 N. Y. Supp. 722.

22 *Chase v. Peck*, 21 N. Y. 581; *De Pierres v. Thorn*, 4 Bosw. 266; *Seymour v. The Canandaigua R. R. Co.*, 14 How. Pr. 531; *Lynch v. Utica Ins. Co.*, 18 Wend. 236; *Stewart v. Hutchins*, 6 Hill, 143.

23 *Payne v. Wilson*, 74 N. Y. 348, aff'g 11 Hun, 302.

24 *Hoyt v. Doughty*, 4 Sandf. 462.

25 *Fletcher v. Morey*, 2 Story (U. S. C. C.) 555.

26 Agreements to purchase on behalf of another and to hold title until advances be paid are equitable mortgages. See § 13.

27 *Mears v. Kearney*, 1 Abb. N. Cas. 303.

The failure of an agreement to give a mortgage "on one of the thirteen houses now being erected" to point out a particular house has been held not to impair the effect of such agreement as an equitable mortgage.²⁸ So a declaration in a promissory note executed by a mortgagor to a mortgagee that it "shall be covered by the mortgage," or "shall be subject to the mortgage," shows an intention to make the mortgage a valid security for the debt and creates an equitable lien or mortgage on the premises for its payment,²⁹ even though the debt which the mortgage, at its inception, was intended to secure, has been paid.³⁰

An agreement to give a mortgage upon a vested interest in realty and personalty, not reducible to possession until the death of a third party is an equitable mortgage.³¹

A covenant by a debtor with his creditor to purchase certain lands and then to mortgage them to him, will be enforced in a court of equity by a decree of sale.³²

An agreement between vendor and vendee that the latter shall execute to the former a mortgage upon the land to secure payment of the purchase money, will give to the vendor or his assigns the same rights in equity as if the mortgage had been executed.³³

Where, by a contract for the sale of land, the vendor retains the title as security for the unpaid purchase money, and the vendee executes his notes therefor, the contract and notes may be sold and enforced in equity as a mortgage.³⁴

A deed with stipulation that the title shall not vest in the grantee until the purchase-money is fully paid is an equitable mortgage in favor of the grantor.³⁵

An equitable mortgage in favor of a tenant in open possession is also created when the landlord consents to a modification of the lease by agreeing that the former shall remain in possession until a debt due from the landlord to him shall be paid.³⁶

²⁸ *Payne v. Wilson*, 74 N. Y. 348, aff'g 11 Hun, 302.

²⁹ *Butts v. Broughton*, 72 Ala. 294.

³⁰ *Peckham v. Haddock*, 36 Ill. 39. See also *Prickett v. Seybert*, 71 Ala. 194; *Bryant v. Stephens*, 58 Ala. 636; *Waddell v. Carlock*, 41 Ark. 523.

³¹ *Tilden v. Tilden*, 26 Misc. R. 672; 57 N. Y. Supp. 864.

³² *Wright v. Shumway*, 1 Bliss. (U. S. C. C.) 23; 2 Am. Rep. 20.

³³ *Richardson v. Hamblett*, 33 Ark. 237.

³⁴ *Wright v. Troutman*, 81 Ill. 374.

³⁵ *Pugh v. Holt*, 27 Miss. 461.

³⁶ *Schneider v. Mahl*, 84 App. Div. 1; 82 N. Y. Supp. 27.

In *Perry v. Board of Missions, etc., of Albany*,³⁷ a conveyance was made to a religious corporation of a dwelling-house, which was intended to be used as a residence for a bishop. The trustees of the corporation passed a resolution that the property be mortgaged for the payment of the sum required for repairs and fitting it up for the desired purpose. In reliance upon this resolution the plaintiff incurred expense, and it was held that he had an equitable lien. It was also declared by the court that the plaintiff's case was within the general doctrine of equity which gives a right equivalent to a lien, when in no other way the rights of parties can be secured. Where upon receiving a grant of land the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging for that purpose the produce of the land, and in case that proved insufficient, appropriating the entire fee, this agreement is an equitable mortgage of the land.³⁸

§ 49. Lien reserved in deed of conveyance.—A lien upon lands may also be created by a reservation in the deed of conveyance,³⁹ and a charge for the support of a third person, when so reserved, has been held to be valid.⁴⁰ A lien so reserved, by express terms, is more than a vendor's implied lien, and is not lost by assignment of the notes given for the debt, but passes to the assignee.⁴¹

§ 50. A writing properly authenticated by which an equitable lien is created may be recorded in like manner as a technical mortgage, and its record will confer the same rights as to priority over subsequent incumbrances.⁴² Where, however, by the terms of an agreement, the giving of the mortgage is contingent upon the happening of certain events in the future, such agreement will be regarded simply as an executory contract, the recording of which is not notice.⁴³ An equitable mortgage of a vested interest in realty and personalty not reducible to possession until the death of a third party need not be filed as a chattel mortgage in order to render it enforceable between the parties and against subsequent transferees or lienors who are not purchasers for value.

³⁷ 102 N. Y. 99; 6 N. E. 116.

³⁸ *Chase v. Peck*, 21 N. Y. 581.

³⁹ *Dingley v. Bank of Ventura*, 57 Cal. 467.

⁴⁰ *Borst v. Crommie*, 19 Hun, 209.

⁴¹ *Payne v. Wilson*, 74 N. Y. 348.
See also *Dingley v. Bank of Ventura*,

57 Cal. 467; *Markoe v. Andras*, 67 Ill. 34.

⁴² *Hunt v. Johnson*, 19 N. Y. 279; *Crane v. Turner*, 7 Hun, 357; *Parkist v. Alexander*, 1 Johns. Ch. 394.

⁴³ *Mathews v. Damainville*, 100 App. Div. 311; 91 N. Y. Supp. 524.

Such purchasers who have recorded their conveyances will not, however, be protected so far as their claims may be inequitable but only for actual advances and lawful interest thereon.⁴⁴

§ 51. **Liens created by parol.**—While a parol agreement to execute a mortgage unaccompanied by part performance will not create a lien on the land as between the parties to it, because of our statute of frauds, this is a rule of evidence, merely, and a subsequent performance of the agreement will be valid for some purposes as of the time when the parol promise was given. This rule was applied in a case under the bankruptcy law, when, but for the previous parol agreement, the mortgage would have been void as to creditors.⁴⁵

When a mortgage was executed by a corporation for part of the purchase price of chattels purchased by it, and the mortgage was void because of a statute prohibiting the executing of mortgages by the corporation, the lien was sustained on the ground that the essence of the transaction between the parties was to transfer, not a complete title, but a mere right to redeem, from the mortgage.⁴⁶

§ 52. **Specific Performance.**—A parol agreement to give a mortgage upon real estate, in the absence of a part performance, establishes no grounds for the maintenance of an action to obtain specific performance of the agreement and for a judgment of foreclosure and sale of the premises.⁴⁷ A present valuable consideration as distinguished from a past indebtedness is necessary in order to make the specific performance of such an agreement enforceable in a court of equity.⁴⁸ What part performance has taken the original agreement out of the Statute of Frauds, a subsequent verbal agreement to give a valid mortgage in place of one which is worthless, being a mere modification of the original agreement will be enforced.⁴⁹ In the case of an agreement to execute a mortgage on real estate to secure a contractor who has erected a building thereon, it is decided that it is incumbent on such contractor to show full performance on his part or to justify his failure so to do.⁵⁰

⁴⁴ *Tilden v. Tilden*, 26 Misc. R. 672; 57 N. Y. Supp. 864.

⁴⁵ *Burdick v. Jackson*, 7 Hun, 488.

⁴⁶ *Coman v. Lakey*, 80 N. Y. 345.

⁴⁷ *Ladd v. Stevenson*, 112 N. Y. 325; 19 N. E. 842.

⁴⁸ *Dempsey v. McKenna*, 18 App. Div. 200; 45 N. Y. Supp. 973.

⁴⁹ *Roberge v. Winne*, 144 N. Y. 709; 39 N. E. 631.

⁵⁰ *Flanders v. Rosoff*, 111 App. Div. 1; 97 N. Y. Supp. 514, holding

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§ 53. **Nature of the Lien.**—The vendor, upon the sale of real estate, has in all cases an equitable lien upon the estate sold, for the unpaid purchase money, as between himself and the vendee, unless there is either an express or implied agreement to waive such lien.⁵¹ *Prima facie* the purchase money is a lien on the land, and it lies with the purchaser to show that the vendor agreed to rest on other security.⁵²

The lien does not exist in favor of a person who advances money to purchase lands, but only between the vendor and vendee and the persons representing them, and then only for the purchase money.⁵³ But the fact that the vendor, at the request of the vendee, gives the deed in the name of the vendee's wife, does not preclude the vendor from enforcing his lien.⁵⁴

Where one conveys his interest in copartnership lands to a copartner, he is entitled to a vendor's lien, on the death of the copartner, before payment, in the absence of fraud and there being no creditors of the deceased's estate.⁵⁵

A vendor's lien extends to equitable titles, subject to the risk that *bona fide* purchasers from the legal holder may intervene.⁵⁶

The vendor has the same lien while the contract is executory, and may have the land sold in discharge of the lien if such remedy is required for his protection.⁵⁷

that in the absence of such proof the complaint is properly dismissed.

51 *Bach v. Kidonsky*, 186 N. Y. 368; 78 N. E. 1088; *Seymour v. McKinsty*, 106 N. Y. 230; 12 N. E. 348; 14 N. E. 94; *Bennett v. Murphy*, 123 App. Div. 102; 108 N. Y. Supp. 231; *Berger v. Woldbaum*, 46 Misc. R. 4; 93 N. Y. Supp. 352.

The question as to whether the vendor has waived his lien is one of fact upon which the determination of the referee is conclusive. *Boies v. Benham*, 127 N. Y. 620; 28 N. E. 657.

52 *Hubbell v. Hendrickson*, 175 N. Y. 175; 67 N. E. 302; *Garson v. Green*, 1 Johns. Ch. 308; *Clark v. Hall*, 7 Paige, 382. See also *Stephens v. Shannon*, 43 Ark. 464; *Chap-*

man v. Liggett, 41 Ark. 292; *Pitts v. Palmer*, 44 Miss. 247.

53 *McKay v. Green*, 3 Johns. Ch. 56. See also *Marquat v. Marquat*, 7 How. (U. S.) 417; *Pettus v. McKinney*, 74 Ala. 108. In some States it exists in favor of a third person who advances purchase money. *Barrett v. Lewis*, 106 Ind. 120; *Divenger v. Branigan*, 95 Ind. 221. In other States it is not recognized at all. *Moore v. Ingram*, 91 N. C. 376; *Hoskins v. Wall*, 77 N. C. 249; *Smith v. High*, 85 N. C. 93; *Kelly v. Ruble*, 11 Oreg. 75.

54 *Williams v. Crow*, 84 Mo. 298.

55 *Reese v. Kinkhead*, 18 Nev. 126; 1 Pac. 667.

56 *Ortmann v. Plummer*, 52 Mich. 76; 17 N. W. 703.

57 *Kerngood v. Davis*, 2 S. C. 183.

§ 54. **Debt barred by limitation.**—A vendor's lien is a mere equity in favor of the vendor and his legal representatives, the effect of which is to preserve to him and them a qualified title to the land, until its price has been paid; it cannot exist apart from the debt, and when the statute of limitations runs against the debt the lien also ceases to have any force.⁵⁸ Where a judgment is obtained on a purchase-money note preserving it from the statute of limitations, the lien is also preserved.⁵⁹ If the circumstances of the case are such that the vendor of the land would not be barred by the statute of limitations, a person who has acquired his rights would not be.⁶⁰

§ 55. **Lien lasts until debt is paid.**—It may also be said that unless there be a waiver, express or implied, the lien remains so long as the debt lasts. Thus, where the vendor and vendee before full performance of the contract made a usurious agreement, and the mortgage given in pursuance of that agreement was set aside, it was held that the original debt was not invalidated, and that the unpaid purchase money remained an equitable lien upon the land.⁶¹ So, where a bond and mortgage for the purchase money was defectively executed, a vendor's lien was enforced.⁶² So, also, where by the fraud of the vendee, a part of the price of the land sold in fact remained unpaid, although the vendor supposed it had been paid in full at the time, there is no waiver of the equitable lien for the part of the price that actually remains unpaid. If, upon the sale of a farm, the purchaser should pay for half of it in good money, and for the other half in the worthless bills of a broken and insolvent bank, from which nothing could be obtained, the vendee fraudulently representing such bills to be good and collectible, the vendor would have the right to elect either to rescind the sale and have a reconveyance of the land, or to charge the land itself with the portion of the purchase money which remained unpaid, as an equitable lien. If, instead

58 *Borst v. Corey*, 15 N. Y. (1 Smith) 505; *Berger v. Waldbaum*, 46 Misc. R. 4; 93 N. Y. Supp. 352; *Stephens v. Shannon*, 43 Ark. 464; *Waddell v. Carlock*, 41 Ark. 523; *Linthicum v. Tapscott*, 28 Ark. 267; *Trotter v. Irwin*, 27 Miss. 772; *contra*, *Hale v. Baker*, 60 Tex. 217; *McRath v. Simmons*, Lead, Cas. in

Eq., vol. 1, p. 496 (4th ed.) Amer. notes and cases cited.

59 *Beck v. Tarrant*, 61 Tex. 402.

60 *Rodman v. Sanders*, 44 Ark. 504.

61 *Crippen v. Heermance*, 9 Paige, 211.

62 *Burger v. Hughes*, 5 Hun, 180.

of being a sale for cash, other property be given in exchange, and the vendee by fraud induces the vendor to believe that the property he is receiving is more desirable than it really is, the vendor can enforce his claim for damages, which in reality represents a portion of the purchase money, as a lien upon the land.⁶³

§ 56. **Improvements made upon the land by the purchaser are subject to the lien**, both in his hands and in the hands of his legal representatives,⁶⁴ and when the lien is upon a lease, it extends to a renewal upon it.⁶⁵

§ 57. **Lien not affected by disability of vendee.**—The lien is created by operation of law, the vendor retaining an interest in the land to the amount of his lien, hence it is not affected by the disabilities of the vendee, even though the vendee be a company, which, by a statutory provision, has no power to mortgage real estate or to give any lien thereon.⁶⁶

§ 58. **Statute.**—It is provided by statute that where real property, subject to a mortgage executed by any ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator, of his ancestor or testator unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.⁶⁷ The sole object of the statute was to change the rule of the common law under which the heir or devisee has the right to call upon the representative of the decedent to pay off the mortgage. A vendor's lien is not a mortgage, and it has often been held, both before and since the statute, that in case of unpaid purchase money, the heir or devisee is entitled to have the same paid out of the personal property.⁶⁸

§ 59. **Assignment of vendor's liens.**—The transfer by indorsement of a note given for purchase money, does not transfer the lien, except in so far as that may be necessary to protect the

⁶³ Bradley v. Bosley, 1 Barb. Ch. 125.

⁶⁴ Warner v. Van Alstyne, 3 Paige, 513.

⁶⁵ Phyfe v. Wardell, 5 Paige, 268.

⁶⁶ Dubois v. Hull, 43 Barb. 26.

⁶⁷ Real Prop. Law, § 250; 1 R. S. 749, § 4.

⁶⁸ Wright v. Holbrook, 32 N. Y. 587; Livingston v. Newkirk, 3 Johns. Ch. 312; Cogswell v. Cogswell, 2 Edw. Ch. 231; Johnson v. Corbett, 11 Paige, 265; Lamport v. Beeman, 34 Barb. 239.

vendor as indorser. Where a vendor had negotiated the note, but was obliged to take it up himself when it fell due, his claim to a lien on the land was sustained, but the assignee of the note or other security has never been permitted to enforce a lien in his own behalf.⁶⁹ The lien exists in favor of the vendor, and to insure to him the payment of the purchase money. If he assigns the claim to a third person, and the transfer be absolute and unaccompanied by any guarantee of the vendor, and for the benefit of the assignee, and if the lien be not mentioned it will be gone forever, unless the claim again becomes the property of the vendor, when the lien will revive in his favor.⁷⁰ The reason of this rule is, that there is no peculiar equity in favor of the third person, and it will not apply where the transfer is for the purpose of paying the debt of the vendor, so far as it may be available, and is therefore for his benefit. In such a case the equity continues.⁷¹

While an assignment of the debt will not operate as a transfer of the lien, the lien may be assigned with the debt by express terms,⁷² and it passes to an assignee for the benefit of creditors as part of the vendor's property.⁷³ It has also been said that the lien may be assigned by parol.⁷⁴

A lien carved out of the estate by the express contract of the parties or reserved by the vendor by the terms of his deed, stands on a different basis with respect to an assignment of it from the implied liens for the purchase money which are recognized by courts of equity in favor of a vendor who has voluntarily parted with his entire legal title. Where the lien is created by contract a transfer of the debt carries the lien.⁷⁵

Where a husband was the owner of an equitable lien for unpaid purchase money, and united with his wife in a conveyance of the property, under a mistaken belief that his wife had title, it was held that the grantee acquired the equitable lien.⁷⁶

69 *White v. Williams*, 1 Paige, 502.

70 *Preston v. Ellington*, 74 Ala. 133; *Lindsey v. Bates*, 42 Miss. 397.

71 *Hallock v. Smith*, 3 Barb. 267; *Smith v. Smith*, 9 Abb. N. S. 420.

72 *Smith v. Smith*, 9 Abb. N. S. 420. See also *Chapman v. Liggett*, 41 Ark. 292.

73 *Hallock v. Smith*, 3 Barb. 267.

74 *Fisher on Mortgages*, 62.

75 *Payne v. Wilson*, 74 N. Y. 348. See also *Lowery v. Peterson*, 75 Ala. 109; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Markoe v. Andras*, 67 Ill. 34.

76 *Lamberton v. Van Voorhis*, 15 Hun, 336; *Arnold v. Patrick*, 6 Paige, 310; *Fisk v. Potter*, 2 Keyes, 72; *Hulett v. Whipple*, 58 Barb. 227.

§ 60. When a third person may enforce a vendor's lien.—A lien for purchase money may, under some circumstances, also be enforced in favor of a third person, notwithstanding doubts formerly expressed on that subject. As, for example, it may be enforced by marshalling assets in favor of legatees and creditors, and subrogating them to the rights of the vendor when he has secured payment out of the personal assets of the vendee; or in favor of a widow, whose dower right may be affected by the lien.⁷⁷ So, if a subsequent incumbrancer or purchaser from the vendee is compelled to discharge the lien of the vendor, he will, in like manner, be entitled to stand substituted in his place against other claimants on the estate, under the vendor, and to have the assets marshalled in his favor.⁷⁸ And if one of two parties, whose lands are jointly subject to a vendor's lien, pays a judgment for the debt, he is entitled to subrogation to the vendor's rights, for the purpose of enforcing his right of contribution.⁷⁹

§ 61. What amounts to a waiver of a vendor's lien.—The giving of a lien for the unpaid purchase money is supposed to be intended in every transfer of real estate, unless the parties by their conduct show that no such security was contemplated, and the lien will be defeated if the vendor do any act manifesting an intention not to rely upon the land for security. It will not be affected by taking the mere written obligation of the vendee, even though it be negotiable, and any bond, note, or covenant, given by the vendee alone, is considered as intended only to countervail the receipt of the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement to waive the equitable lien.⁸⁰ Neither is it waived by taking a renewal note.⁸¹

On the other hand, the lien is considered as waived whenever any security is taken on the land or otherwise, for the whole or any part of the purchase money, unless there is an express agreement that the equitable lien upon the land shall be retained. Where, by agreement of the parties, there is express security,

⁷⁷ Warner v. Van Alstyne, 3 Paige, 513.

⁷⁸ Story's Eq. Jur. § 1227; Turner v. Peck, 1 Barb. Ch. 549; Crafts v. Aspinwall, 2 N. Y. (2 Comst.) 289.

⁷⁹ Beck v. Tarrant, 61 Tex. 402.

⁸⁰ Maroney v. Boyle, 141 N. Y.

462; 36 N. E. 511; Garson v. Green, 1 Johns. Ch. 308; White v. Williams, 1 Paige, 502; Shirley v. Sugar Refinery, 2 Edw. 505; Warren v. Finn, 28 Barb. 333.

⁸¹ Cordova v. Hood, 17 Wall. (U. S.) 1.

either by the obligation of a third person,⁸² or by express lien upon the estate or some portion of it, or upon other property, for a portion of the purchase money, it excludes the idea of an implied lien for the residue.⁸³ Where the note of a third party is given in payment of a part of the purchase money, the lien would not be waived for the balance, and there is strong reason and some authority for holding that the taking of such an obligation as security for a portion of the amount, will not affect the lien as to the residue.⁸⁴ Thus, where two persons agreed to exchange lands, the first agreeing to pay certain mortgages on his land and also giving back a mortgage on the land conveyed to him, and he failed to pay the mortgage on his land, it was held that the second party had a right to a vendor's lien for the amount of the mortgages on the land conveyed to him, and that it was not waived by his taking back a mortgage for another part of the purchase price.⁸⁵

Taking the note of the husband for land conveyed to the wife is not a waiver of the vendor's lien.⁸⁶

A vendor's lien is not lost by the acceptance of securities which have no legal validity.⁸⁷ And where the vendor was, subsequently to the sale, by fraudulent representations induced to accept a worthless bond in payment of a portion of the purchase money, it was held that this was not a payment and that the vendor's lien still subsisted.⁸⁸

The surrender of a mortgage voluntarily on a fair contract is an abandonment of it, and does not revive the equitable lien.⁸⁹

⁸² *Bennet v. Murphy*, 123 App. Div. 102; 108 N. Y. Supp. 231. See also *Lord v. Wilcox*, 99 Ind. 491; *Masters v. Templeton*, 92 Ind. 447; *Crane v. Board, etc.*, 87 Ind. 162; *Way v. Patty*, 1 Ind. 102.

⁸³ *Vail v. Foster*, 4 N. Y. (4 Comst.) 312; *Fish v. Howland*, 1 Paige, 20; *Shirley v. Sugar Refinery*, 2 Edw. 505; *Gaylord v. Knapp*, 15 Hun, 87. See also *Camden v. Vail*, 23 Cal. 633; *Hawkins v. Thurman*, 1 Idaho Ter. 598; *Land Co. v. Peck*, 112 Ill. 408; *Masters v. Templeton*, 92 Ind. 447; *Richards v. McPherson*, 74 Ind. 158; *contra*, *Anketel v. Converse*, 17 Ohio St. 11.

⁸⁴ *Hallock v. Smith*, 3 Barb. 267.

⁸⁵ *Elliott v. Plattor*, 43 Ohio St. 198.

⁸⁶ *Bakes v. Gilbert*, 93 Ind. 70; *Felton v. Smith*, 84 Ind. 485; *Martin v. Canall*, 72 Ind. 67; *Humphrey v. Thorn*, 63 Ind. 296; *Anderson v. Tannehill*, 42 Ind. 141.

⁸⁷ *Gilbert v. Bakes*, 106 Ind. 558; 7 N. E. 257; *Lord v. Wilcox*, 99 Ind. 491; *Hines v. Langley*, 85 Ind. 77; *Felton v. Smith*, 84 Ind. 485; *Fouch v. Wilson*, 60 Ind. 24; 28 Am. Rep. 651.

⁸⁸ *Brown v. Byam*, 65 Iowa, 374; 21 N. W. 684; *McDoll v. Purdy*, 23 Iowa, 277; *Bradley v. Bosley*, 1 Barb. Ch. 125.

⁸⁹ *Mattix v. Weand*, 19 Ind. 151.

§ 62. The taking of a bond or note from the vendee for the payment of the purchase money, will not discharge the lien, and there is no good reason why the prosecution of such a bond or note should have that effect. The obtaining of a judgment upon the debt may, with other facts, be some evidence of an intention to waive the lien; but, in itself, it does not amount to a waiver.⁹⁰ The question whether there has been a waiver or estoppel to assert the priority of such a lien is one of fact in respect to which the determination of the referee, in proceedings to foreclose a purchase-money mortgage held by a third party is conclusive.⁹¹ It may, indeed, be said that the taking of security of any kind for the purchase money, is only evidence of an intention to abandon the lien, and that even when it is very strong, it does not amount in itself to a waiver, but that the inference of a waiver which is thus created may be rebutted by proof of an agreement or of circumstances leading to the presumption of an agreement to the contrary.⁹²

§ 63. The lien is waived when the parties agree to substitute something else for the unpaid purchase money, as the covenant or obligation of the vendee to do some collateral act.⁹³ In such a case the covenant or obligation takes the place of the unpaid purchase money, and forms part of the consideration. There is, therefore, no part of the purchase money unpaid, and the vendor's lien is only intended to secure such a debt. If a debt or obligation of another kind has been created by the parties, they must also create security for it if they desire it to be secured.⁹⁴ As examples of this rule, a covenant to support a third person, given in payment for a conveyance of land, is not secured by any equitable lien upon the land so conveyed;⁹⁵ and a covenant against incumbrances contained in a deed given as part of the purchase price for other real estate can be enforced only as the personal obligation of the person making it.⁹⁶ So, also, the lien is lost

⁹⁰ *Dubois v. Hull*, 43 Barb. 26; *contra*, *Ould v. Stoddard*, 54 Cal. 613.

⁹¹ *Boies v. Benham*, 127 N. Y. 620; 28 N. E. 657.

⁹² *Fisher on Mortgages*, 63; *Cordova v. Hood*, 17 Wall. (U. S.) 1.

⁹³ *McKillip v. McKillip*, 8 Barb. 552; *Patterson v. Edwards*, 7 Cush. (Miss.) 67.

⁹⁴ *Hare v. Van Deusen*, 32 Barb. 92.

⁹⁵ *McKillip v. McKillip*, 8 Barb. 552. See *Pritchard v. Prichard*, 134 App. Div. 301; 118 N. Y. Supp. 882.

⁹⁶ *Hare v. Van Deusen*, 32 Barb. 92.

when the vendee has done all that he agreed to do, as where he delivered a deed of other property to a third person in escrow, even though such third person wrongfully refuses to surrender it.⁹⁷

§ 64. **Not waived where the intent is to preserve it.**—An equitable lien created by contract or by an ineffectual attempt to create a legal lien, is not waived by thereafter taking a mortgage properly executed so as to give priority to intermediate incumbrances. In such a case the equitable lien has had an existence and the law is not anxious to imply a waiver.

Whether it has ceased to exist depends upon the rules of equity which determine whether a waiver has taken place. It is a general rule that where an equitable and legal estate meet and vest in the same ownership, the former is merged in the latter. But the doctrine of merger, as applied to mortgages, is founded upon equitable principles, and is only applied where equity requires that it should be. Where the owner of the legal and equitable titles has an interest in keeping those titles distinct, as where there is an intervening incumbrance, he has a right so to keep them, and the equitable title will not be merged and thereby extinguished.⁹⁸

§ 65. **Lien of a vendee for money paid on contract of purchase.**—Another example of an equitable lien is furnished, where some part of the purchase money has been paid upon an executory contract for the purchase of lands, the title remaining in the vendor. In such a case the vendee acquires a lien upon the property to the extent of the money paid, and it is well settled that his interest will be protected against any one but a *bona fide* purchaser and incumbrancer, who has advanced money or property without notice of the vendee's equity. In such cases, the vendee is considered in equity as the owner, and the vendor as his trustee, and the equitable rule is enforced of treating that as done which was agreed to be done.⁹⁹

⁹⁷ Coit v. Fougere, 36 Barb. 195.

⁹⁸ Per FOLGER, J., in Payne v. Wilson, 74 N. Y. 348, 353.

⁹⁹ Elterman v. Hyman, 192 N. Y. 113; 84 N. E. 937; Davis v. Rosenzweig, 192 N. Y. 128; Chase v. Peck, 21 N. Y. 585; Feldblum v.

Laurelton Land Co., 151 App. Div. 24; Martin v. Bauer, 138 App. Div. 57; 122 N. Y. Supp. 595; Lane v. Ludlow, 6 Paige, 316, n.; Parks v. Jackson, 11 Wend. 442; Ætna Ins. Co. v. Tyler, 16 Wend. 385; Westbrook v. Gleason, 14 Hun, 245.

PRIORITY OF EQUITABLE MORTGAGES AS AGAINST SUBSEQUENT PURCHASERS AND INCUMBRANCERS.

§ 66. **General rule.**—Vendors' liens for unpaid purchase money are the most common of equitable liens, and the adjudications upon them are the most numerous, but the rules which fix their priority as against judgments and the like will also determine the priority of other equitable liens. They will in general prevail as against everything except the claims of purchasers for value and without notice.¹ It must be remarked, however, that an equitable lien cannot prevail to divest rights which existed before the lien was created, and that an equity against one person cannot be enforced against another.² Where property so encumbered is mortgaged by the vendee to a mortgagee with notice of the vendor's lien and the mortgage is assigned by the mortgagee, the assignee in an action brought against him by the vendor to establish an equitable lien prior to the lien of the mortgagee must set up and prove that he had no notice of the vendor's equitable rights and in the absence of such proof the vendor is entitled to the relief sought. It is unnecessary for the vendor to allege in his complaint that he has not waived his lien or that the assignee took with notice; waiver or want of notice must be set up in the answer and proved as a defense.³

§ 67. **The lien for purchase money** exists not only as against the vendee himself, but as against his heirs and other privies in estate, and also as against all subsequent purchasers having notice that the purchase money is unpaid. To the extent of the lien the vendee becomes a trustee for the vendor; and his heirs and all other persons claiming under him or them, with such notice, are treated as in the same predicament.⁴ As Lord REDESDALE remarked in *Hughes v. Kearney* (1 Schoale & Lefroy, 132), "the heir cannot be permitted to hold what the ancestor unconscientiously obtained; and is it not a thing unconscientiously obtained

¹ *Maroney v. Boyle*, 141 N. Y. 462; 36 N. E. 511; *Christopher v. Christopher*, 64 Md. 583; *Gilman v. Brown*, 4 Wheat. (U. S.) 256.

² *Cook v. Kraft*, 3 Lans. 512; s. c. *sub nom. Cook v. Banker*, 50 N. Y. 655; *Dwight v. Newell*, 3 N. Y. (3 Comst.) 185; *Spring v. Short*, 90 N.

Y. 538. See *Watkins v. Reynolds*, 123 N. Y. 211; 25 N. E. 322.

³ *Seymour v. McKinstry*, 106 N. Y. 230; 12 N. E. 348; 14 N. E. 94.

⁴ *Maroney v. Boyle*, 141 N. Y. 462; 36 N. E. 511; *Story's Eq. Jur.* § 1217; *Davis v. Pearson*, 44 Miss. 508.

when the consideration is not paid?" Upon the same principle the lien is said to exist as against a widow's claim for dower,⁵ or as against a judgment creditor of the vendee,⁶ unless special equities are shown,⁷ or an assignee for the benefit of creditors,⁸ or a purchaser from the vendee with notice or who paid no new consideration,⁹ or a holder of a subsequent mechanic's lien,¹⁰ or a claim to homestead rights subsequently set apart.¹¹ And, in general, a vendor's lien will prevail against any subsequent equal equity unconnected with any legal advantage, or an equitable advantage, giving a superior claim to the legal estate.¹² It will be preferred to a mortgage given without new consideration by a wife to secure her husband's debt.¹³

§ 68. A conveyance to a bona fide purchaser will destroy a lien upon the land,¹⁴ but it will still attach to any interest in the land retained by the vendee. For example, a mortgage taken by him from the purchaser will be subject to the lien, not only in his hands, but also in the hands of his assignee with notice.¹⁵

A mortgage executed to a third person for money advanced to pay part of the purchase money will be superior to the vendor's implied lien for the balance.¹⁶

The lien of the vendor is subordinate to the rights of a junior mortgagee of the crop without notice.¹⁷

5 Warner v. Van Alstyne, 3 Paige, 513.

6 Robinson v. Williams, 22 N. Y. 386; In the matter of Howe, 1 Paige, 129; Lane v. Ludlow, 6 Id. 316, n.; Parks v. Jackson, 11 Wend. 442; Rockwell v. Hobby, 2 Sandf. Ch. 9; Lamberton v. Van Voorhis, 15 Hun, 336.

7 Spring v. Short, 90 N. Y. 538, 543. See § 71.

8 Shirley v. Sugar Refinery, 2 Edw. 505; Warren v. Fenn, 28 Barb. 333.

9 Arnold v. Patrick, 6 Paige, 310; Champion v. Brown, 6 Johns. Ch. 398; Hallock v. Smith, 3 Barb. 267; Burlingame v. Robbins, 21 Barb. 327. See also Petry v. Ambroscher, 100 Ind. 510; Porter v. Woodruff, 35 N. J. Eq. 174.

10 Payne v. Wilson, 74 N. Y. 348.

11 Palmer v. Simpson, 69 Ga. 792.

12 Butterfield v. Okie, 36 N. J. Eq. 482; Bayley v. Greenleaf, 7 Wheat (U. S.) 47.

13 Butterfield v. Okie, 36 N. J. Eq. 482.

14 Hubbell v. Hendrickson, 175 N. Y. 175; 67 N. E. 302; Spring v. Short, 90 N. Y. 538; Fisk v. Potter, 2 Keyes, 64; 2 Abb. App. Dec. 138; Fish v. Howland, 1 Paige, 20; Shirley v. Sugar Refinery, 2 Edw. 505; Champion v. Brown, 6 Johns. Ch. 402. See also Zoll v. Carnahan, 83 Mo. 35.

15 Arnold v. Patrick, 6 Paige, 310.

16 Neff v. Crumbaker, 4 Ohio St. 85.

17 Wooten v. Bellinger, 17 Fla. 289.

§ 69. As to what shall be sufficient notice, in order to charge a second purchaser, it has been held that a purchaser is bound to take notice of all liens shown to exist by the vendor's title deed.¹⁸

Where the deed recites full payment of the consideration, the lien cannot be enforced against a purchaser for value without proving actual notice that the whole of the purchase money had not been paid.¹⁹ But when a deed shows upon its face that the purchase money is yet unpaid, any purchaser from the grantee is chargeable with notice of the vendor's lien.²⁰ The lien may also be expressly reserved in the deed, and this will be notice.²¹

Where the agent of a railroad company conveyed a parcel of land to the company with knowledge that a mortgage was already in existence to secure the bonds of the corporation which would immediately attach, it was held that the legal lien of the recorded mortgage would take precedence of the lien for unpaid purchase money.²²

§ 70. If the original vendor remains in open possession, this will be notice of his rights, especially if the purchaser shall have heard of an agreement between his vendor and the occupant,²³ and generally any notice will be sufficient which ought to put the purchaser, as a reasonable man, upon inquiry.²⁴ Thus, knowledge on the part of a subsequent purchaser, that some portion of the purchase money is unpaid, without knowing how much or how it is secured, is sufficient to put him upon inquiry and charge him with notice.²⁵

§ 71. When judgment will have priority.—A lien for unpaid purchase money will be inferior to the lien of a subsequent judgment if the judgment be recovered for money advanced by the creditor in reliance upon an apparently unencumbered title,²⁶ or if

¹⁸ *Stephens v. Shannon*, 43 Ark. 464; *Stidham v. Matthews*, 29 Ark. 650; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277; *Daughady v. Paine*, 6 Minn. 452; *McKimmon v. Martin*, 14 Tex. 318.

¹⁹ *Gordon v. Manning*, 44 Miss. 756.

²⁰ *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Masich v. Shearer*, 49 Ala. 226; *Tydings v. Picher*, 82 Mo. 379; *Orrick v. Durham*, 79 Mo. 179.

²¹ *Davis v. Hamilton*, 50 Miss.

213; *Foster v. Powers*, 64 Tex. 247.

²² *Fisk v. Potter*, 2 Abb. Ct. of App. Dec. 138; 2 Keyes, 64.

²³ *Hamilton v. Fowlkes*, 16 Ark. 340; *Hopkins v. Garrard*, 6 B. Mon. (Ky.) 66.

²⁴ *Briscoll v. Bronaugh*, 1 Tex. 326.

²⁵ *Baum v. Grigsby*, 21 Cal. 176; *Manly v. Slason*, 21 Vt. 271.

²⁶ *Spring v. Short*, 90 N. Y. 538, 543; *Hulett v. Whipple*, 58 Barb. 224; *Cutler v. Ammon*, 65 Iowa, 281;

a judgment which is an apparent lien is transferred to a *bona fide* purchaser.²⁷ In such cases the judgment creditor will stand in equity as a *quasi* purchaser or mortgagee. A vendor relying upon his lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien.²⁸ But a merely ordinary creditor who has given credit supposing that the debtor was the owner of property unencumbered and had ability to pay, and who is mistaken in this respect, and whose claim has not ripened into a legal lien by the recording of a judgment or otherwise, does not require the rights of a party who advances money within the rule above stated. In relying upon the responsibility of the apparent owner of real estate every creditor takes the chance of being mistaken, and unless a fraud has been committed by means of which a lien is created and a creditor is defrauded, such creditor occupies no different position than an ordinary creditor. The question as to the good faith of the parties in the transaction is a proper subject for consideration by the court, and in a case where a mortgage was executed long after the delivery of a deed to the mortgagor, but pursuant to an agreement made at the date of the deed to secure the purchase money, such mortgage was held entitled to priority over a judgment subsequently docketed.²⁹

REMEDIES PROPER FOR AN EQUITABLE MORTGAGEE.

§ 72. **By suit in equity.**—The remedy for the equitable mortgagee is to enforce his lien by a proceeding in the nature of a suit in equity, and he may do this even though he has a remedy at law.³⁰ He is not obliged to bring an action at law in the first instance,³¹ and the fact that he has obtained a judgment upon the

21 N. W. 604; *Allen v. Loring*, 34 Iowa, 499.

27 *Prec. in Chan.* 478.

28 *Per MARSHALL, C. J.*, in *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 51.

29 *Spring v. Short*, 90 N. Y. 538.

30 *Mears v. Kearney*, 1 Abb. N. C. 303.

31 *Bradley v. Bosley*, 1 Barb. Ch. 125. See also *Campbell v. Roach*, 45

Ala. 667; *Owen v. Moore*, 14 Ala. 640; *Richardson v. Baker*, 5 J. J. Marsh. (Ky.), 323; *Pratt v. Clark*, 57 Mo. 189; *High v. Batte*, 10 Yerg. (Tenn.) 186. In some States the plaintiff must first exhaust his legal remedies. *Ford v. Smith*, 1 MacArthur (D. C.), 592; *Pratt v. Van Wyck's Ex'r*, 6 Gill and J. (Md.) 595; *Gilman v. Brown*, 1 Mason, 192; *Smith's Lead. Cas. in Eq.* (Am. ed.),

debt will not impair his right to enforce the lien.³² The relief will consist in directing a sale of the land,³³ and the proceeding will resemble closely an action to foreclose a mortgage.³⁴

§ 73. Parties to action.—The action may be brought by the person authorized to receive payment of the debt,³⁵ or his personal representatives,³⁶ and the widow³⁷ and heirs at law of the vendee³⁸ are necessary defendants. A person claiming adversely to the title is not a proper defendant.³⁹ The administrator of the vendee having no interest in the land need not be joined.⁴⁰ Since as between the heir and the administrator the debt for purchase money is primarily chargeable upon the personal estate,⁴¹ it is believed that it would be proper, though not necessary to join the executor or administrator as a defendant.

§ 74. Defenses.—The defenses appropriate in an action to foreclose a vendor's lien are those that would be proper in an action to foreclose a purchase-money mortgage. Failure to put the vendee in possession is a breach of the covenants for quiet possession and of warranty of title and constitutes a defense, as also is fraud in concealing prior incumbrances.⁴²

§ 75. Retaining possession.—If the equitable mortgagee be in possession of the premises, he may retain possession until his just claims be satisfied, and the proper way for the person owning the legal title to acquire possession is not by an action of ejectment, but by an action to redeem and for an accounting.⁴³

§ 76. Tender of deed before action to enforce lien for purchase money.—It is an open question as to whether a party can by action enforce as an equitable mortgage, a claim for the unpaid purchase money upon an executory contract for the sale of lands

vol. i., pp. 366, 373, and notes; Lord v. Wilcox, 99 Ind. 491; Chandler v. Chandler, 78 Ind. 417; 1 Sugd. on Vend. 394.

32 Dubois v. Hull, 43 Barb. 26.

33 Perry v. Board of Missions of Albany, 102 N. Y. 99.

34 Ross v. Shurtleff, 55 Vt. 177.

35 Story Eq. Jur. § 1227.

36 Dayhuff v. Dayhuff, 81 Ill. 499.

37 McKay v. Green, 3 Johns. Ch. 50.

38 McKay v. Green, 3 Johns. Ch. 56; Jackson v. Hill, 39 Tex. 493.

39 Dial v. Reynolds, 6 Otto (U. S.) 340; Croghan v. Miner, 53 Cal. 15; Wells v. Francis, 7 Colo. 396.

40 McKay v. Green, 3 Johns. Ch. 56.

41 Wright v. Holbrook, 32 N. Y. 587; Lamport v. Beeman, 34 Barb. 329; Livingston v. Newkirk, 3 Johns. Ch. 312; Warner v. Van Alstyne, 3 Paige, 513.

42 Payse v. McGuire, 81 Ky. 608.

43 Chase v. Peck, 21 N. Y. 581.

where he has an election of remedies, either by ejectment to recover the premises, or an action for the amount due on the contract.⁴⁴ A judgment in such an action was sustained by the Court of Appeals when the objection was not made in the court below, and it was held that, conceding the remedy sought to be proper, it was not necessary for the plaintiff to show that he had tendered a deed before commencing his suit.⁴⁵ The rule would be otherwise, however, and a tender of a deed should be made before suit is brought if the vendor dies; at least unless the heir or devisee of the vendor is made a party so as to be bound by the judgment. The reason of this is found in the fact that the right to the purchase money will be in the personal representatives of the vendor, while the power to give the conveyance will be in his heir or devisee.⁴⁶

44 Freeson v. Bissell, 63 N. Y. 168.

46 Thomson v. Smith, 63 N. Y.

45 Freeson v. Bissell, 63 N. Y. 168. 301.

CHAPTER IV.

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Since every conveyance made as security for a debt or obligation is a mortgage, it follows that any property which may be conveyed may also be mortgaged, and any present interest, legal or equitable, in real or personal property, which can be the subject of a sale, may be the subject of a mortgage.³ For example, the interest of a person in possession of land under a parol contract of sale, may be sold, and it may therefore be mortgaged,⁴ and a mortgage security may itself become the subject of mortgage by being assigned as security for a debt of the mortgagee.⁵

A mortgage of rents issuing out of land under a grant in fee, reserving rent, creates a lien on incorporeal hereditaments and is not a mere chose in action or personal property, and is to be treated as a mortgage of real estate and not of chattels.⁶

§ 78. **Mortgages of equitable interests.**—A vested equitable life estate is such an interest in land as will pass by a mortgage of the same; and where such an estate is conveyed or encumbered by the *cestui que trust* without the concurrence of the trustee holding the legal title, it will become the duty of the trustee to

¹ *Hosford v. Nichols*, 1 Paige, 220. See also *Cutler v. Davenport*, 1 Pick. (Mass.) 81.

² *Cope v. Wheeler*, 53 Barb. 350, aff'd 41 N. Y. 303.

³ *Crane v. Turner*, 7 Hun, 357, aff'd 67 N. Y. 437; *Wilson v. Wilson*, 32 Barb. 328. See *Grant v. Keator*, 117 N. Y. 369; 22 N. E. 1055; *Birdsall v. Grant*, 37 App. Div. 348; 57 N. Y. Supp. 705. See § 13 herein.

⁴ *Crane v. Turner*, 7 Hun, 357, aff'd 67 N. Y. 437; *Titcomb v. Fonda, Johnstown & Gloversville R. Co.*, 38 Misc. R. 630; 78 N. Y. Supp. 226. See also *Langlin v. Bralley*, 25 Kans. 147; *Jones v. Lapham*, 15 Kans. 540; *Sinclair v. Armitage*, 12 N. J. Eq. 174.

⁵ *Hoyt v. Martense*, 16 N. Y. (2 Smith) 231.

⁶ *Van Rensselaer v. Dennison*, 35 N. Y. 393, 401.

recognize the rights of the grantee or mortgagee. But the purchaser under such a mortgage will take only such rights as the mortgagor had, to wit, a life estate.⁷

Where a testator directed his executor by his will to sell his real estate, and, after having set aside a specified sum for his widow, to divide the remainder among his children; and, before the executor sold the real estate, a son of the testator mortgaged his interest therein, it was held that the mortgage by the son was to be treated as an equitable assignment of his interest in the proceeds of the sale.⁸

Where a testator devised a specific piece of realty subject to the payment of legacies, a mortgage by the devisee was held to be a lien subordinate to the lien of the legacies.⁹

A mortgage by a *cestui que trust*, assuming to mortgage real estate the title to which is in the trustee, creates no lien on the realty, but the *cestui que trust* having the right to rents and profits, the mortgage is a valid lien upon them. The decree on the foreclosure of such a mortgage will direct the trustee to apply the net rents to the payment of the debt, and the trustee is, therefore, a necessary party.¹⁰

§ 79. Mortgage of undivided interest.—The Code of Civil Procedure,¹¹ following the Revised Statutes,¹² provides as to actions for partition as follows: “The plaintiff may, at his election, make a creditor having a lien on an undivided share or interest in the property, a defendant in the action. In that case he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be first charged with its just proportion of the costs and expenses of the action, in preference to the lien.”¹³

Independent of our statute, a mortgagee of an undivided interest

⁷ See *Shindler v. Robinson*, 150 App. Div. 875; *Bryan v. Howland*, 98 Ill. 625; *Burkan v. Burk*, 96 Ind. 270.

⁸ *Horst v. Dague*, 34 Ohio St. 371.

⁹ *Conkling v. Weatherwax*, 173 N. Y. 43; 63 N. E. 855, and see *Dick-*

inson v. Blake, 116 App. Div. 545; 101 N. Y. Supp. 709.

¹⁰ *Wilson v. Russ*, 17 Fla. 691.

¹¹ Code of Civ. Pro. § 1540.

¹² 2 R. S. 318, §§ 8, 9; Laws 1830, ch. 320, § 41.

¹³ *Harwood v. Kirby*, 1 Paige, 469.

would not be bound by the partition between the co-tenants to which he was not a party or assented.¹⁴

§ 80. **Description of the mortgaged real estate.**—The same rules will control in construing the description of real estate in a mortgage that would apply if it were an absolute grant. In answering the question as to whether a mortgage is incapable of taking effect and void by reason of vagueness and uncertainty in the description of the mortgaged premises, we are to regard the rule that a deed should never be held to be void when the words may be applied to any intent to make it good, and to that end they are to be taken most strongly against the grantor, for he should not be allowed to say that a description framed by himself was so indefinite that, upon an enforcement of the mortgage, no title to the property could be acquired.¹⁵ It is enough, therefore, if, by any particular in the description, the thing granted can be sufficiently ascertained to enable the court to say that the words chosen by the parties were intended to relate to it; and for that purpose we may go beyond the face of the deed if it refers to some subject matter in respect to which we can locate and apply the description.¹⁶ A general description of all of the land owned by the mortgagor in a certain county is sufficient, and the purchaser at a sale under foreclosure of such a mortgage can recover in ejectment.¹⁷

And a mortgage of "all my property," or "all my lands wherever situated," is not void because of the generality of the description.¹⁸ So a description of land as "all my right, title, interest, and claim in and to the farm of A. B., deceased," is sufficient.¹⁹ And a description as follows has been held sufficient: "Certain land situate in Bridgeport, and described as follows, it being our home farm, containing about 180 acres."²⁰

Omitting to name the state, county, or township in the description of premises in a mortgage will not invalidate the instrument,

¹⁴ Jackman v. Beck, 37 Ark. 125.

¹⁵ Jackson v. Gardner, 8 Johns. 394. See also Tryon v. Sutton, 13 Cal. 490.

¹⁶ Per DANFORTH, J., in *The People ex rel. Myers v. Storms*, 97 N. Y. 364; *Coleman v. Manhattan Beach Imp. Co.*, 94 N. Y. 229. See also *Thomson v. Building Ass'n*, 103 Ind. 279; 2 N. E. 735.

¹⁷ *Durant v. Kenyon*, 32 Hun, 634. See also *Starling v. Blair*, 4 Bibb. (Ky.) 288.

¹⁸ *Wilson v. Boyce*, 92 U. S. 320; *Usina v. Wilder*, 58 Ga. 178.

¹⁹ *Bailey v. Alleghany Nat. Bank*, 104 Pa. St. 425.

²⁰ *Howe's Ex'rs v. Towner*, 55 Vt. 315.

where other adequate elements of identification exist; and it is not essential that the property should be so described as to identify it without the aid of extrinsic evidence, but it is always competent to connect the written description with the material subject matter by proof of the surrounding circumstances.²¹

In a suit in equity for foreclosure it is not competent for the mortgagor to prove by parol evidence that he intended to convey an interest in the land different from that specified in the mortgage.²²

A right of access is covered by the phrase "together with the appurtenances."²³

A mortgage containing a defective description, if not so uncertain that it cannot be rendered certain by averment, may be reformed and foreclosed against a subsequent purchaser for value without actual notice, such description being sufficient to put the purchaser on inquiry.²⁴

§ 81. Mortgages of lands held adversely.—It is provided by statute that "A grant of real property is absolutely void, unless the same shall be made to the people of the State of New York, if at the time of the delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively."²⁵

Where a mortgagor was in possession of the mortgaged property at the time of the execution of the mortgage, but was afterward ousted, it was held that these statutes did not operate to invali-

²¹ *Stockwell v. State*, 101 Ind. 1; *Robinson v. Brennan*, 115 Mass. 582; *Slater v. Breese*, 36 Mich. 77.

²² *Cowley v. Shelby*, 71 Ala. 122; *Shepard v. Shepard*, 36 Mich. 173.

²³ *Putnam v. Putnam*, 77 App. Div. 554; 78 N. Y. Supp. 987.

²⁴ *Pence v. Armstrong*, 95 Ind.

191; *Bunker v. Anderson*, 32 N. J. Eq. 35. But see *Thomson v. Wilcox*, 7 Lans. 376.

²⁵ *Real Prop. Law*, § 260; 1 R. S. 739, §§ 147, 148; *Ten Eyck v. Craig*, 62 N. Y. 406; *Towle v. Remsen*, 70 N. Y. 303, 318.

date an assignment of the mortgage executed after the time of such ouster.²⁶

MORTGAGES EXECUTED UNDER POWERS.

§ 82. **Power to sell does not confer power to mortgage.**—Although a mortgage is a defeasible conveyance, or a conveyance made as security, a power to sell, whether contained in a will or elsewhere, does not, in itself, confer a power to mortgage.²⁷

A power to mortgage may, however, be derived by implication from other parts of an instrument creating a power to sell.²⁸ Where a power of sale only is conferred upon executors, a mortgagee for value who has acted in good faith and is innocent of any wrong is entitled to rely upon an apparent execution of such power in his chain of title.²⁹ Thus, when A receives a deed with power to sell for the benefit of B, and at the same time executes a mortgage for the purchase money, the mortgage is valid.³⁰ Where a widow takes a life estate under the will of her husband with a power to convert to her own use so much of the corpus of the estate as she may need for her comfort and support she has the right to mortgage for the purpose specified as well as to sell and a mortgage given by her will be presumed to have been executed for such a purpose.³¹

§ 83. **A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are:** 1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and, 2. That any subsequent estate, created by the owner,

²⁶ *Tobias v. The Mayor, etc.*, 48 N. Y., 17 Hun, 534.

²⁷ *Potter v. Hodgman*, 81 App. Div. 233; 80 N. Y. Supp. 1056; *Griswold v. Caldwell*, 65 App. Div. 371; 73 N. Y. Supp. 2; *Arnoux v. Phyfe*, 6 App. Div. 605; 39 N. Y. Supp. 973; *Bloomer v. Waldron*, 3 Hill, 361, overruling dictum in *Williams v. Woodard*, 2 Wend. 487, 492. See also *Smith v. Hutchinson*, 108 Ill. 662; *Jeffery v. Hursh*, 58 Mich. 246; 25 N. W. 176; 27 N. W. 7; *Van-*

deveer v. Conover, 40 N. J. Eq. 161.

²⁸ *Freifeld v. Mankowski*, 37 Misc. 303.

²⁹ *Olyphant v. Phyfe*, 27 Misc. R. 64; 58 N. Y. Supp. 217; 48 App. Div. 1; 62 N. Y. Supp. 688. See also *Benedict v. Arnoux*, 154 N. Y. 715; 49 N. E. 326.

³⁰ *Contant v. Servoss*, 3 Barb. 128.

³¹ *Swarthout v. Ranier*, 143 N. Y. 499; 38 N. E. 726. See also *Blauvelt v. Gallagher*, 22 Misc. R. 564; 49 N. Y. Supp. 608.

in execution of the power, becomes subject to the mortgage as if in terms embraced therein.³²

§ 84. A power to mortgage includes in it, of necessity, a power to consent to the usual and customary provisions which are commonly inserted in mortgages, and among these is a clause authorizing the mortgagee to sell on default of prompt payment.³³ On the same principle, a clause imposing on the mortgagor the duty of keeping the buildings on the mortgaged premises insured, would be proper; as also would be a clause making the term of credit depend on the prompt payment of interest. These latter clauses would also properly be inserted by a person authorized to borrow money under a general authority to bargain with the lender as to the security to be given and the term of credit.

§ 85. A devise of lands to executors or other trustees to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, does not vest any estate in the trustees; but the trust is valid as a power, and the lands descend to the heirs, or pass to the devisees of the testator subject to the execution of the power.³⁴

Where lands are devised to an executor for life with the remainder over, and the executor is given "full power and authority to buy, sell and convey and lease and mortgage real estate at his will and pleasure without bail" by the will, such power must be exercised for the benefit of the *cestui que trust*. If exercised otherwise a mortgage would be void if the mortgagee knew it, or knew facts which should put him upon an inquiry that would disclose it.³⁵

Where a testator devises real property to trustees, with a power of sale, in trust for his wife for her life, with the remainder over to his three sons, each of the sons takes an alienable estate in the trust fund and may create a valid lien thereon by way of mortgage. Even if there were an equitable conversion of the realty by the will, still the alienation for a valuable consideration of the subject of such conversion by one having an interest therein, made before the actual sale thereof under the power, is sufficient

³² Real Prop. Law, § 156; 1 R. S. 733, §§ 90, 91.

³³ Wilson v. Troup, 7 Johns. Ch. 25, aff'd 2 Cow. 195; Fox. v. Lipe, 24 Wend. 164.

³⁴ Real Prop. Law, §§ 96, 99.

³⁵ Danziger v. Deline, 25 Misc. 635; 56 N. Y. Supp. 354.

to create an equitable mortgage which will follow the proceeds after the conversion had actually become effective by sale.³⁶ A person dealing with another who holds a mortgage as trustee must take notice of the scope of his authority, and while an act within his authority, done by him with intent to defraud the estate, and which accomplished that purpose will bind the estate or the beneficiaries, as to a third person acting in good faith and without notice, where the act is beyond the scope of the trustees' authority, such third person is not protected.³⁷ The power to mortgage in such a case confers no authority to execute a mortgage which is in effect an application of the trust property to a private use.³⁸

It is unlawful for executors to exercise a general power to mortgage given by will for the purpose of securing debts not of the estate and by which the estate did not benefit.³⁹

§ 86. A conveyance of land in trust to mortgage for the benefit of creditors is not one of the trusts authorized by law,⁴⁰ and no estate will vest under it in the trustees.⁴¹

§ 87. Where a mortgage is executed by an executor or other trustee for a part of the purchase money of the land covered by it, no question of authority to execute the mortgage can be raised without also repudiating the conveyance, since the contract must be taken as a whole, and the benefits received under it cannot be retained by a *cestui que trust* while at the same time the burdens it imposes are denied.⁴²

Where a person had title to an undivided moiety of land and power to convey, without any legal or equitable interest in the balance, a mortgage by which he assumed to pledge the whole,

36 *Archer v. Archer*, 147 App. Div. 44.

37 *Kirsch v. Tozier*, 143 N. Y. 390; 38 N. E. 375. See *Mutual Life Ins. Co. v. Shipman*, 108 N. Y. 19; 15 N. Y. Supp. 58; *Pawling Savings Bank v. Washburn*, 50 App. Div. 526; compare *Danziger v. Deline*, 25 Misc. R. 635; 56 N. Y. Supp. 354.

38 *Boscowitz v. Held*, 18 Misc. R. 674; 43 N. Y. Supp. 818.

39 *Boscowitz v. Held*, 15 App. Div.

306; 44 N. Y. Supp. 136. See *Wood v. Travis*, 24 Misc. R. 589; 54 N. Y. Supp. 60.

40 Real Prop. Law, § 96.

41 *Rogers v. De Forest*, 7 Paige, 272; *Barnum v. Hempstead*, 7 Paige, 568; *Darling v. Rogers*, 22 Wend. 483; *Irving v. De Kay*, 9 Paige, 521, aff'd 5 Den. 646; *Potter v. Hodgman*, 81 App. Div. 233; 80 N. Y. Supp. 1056, aff'd 176 N. Y. 580.

42 *Skelton v. Scott*, 18 Hun, 375.

but which did not recite the power, was held to affect only the part to which he had title.⁴³

A person taking a mortgage executed under a power of attorney is chargeable with notice of the extent and limitations of the power.⁴⁴

Where a *cestui que trust* bought land giving back a bond and mortgage signed by himself and by his trustee, as such, it was held that the trustee was not liable individually, but only in his representative capacity.⁴⁵

EXECUTION AND DELIVERY.

§ 88. **Execution and acknowledgment.**—It is provided by the Consolidated Laws: "A grant in fee or of a freehold estate, must be subscribed by the person from whom the estate or interest conveyed is intended to pass, or by his lawful agent. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested it does not take effect as against a subsequent purchaser or incumbrancer until so acknowledged."⁴⁶ This provision is equally applicable to mortgages.⁴⁷ In cases where from lack of a seal,⁴⁸ or for want of proper acknowledgment,⁴⁹ or from any other technical cause, an

⁴³ Shirras v. Craig, 7 Cranch (U. S.) 34.

⁴⁴ Kingsland v. Chetwood, 39 Hun, 602.

⁴⁵ Crote v. Benzinger, 13 App. Div. 617.

⁴⁶ Real Prop. Law, § 243; 1 R. S. 733, § 137; Genter v. Morrison, 31 Barb. 155; Wood v. Chapin, 13 N. Y. 509.

Execution may be shown, where a bond and mortgage have been duly acknowledged, by putting the instruments in evidence without further proof. Preston v. Albee, 120 App. Div. 89; 109 N. Y. Supp. 33.

⁴⁷ White v. Leslie, 54 How. Pr. 394. See also Porter v. Muller, 53 Cal. 677.

⁴⁸ Erwin v. Shuey, 8 Ohio St. 509. *The seal is presumptive evidence of consideration and the burden is upon*

the mortgagor to overcome the presumption. Quackenbush v. Mapes, 123 App. Div. 242; 107 N. Y. Supp. 1047.

A seal is no longer required where the instrument expresses a consideration. Heburn v. Reynolds, 73 Misc. R. 73; 132 N. Y. Supp. 460.

⁴⁹ Maine v. Alexander, 9 Ark. 112; 47 Am. Dec. 732.

A certificate of acknowledgment is prima facie as strong as if the facts had been duly sworn to in open court by a witness apparently disinterested and worthy of belief. It should not be overthrown upon evidence of a doubtful character but only upon proof so clear and convincing as to amount to a moral certainty. Albany Co. Savings Bank v. McCarthy, 149 N. Y. 71; 43 N. E. 427.

effort to execute a mortgage fails of legal validity, it may nevertheless be enforced as an equitable lien.⁵⁰

A mortgage does not become void because the name of the mortgagee is not stated accurately if the person intended can be sufficiently identified. Where G. and W. were partners under the name of the Chicago Lumber Co., and received a mortgage by the latter name, it was held enforceable by them.⁵¹ The signature of a husband to a mortgage of his wife's property is of no effect, for a tenancy by the curtesy, while merely initiate, is not an estate, but a simple possibility or expectancy.⁵²

§ 89. **Neither a grant nor a mortgage can take effect without a grantee being named in it.**⁵³—So an instrument in the form of a mortgage, but containing the name of no mortgagee, does not become effectual by delivery to one who advances money on the agreement that he shall hold the paper as security for a loan.⁵⁴ But if such an instrument is prepared and delivered by the mortgagor to a person authorized to use it to obtain money for the mortgagor, and to insert the name of the mortgagee, this can be done and the mortgage will be valid.⁵⁵ And, in general, any alteration may be made in a mortgage after its execution, provided it be done with the authority and consent of the mortgagor.⁵⁶

Where a mortgage is executed in blank, authority to fill in the name of a mortgagee may be implied where the use is made of the instrument which was authorized by the mortgagor.⁵⁷ But where a different use is made of the instrument from that authorized by the mortgagor, it will be void and will create no lien, and this rule has peculiar force when the mortgagee knows that his name was filled in after execution and without the knowledge of the mortgagor.⁵⁸

⁵⁰ See *ante*, Chap. III., §§ 46 to 51; *Du Val v. Johnson*, 39 Ark. 182.

⁵¹ *Chicago Lumber Co. v. Ashworth*, 26 Kans. 212.

⁵² *Albany Co. Savings Bank v. McCarthy*, 149 N. Y. 71, 85; 43 N. E. 427.

⁵³ A mortgage for the benefit of a third party intended to run to a trustee, from which the name of the trustee is omitted, is not void for such omission if it contains the means of ascertaining the trustee; *Hitesman v. Donnel*, 40 Ohio St. 287.

⁵⁴ *Chauncey v. Arnold*, 24 N. Y. 330.

⁵⁵ *Hemmenway v. Mulock*, 56 How. Pr. 38.

⁵⁶ *Knapp v. Maltby*, 13 Wend. 587; *Woolley v. Constant*, 4 Johns. 54; *Penny v. Corwithe*, 18 Johns. 499; *ex parte Kerwin*, 8 Cow. 118; *Texvia v. Evans*, 1 Anst. 228.

⁵⁷ *Van Etta v. Evenson*, 28 Wis. 33.

⁵⁸ *Ayers v. Probasco*, 14 Kans. 175.

Where a bond and mortgage were executed with the name of the mortgagee blank, and delivered to a third person with authority to raise money for the mortgagor, and he delivered them for his own benefit, filling in the name of a mortgagee, it was held that they were utterly void as against the mortgagor.⁵⁹

The record of a mortgage from which the name of the mortgagee is omitted does not charge a subsequent purchaser with notice thereof.⁶⁰

§ 90. Alterations after execution.—If a mortgage is altered by a mere stranger while it is out of the possession of the mortgagee, and without his knowledge or consent, this does not work a destruction of it. But if an alteration is made without the consent of the party against whom it is sought to be enforced, either by the plaintiff who brings the action upon it, or by some other person while the instrument is in the possession or custody of the plaintiff, such alteration will discharge the original instrument without substituting any new contract or obligation in its place.⁶¹

This principle has been applied where a mortgage executed by a married woman was altered by her husband by changing the name of the mortgagee without her express consent. The husband derived no authority from the marital relation nor from the possession of the instrument to dispose of the mortgage otherwise than according to its strict terms.⁶² So, a mortgage was held void and incapable of reformation which was made by a married woman to secure her husband's debt, and which the husband assumed to correct in respect to an erroneous description.⁶³

Where a mortgage is altered after execution, either by changing the description of the mortgaged property⁶⁴ or by inserting an additional obligation,⁶⁵ it becomes entirely void. And the doctrine of equitable subrogation will not be applied to relieve the mortgagee.⁶⁶

⁵⁹ Cady v. Jennings, 17 Hun, 213.

⁶⁰ Dicke v. Wright, 49 Iowa, 538.

⁶¹ Gleason v. Hamilton, 138 N. Y. 353; 34 N. E. 283; Jackson v. Malin, 15 Johns. 297; Rees v. Overbaugh, 6 Cow. 746; Lewis v. Payn, 8 Cow. 71; Waring v. Smyth, 2 Barb. Ch. 119; Pigott's Case, 11 Coke, 27; Shep. Touch. 69.

⁶² Smith v. Fellows, 41 N. Y. Super. (9 J. & S.) 36.

⁶³ Marcy v. Dunlap, 5 Lans. 365. See also Johnson v. Moore, 33 Kans. 90; 5 Pac. 406.

⁶⁴ Pereau v. Frederick, 17 Neb. 117; 22 N. W. 235.

⁶⁵ Gleason v. Hamilton, 138 N. Y. 353; 34 N. E. 283; Johnson v. Moore, 33 Kans. 90; 5 Pac. 406.

⁶⁶ Guckenheimer v. Angevine, 81 N. Y. 394. See also Johnson v. Moore, 33 Kans. 90; 5 Pac. 406.

§ 91. **Delivery.**—A valid delivery of a mortgage may be made to any one of two or more persons interested in its enforcement. Thus, where upon a dissolution of a copartnership, one partner assumed the payment of a firm note and executed a mortgage to secure its payment, and as indemnity to the other partner against his liability thereon, a delivery of the mortgage to the firm creditor was held sufficient as a delivery to his copartner.⁶⁷

A mortgage takes effect from its delivery and not from its date.⁶⁸

The destruction of a mortgage after delivery will not impair its validity as against the mortgagor and others claiming under him with notice. This principle was applied in a case where a purchase-money mortgage, after being recorded, was destroyed by the wife of the mortgagee.⁶⁹

Possession by the obligee of a bond and mortgage is *prima facie* evidence of a delivery thereof.⁷⁰

If a mortgage is not voluntarily delivered, no title passes, though the mortgagor may by his carelessness in permitting the mortgagee to gain possession of the mortgage, be estopped from denying the validity of the delivery as against third persons claiming by purchase from the mortgagee.⁷¹

The recording of a mortgage is presumptive evidence of its delivery,⁷² but not to a third person in whose favor a mortgage contains a provision testamentary in its nature.⁷³

So, where a mortgage was written and signed by the mortgagor, and was filed by him in the recorder's office for record, and it was subsequently found in the mortgagee's possession, this was held sufficient *prima facie* evidence of a delivery.⁷⁴ And, in a similar case, but where the mortgagee never had possession of the instrument, delivery was inferred.⁷⁵ So, where the mortgagor who delivered the mortgage to the recording officer was shown to have received the consideration therefor.⁷⁶

It is not necessary that a mortgage should be delivered to the

⁶⁷ Conwell v. McCowen, 81 Ill. 285.

⁶⁸ Conwell v. McCowen, 81 Ill. 285.

⁶⁹ Sloan v. Holcomb, 29 Mich. 153.

⁷⁰ Kranichfelt v. Slattery, 12 Misc. R. 96; 33 N. Y. Supp. 27.

⁷¹ Fisher v. Beckwith, 30 Wis. 55; 11 Am. R. 546.

⁷² Preston v. Albee, 120 App. Div. 89; 105 N. Y. Supp. 33.

⁷³ Townsend v. Rackham, 143 N. Y. 516; 38 N. E. 731.

⁷⁴ Haskill v. Sevier, 25 Ark. 152.

⁷⁵ Elsberry v. Boykin, 65 Ala. 336.

⁷⁶ Connard v. Colgan, 55 Iowa, 338; 8 N. W. 351.

mortgagee personally. Delivery to a third person with instructions to deliver it to the mortgagee is sufficient.⁷⁷

Delivery in any case must, however, be complete and be proved.⁷⁸

§ 92. **Acceptance.**—There must not only be a mortgagee in order to constitute a valid mortgage, but the mortgage must also be accepted by him.⁷⁹ Slight evidence of an acceptance will ordinarily be sufficient, since the contract is presumptively beneficial, and if it be delivered to a third person for the benefit of the mortgagee, an acceptance will be implied from his conduct in subsequently claiming rights under it.⁸⁰

The acceptance of a mortgage containing a declaration of trust for third persons is an acknowledgment of the trust by the mortgagee and binds him to perform it.⁸¹

§ 93. **Delivery in escrow.**—Where a mortgage is placed in the custody of a third person to deliver to the mortgagee, on the happening of a specified event, no valid delivery can be made until the condition imposed is satisfied, and if delivered before that is done, the mortgage cannot be enforced.⁸² Where a mortgage was left with a firm of attorneys acting for both parties, to be delivered only on the consent of both, and there was a conflict of testimony as to whether such consent was ever had, the fact that the mortgagee was found in possession of the mortgage, and the mortgagor in possession of an instrument executed by the mortgagee, to show what the mortgage was given for, was held to be decisive, and evidence offered by the mortgagor to show that the mortgage was given to defraud his creditors, was excluded.⁸³

⁷⁷ *Booker v. Booker*, 119 App. Div. 482; 104 N. Y. Supp. 21, citing *Hathaway v. Payne*, 34 N. Y. 928, holding that a delivery of the key of a box containing a mortgage executed by a mother in favor of her son to a third person, with instructions to deliver the mortgage to the son, is a good delivery to the latter. But if prior to such delivery the mortgagor executed and delivered a deed of the mortgaged property to another she divested herself of title, and nothing passed by the subsequent delivery of the mortgage.

⁷⁸ *Gannon v. McGuire*, 22 App. Div. 43; 47 N. Y. Supp. 870.

⁷⁹ *Freeman v. Peay*, 23 Ark. 439.

⁸⁰ *Lady Superior v. McNamara*, 3 Barb. Ch. 375; *Souverye v. Arden*, 1 Johns. Ch. 240; *Church v. Gilman*, 15 Wend. 656. See also *Ensworth v. King*, 55 Mo. 477.

⁸¹ *Kirsch v. Tozier*, 143 N. Y. 390; 38 N. E. 475.

⁸² *Thompson v. White*, 48 Conn. 509; *Cressinger v. Dessenburgh*, 42 Mich. 580; 4 N. W. 269; *Powell v. Conant*, 33 Mich. 396; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1.

⁸³ *Hess v. Final*, 32 Mich. 515.

A mortgage has no efficacy if its delivery depends upon a condition precedent which is to be performed after the death of the mortgagor.⁸⁴

THE DEBT SECURED.

§ 94. **Debt must be valid.**—The debt being the principal, and the mortgage lien merely the security for it, there can be no valid mortgage independent of a valid debt. So, a deed in the nature of a mortgage to secure a bargain, which is contrary to the policy of the law, will be void.⁸⁵

Where the rights of creditors do not interfere, a mortgage may be valid as against all persons but the mortgagor, though given without consideration. So, where a father made a voluntary provision for his child by a mortgage, this was held as valid as against his heirs, as a transfer for a valuable consideration.⁸⁶

If a mortgage is made to secure debts arising out of several transactions which can be separated, and some are legal while others are not, the mortgage will be valid for that part of the debt which is free from illegality.⁸⁷ This was so held where a part of the debt sought to be secured was for a sale of liquor in violation of a statute.⁸⁸

A mortgage given for a valid debt is good although the purpose of the mortgagor in executing it was to defraud his other creditors.⁸⁹

§ 95. **Mortgage lien must be complete at its inception.**—A mortgage made to secure one debt cannot, by parol, afterward be made to stand for a new or different debt, even between the parties; and the cases which recognize the admissibility of parol testimony to establish the actual contract made between the parties at the time of the grant, must be distinguished from those in which attempts have been made to enlarge the scope of the mortgage after its inception.⁹⁰ The grant must be in writing under seal, and must comply with all of the formalities prescribed by

⁸⁴ Taft v. Taft, 59 Mich. 185; 26 N. R. 426; 33 Alb. L. J. 264, in which case there is an elaborate examination of the authorities on conditional delivery and delivery in escrow; Latham v. Udell, 38 Mich. 238; Wallace v. Harris, 32 Mich. 380.

⁸⁵ Gilbert v. Holmes, 64 Ill. 548.

⁸⁶ Bucklin v. Bucklin, 1 Abb. App. Cas. 242.

⁸⁷ Feldman v. Gamble, 26 N. J. Eq. 494.

⁸⁸ Shaw v. Carpenter, 54 Vt. 155; 41 Am. R. 837.

⁸⁹ Billings v. Billings, 31 Hun, 65.

⁹⁰ Stoddard v. Hart, 23 N. Y. 556; Taylor v. Post, 30 Hun, 446; Hubbell v. Blakeslee, 8 Hun, 603; Bank of Utica v. Finch, 3 Barb. Ch. 293. See also Hughes v. Johnson, 38 Ark. 222.

law for absolute conveyances of land; and while the defeasance may rest in parol and may provide for future advances or for almost any kind of present or future obligation, the agreement made at the time of the grant must control all of the subsequent dealings of the parties with the security.⁹¹

§ 96. If the defeasance is in writing, it cannot be enlarged by subsequent parol agreement.⁹²—So a mortgage originally given to secure an indebtedness for one firm cannot, by parol, be extended to secure an obligation to a new firm.⁹³

An agreement indorsed after its maturity upon a note secured by mortgage, by which the rate of interest is increased, is a personal covenant merely, and is not secured by the lien, even against the mortgagor,⁹⁴ though an agreement in writing to that effect for a valuable consideration has been enforced where no rights of third persons have intervened.⁹⁵

An agreement between the mortgagor and mortgagee, tending to increase the mortgage, will always be void against a junior incumbrance.⁹⁶

As between the parties, and to prevent fraud, the courts have sometimes refused to give relief to a mortgagor except on condition of his doing equity, even where this practically resulted in enforcing a parol agreement, by which the lien of a mortgage was extended after its inception.⁹⁷

§ 97. The condition of the mortgage should give reasonable notice of the amount of the incumbrance, in order that junior incumbrancers and purchasers may ascertain from the record the extent of the lien claimed under it. It has even been held in some cases in Connecticut that reasonable definiteness of descrip-

⁹¹ See Chap. VI. as to effect of agreement for further advances made after execution of mortgage; Chap. VII. as to extension of time by renewal of notes secured by mortgage; Chap. XI. as to reissue of paid mortgage.

⁹² *Bank of Utica v. Finch*, 3 Barb. Ch. 293; 49 Am. Dec. 175. See also *Hughes v. Johnson*, 38 Ark. 285; *Morris v. Tillson*, 81 Ill. 607; *Savage v. Scott*, 45 Iowa, 130.

⁹³ *Taylor v. Post*, 30 Hun, 446.

⁹⁴ *Havens v. Jones*, 45 Mich. 253;

7 N. W. 818; *Spear v. Hadden*, 31 Mich. 265.

⁹⁵ *Smith v. Graham*, 34 Mich. 302.

⁹⁶ *Schiffer v. Feagin*, 51 Ala. 335; *Gardner v. Emerson*, 40 Ill. 296; *Coombs v. Jordan*, 3 Bland Ch. 284; 22 Am. Dec. 236; *Perrin v. Kellogg*, 38 Mich. 720; *Jones v. Brogan*, 29 N. J. Eq. 139; *Mitchell v. Coombs*, 96 Pa. St. 430.

⁹⁷ *Stone v. Lane*, 92 Mass. (10 Allen) 74.

tion is essential where the amount of the debt is liquidated or capable of ascertainment at the time of the execution of the mortgage.⁹⁸ But no such doctrine has ever been approved in this State, and a mortgage is valid if it contains within itself a description of the debt or refers to some other paper or to some other facts outside of any paper from which the extent of the claims of the mortgagee can be ascertained. A truthful statement of the debt is desirable, since any attempt at concealment or misstatement will be material if questions of fraud are raised.⁹⁹

§ 98. Over-stating debt a badge of fraud.—A mortgage given to secure a debt actually due, but drawn for a larger sum, with intent on the part of both parties to the instrument to defraud or delay creditors, may be adjudged void at the instance of creditors.¹ In the absence of explanatory evidence, over-stating the debt is a badge of fraud and may, in itself, be sufficient to establish a fraudulent intent so as to avoid the mortgage as to existing creditors.² The burden of establishing the honesty of the transaction is thereby cast upon the person claiming under the mortgage,³ but it is not conclusively fraudulent if it appears that it was not made to defraud other creditors.⁴

Knowledge by the mortgagee that his debtor is trying to magnify his liabilities and wants him to take a mortgage for a sum

98 *Pettibone v. Griswold*, 4 Conn. 158; 10 Am. Dec. 106; *Stoughton v. Pasco*, 5 Conn. 442; 13 Am. Dec. 72; *Booth v. Barnum*, 9 Conn. 286; 23 Am. Dec. 389; *Hart v. Chalker*, 14 Conn. 77; *Merrill v. Smith*, 18 Conn. 257; 46 Am. Dec. 315; *Bramhall v. Flood*, 41 Conn. 68; *Stearns v. Porter*, 46 Conn. 313; *Bullock v. Batteuhousen*, 108 Ill. 28.

99 Per MARSHALL, Ch. J., in *Shirras v. Craig*, 7 Cranch (U. S.) 34; *Truscott v. King*, 6 N. Y. (2 Seld.) 147; *McKinster v. Babcock*, 26 N. Y. 378; *Bumpas v. Datson*, 7 Humph. (Tenn.) 310; 46 Am. Dec. 81; *Goff v. Rogers*, 71 Ind. 459. See *First National Bank of Richfield Springs v. Keller*, 127 App. Div. 435.

1 *Heintze v. Bentley*, 34 N. J. Eq. 562.

2 *Tripp v. Vincent*, 8 Paige, 176.

See also *Taylor v. Wendling*, 66 Iowa, 562; 24 N. W. 40; *Wood v. Scott*, 55 Iowa, 114; 7 N. W. 465; *Davenport v. Cummings*, 15 Iowa, 219; *Lynde v. McGregor*, 95 Mass. 172; *Rice v. Morner*, 64 Wis. 599; 25 N. W. 668; *Butts v. Peacock*, 23 Wis. 359.

3 *Carson v. Byers*, 67 Iowa, 606; 25 N. W. 826; *Lombard v. Dows*, 66 Iowa, 243; 23 N. W. 649.

4 *Berry v. O'Connor*, 31 Alb. L. J. 357; *Tully v. Harloe*, 35 Cal. 302; *Wood v. Scott*, 55 Iowa, 114; 7 N. W. 465; *Bush v. Bush*, 33 Kan. 556; 6 Pac. 794; *Berry v. O'Connor*, 33 Minn. 29; 21 N. W. 840; *Minor v. Sheehan*, 30 Minn. 419; 15 N. W. 687; *Whittredge v. Edmunds*, 63 N. H. 248; *Noyes v. Patrick*, 58 N. H. 618.

so large that, if his other creditors should regard it as an honest security, his lands would be put effectually beyond their reach, makes it his duty to inquire as to his debtor's object, and failure to do so will vitiate such a mortgage *in toto*, though partly founded on a good consideration.⁵

§ 99. **Inaccuracies in description of debt.**—The liability intended to be secured should be sufficiently described in the mortgage,⁶ but where there was an accidental omission to insert in a mortgage the amount of the bond it was intended to secure, it was held that this did not invalidate the mortgage or postpone its lien to that of a subsequent mortgage.⁷ Even an intentional omission to set out in the mortgage the amount of a note which it is intended to secure, will not subordinate it to creditors having no actual notice of the mortgage.⁸ A mortgage has been held valid when made to secure a specified debt amounting to a certain sum "or thereabout," the debt being a little larger than the amount named.⁹ Clerical inaccuracies in the description of the debt will not affect the lien of the mortgage as against the mortgagor or his subsequent judgment creditors, provided the debt is clearly identified as the one intended to be secured.¹⁰

A valid mortgage may be made for the payment of money without particularly describing the writing which forms the evidence of the debt, and even without giving any independent evidence thereof.¹¹ If an attempt is made to describe the evidence of debt in the recitals in the mortgage, it is not necessary that all of the particulars of the paper should be set forth, and it is enough if the paper produced by the mortgagee appears with reasonable certainty to be the one intended.¹²

Where a mortgage was executed by several persons on property owned jointly to secure the mortgagee on a recognizance and contained also the following clause: "and pay him all sums of money now due or that may be due from us hereafter," and each of the

⁵ Russell v. Winne, 37 N. Y. 596.
See also Holt v. Creamer, 34 N. J. Eq. 181.

⁶ Thomas v. Olney, 16 Ill. 53.

⁷ Hall's Ex'rs v. Lambert's Ex'rs,
3 Halst. (N. J.) 651; 51 Am. Dec. 272.

⁸ Wilson v. Vaughn, 61 Miss. 472.

⁹ Booth v. Barnum, 9 Conn. 286.

¹⁰ Curtis v. Finn, 46 Ark. 70;
Winchell v. Coney, 54 Conn. 24; 5
Atl. 354; 34 Alb. L. J. 210; Tousley
v. Tousley, 5 Ohio St. 78.

¹¹ Fetes v. O'Loughlin, 62 Iowa,
532; 17 N. W. 764; Varney v. Hawes,
68 Me. 442.

¹² Webb v. Stone, 24 N. H. 282.

mortgagors owed separate debts to the mortgagee, but did not know, through their own neglect, that the special clause was in the mortgage, it was held that their debts were secured.¹³

§ 100. A note is sufficiently identified as the one secured by a mortgage when it is identical with the one described in the mortgage in dates, amount, and in the names of the maker and payee, although in the mortgage the payee is described "as" trustee, while in the note the word "as" is omitted.¹⁴

A mortgage which does not distinctly identify the debt or provide a time of payment, is held to be due as soon as given.¹⁵

§ 101. Parol evidence to aid description of debt.—If the amount secured by a mortgage is left indefinite and uncertain in the instrument parol evidence is admissible, in an action to foreclose, to show what such amount actually was.¹⁶

Where the condition of a mortgage described two notes for \$150 each and one of the notes intended to be secured was, in fact, for \$150, but the other was for \$200, but in all other respects they corresponded with those described in the mortgage, it was held that it might be shown by parol that they were the notes intended to be secured, and that the mortgage was not necessarily void.¹⁷

A note payable "one — after date" may be identified as one payable in one "year" after date, to correspond with the one described in the mortgage.¹⁸

A chattel mortgage executed to an indorser of a note to secure payment of that note, has been shown by parol to have been intended as security for the mortgagee and another indorser as well, and the mortgagee was said to hold as trustee for himself and the other indorser.¹⁹

Where a mortgage is given to secure a bond for a certain time, it is competent to prove, by parol, that it was really given to se-

13 Bishop v. Allen, 55 Vt. 423.

14 Cowley v. Shelby, 71 Ala. 122.

15 Sheehy v. Maindeville, 7 Cranch, 208; Brewster v. Wakefield, 22 How. 118, 127; Selleck v. French, 1 Conn. 32; Sirett v. Hooper, 62 Me. 54; Dodge v. Perkins, 9 Pick. 369; Eaton v. Truesdail, 40 Mich. 1; Heath v. Page, 63 Pa. St. 108; Hummel v. Brown 24 Pa. St. 313; Roberts v. Cocke, 28 Gratt, 207.

16 Burnett v. Wright, 135 N. Y. 543; 32 N. E. 253.

17 Cushman v. Luther, 53 N. H. 562.

18 Stowe v. Merrill, 77 Me. 550; Nichols v. Frothingham, 45 Me. 220, and cases cited.

19 Bainbridge v. Richmond, 17 Hun, 391, aff'd 78 N. Y. 618.

cure an open account, the balance of which was continually varying, or for future advances,²⁰ or to indemnify the mortgagee for becoming surety on a note,²¹ and it has repeatedly been held that parol evidence to show the purpose and intent for which a security was executed is not regarded as contradicting or varying its terms or effect.²² It is even permissible to show, by parol, that the mortgagee is a trustee for other persons whose debts the mortgage was intended to secure.²³

It is competent for the mortgagor to show in defense to a mortgage given, on its face, to secure the payment of a certain sum of money, that it was really given to indemnify sureties on a recognizance of bail, and that the sureties had been discharged without being damnified; in such a case a *bona fide* assignee takes only for the purposes of the indemnity.²⁴

Parol evidence is admissible to explain the language used in a mortgage but not to vary its time and conditions.²⁵ For instance, it will not be received to show that it was intended that the lien should cease on payment of a part of the debt.²⁶ Thus a wife is not chargeable with any verbal arrangement made by her husband in her absence, in respect to the purpose for which a mortgage upon her separate estate is given, other than such as is imparted by its terms.²⁷

§ 102. A mortgage may secure future or contingent obligations and it is not necessarily a security for a debt.—Thus, it may secure an accommodation indorser for liability incurred by the indorserment.²⁸ Or it may be conditional on the removal of certain specified defects of title, and will then secure those only, and will not be enforceable by showing other defects not set forth in the condition.²⁹ Or it may be given to indemnify the mortgage from

²⁰ *Esterly v. Purdy*, 50 How. Pr. 350.

²¹ *Kimball v. Myers*, 21 Mich. 276; 4 Am. R. 487.

²² *Truscott v. King*, 6 N. Y. (2 Seld.) 147, 161; *Chester v. The Bank of Kingston*, 16 N. Y. 336, 343; *Agawam Bank v. Strever*, 18 N. Y. 502; *Hutchins v. Hebbard*, 34 N. Y. 24; *Bainbridge v. Richmond*, 17 Hun, 391, *aff'd* 78 N. Y. 618.

²³ *Archer v. McDuffie*, 5 Barb. 147; *Hall v. Crouse*, 13 Hun, 557,

561; *Hubbell v. Blakeslee*, 71 N. Y. 63, 69; *Bainbridge v. Richmond*, 17 Hun, 391, *aff'd* 78 N. Y. 618.

²⁴ *Colman v. Post*, 10 Mich. 422.

²⁵ *State Bank v. Lighthall*, 46 App. Div. 397.

²⁶ *Taylor v. Thomas*, 61 Ga. 472.

²⁷ *Parker v. Collins*, 127 N. Y. 185; 27 N. E. 825.

²⁸ *Gibson v. Wilson*, 38 Ark. 207.

²⁹ *Goodenow v. Curtis*, 33 Mich. 505.

an obligation to support a third person.³⁰ So, where a mortgage made to secure certain payments as well as the performance of a certain specified agreement, further provided that it should also become security for the performance of a certain other agreement if the mortgagor elected to perform the second agreement, it was held that, after election and notice by the mortgagor, such mortgage became security for the performance of the second agreement as effectually as if the same had been set forth in the mortgage.³¹

Mortgages to one person in trust for the benefit of others have repeatedly been used and upheld by the courts,³² and a mortgage to several persons jointly may be made to cover separate debts.³³

Where an indorsement is given on the faith of a mortgage, the liability thus assumed is a sufficient consideration, and the mortgagee will be protected under the recording acts against subsequent purchasers.³⁴

§ 103. The construction of the condition of a mortgage depends upon the same rules which control other classes of writing. The interpretation of any instrument under seal is to be arrived at by a fair consideration of all its terms and provisions. Isolated phrases are not to be torn from their context and examined by themselves, but the whole document is to be considered.³⁵

Where the condition of a mortgage, dated June 28, 1871, was that the principal should be paid on April 1, 1873, "with interest annually on the first day of April in each year," and an action was commenced to foreclose the mortgage upon the ground of default in the payment of interest alleged to have become due April 1, 1872, it was held that by the stipulation as to interest, reference was had to, and it was intended to provide for a payment of interest prior to, the time when the principal became due, and that the plaintiff's claim was well founded.³⁶

Where a bond dated in October, 1827, was conditioned for the

³⁰ *Whitton v. Whitton*, 38 N. H. 127.

³¹ *Furbish v. Sears*, 2 Clifford, 454.

³² *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43, 53; *De Ruyter v. St. Peter's Church*, 3 N. Y. (3 Comst.) 238; *King v. Merchant's Exch. Co.*, 5 N. Y. (1 Seld.) 547;

Bucklin v. Bucklin, 1 Abb. App. Dec. 242.

³³ *Adams v. Niemann*, 46 Mich. 135; 8 N. W. 719.

³⁴ *Uhler v. Semple*, 20 N. J. Eq. 288.

³⁵ *Harnickell v. Omaha Water Co.*, 146 A. D. 693.

³⁶ *Cook v. Clark*, 68 N. Y. 178, aff'g 3 Hun, 247; 5 T. & C. 493.

payment of a sum of money in three instalments, to wit, on the 1st May, 1830, 1st May, 1832, and 1st May, 1834, and then followed these words, "or of the interest thereof or any part thereof, to be paid yearly and every year *after the same commences*, then, etc.," it was held that the interest payments must commence on the first day of May, 1828; that is, that interest from the date of the bond for one year should be paid on May 1, 1828, and annual payments of interest should thereafter be made on that day, thus making the annual interest payable partly in advance or before the expiration of the year for which it was payable.³⁷

Where the condition of a bond dated Dec. 14, 1833, was that the obligor should pay to the obligee the "sum of \$3,200, to be paid in manner following, viz.: \$1,000 on the first of April next, the remainder in four annual payments thereafter of \$550 each, interest annually," it was held that the obligee was not entitled to any interest during the interval between the date of the bond and April 1, 1834, when the first payment was to be made. This construction was aided by the fact that the words "with interest on the whole" had been stricken out of the bond before execution.³⁸

Where a bond and mortgage dated March 18, 1831, were conditioned to pay "the just and full sum of \$1,256.50, with interest after the first day of April next, in fourteen equal annual payments on the first day of April of each and every year after the first day of next April," it was held that the interest on each instalment became due when the instalment was payable and not before. Interest is not payable before the principal on which it accrues, unless there be a special agreement to that effect.³⁹

§ 104. Personal covenant to pay amount secured.—It is provided by statute that a mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.⁴⁰ And no covenant can

³⁷ *Fake v. Eddy*, 15 Wend. 76.
See also *Robbins v. Cheek*, 32 Ind.
330.

³⁸ *Fellows v. Harrington*, 3 Barb.
Ch. 652.

³⁹ *French v. Kennedy*, 7 Barb.
452.

⁴⁰ *Real Prop. Law* § 249; 1 R. S.
738, § 139; *Severance v. Griffith*, 2
Lans. 38; *Weed v. Covill*, 14 Barb.

now be implied in any conveyance of real estate, except a lease, whether such conveyance contains special covenants or not.⁴¹ Where a mortgage, therefore, is taken for the security of a pre-existing indebtedness, without any intention of discharging the original debtor from personal responsibility upon his former security, his liability upon that security will remain, notwithstanding the debt is further secured by such mortgage.⁴² But if the original indebtedness is intended to be discharged and a mere mortgage is taken to secure the amount, without any express covenant to pay the same, and no bond or separate instrument is given to secure such payment, the mortgagee has no remedy upon any implied agreement of the mortgagor to pay the amount secured by the mortgage, but must resort to the land alone, or the proceeds thereof, for payment. The result will be the same where an absolute deed is taken as a mere security for the repayment of the consideration of such deed instead of an ordinary mortgage; and where there is no covenant or other instrument rendering any one personally liable for the debt intended to be secured.⁴³

Where a mortgage without an accompanying bond is given upon an advance of money, in the absence of evidence to the contrary, the presumption is that the advance was made upon the terms and conditions contained in the mortgage; and if the mortgage contains no covenant or promise on the part of the mortgagor to pay the money advanced, the mortgagee must look to the mortgaged premises alone for reimbursement. This is so even though the mortgage contains an incorrect recital to the effect that a bond of the mortgagor had been given.⁴⁴

Where an agreement to sell land for a certain price is consummated by a payment of part of the amount in cash and the delivery of a purchase-money mortgage for the balance, the mort-

242; *Salisbury v. Phillips*, 10 Johns. 57; *Turk v. Ridge*, 41 N. Y. 201; *Patrick v. Underwood*, 17 Misc. R. 646; 40 N. Y. Supp. 193. See *Heburn v. Reynolds*, 73 Misc. R. 73; 132 N. Y. Supp. 460. In *King v. King*, 3 Peere Williams, 358, Lord Chancellor Talbot well expressed the contrary opinion 'by stating that every mortgage implies a loan, and that every loan implies a debt, and

that though there was no covenant or bond, yet the personal estate of the borrower remained liable to pay off the mortgage. See *ante*, § 102.

41 1 R. S. 738, § 140.

42 *Gaylord v. Knapp*, 15 Hun, 87; *Hone v. Fisher*, 2 Barb. Ch. 559.

43 *Hone v. Fisher*, 2 Barb. Ch. 559, 569.

44 *Spencer v. Spencer*, 95 N. Y. 353.

gagor is not personally liable for the amount secured in the absence of a bond or express covenant.⁴⁵

§ 105. The covenant to pay must be specific and distinct.⁴⁶—Where a mortgage executed by a married woman contained the following words: "This grant is intended as security for the payment of the sum of \$1,200, money loaned and advanced to said party of the first part for the benefit and on the credit of her separate estate and property, and said party of the first part hereby charges her separate estate with the payment of said sum," it was held on demurer that this was not a covenant to bind the mortgagor personally.⁴⁷ If a debt existed, the language might have been used in evidence as an admission,⁴⁸ but such debt would have to be pleaded.⁴⁹

If there be a personal covenant to pay the amount secured by the mortgage it may stand quite independent of any collateral obligation. Where a mortgage was given by one of the joint makers of a note which contained a covenant to pay the "sum of money" mentioned in the note, and the other joint maker was thereafter, on payment of a small sum, entirely released it was held that the covenant contained in the mortgage was not discharged.⁵⁰

MORTGAGES OF PARTNERSHIP REAL ESTATE.

§ 106. Partnership real estate chargeable with partnership debts.⁵¹—Where the title to land is taken in two or more persons the legal effect of the conveyance is to constitute them tenants in common of the premises therein described, and each can deal with his interest as such tenant in common by deed or mortgage so as to transfer all the title he has and make it subject to a valid lien. But where tenants in common *prima facie* are also copartners in business, and partnership funds have been expended in the pur-

⁴⁵ Vrooman v. Dunlap, 30 Barb. 203.

⁴⁶ Shafer v. Bear River, etc., Mining Co., 4 Cal. 294.

⁴⁷ Mack v. Austin, 95 N. Y. 513, aff'g 29 Hun, 534.

⁴⁸ Culver v. Sisson, 3 N. Y. (3 Comst.) 264; Chase v. Ewing, 51 Barb. 597; Coleman v. Van Rensselaer, 44 How. Pr. 368; Elder v.

Rouse, 15 Wend. 218. See also Roney v. Moss, 74 Ala. 390; Couger v. Lancaster, 6 Yerg. (Tenn.) 477; Suffield v. Baskervil, 2 Mod. 36.

⁴⁹ Mack v. Arthur, 95 N. Y. 513; Weed v. Covill, 14 Barb. 242.

⁵⁰ Walls v. Baird, 91 Ind. 429.

⁵¹ See elaborate article on "Equity of Partnership Creditors," 34 Alb. L. J. 344, 364.

chase of the real property for the use of the copartnership, and the same has been used for partnership purposes by agreement to that end, it is to be treated in equity as partnership assets.⁵² It is made liable for debts due to the creditors of the copartnership.⁵³

And where moneys of the firm have been expended upon such real estate in the improvement of it, the same rule follows as to its enhanced value. Other rules as to the disposition of partnership assets also apply in such case. The creditors of the partnership are entitled to priority of payment thereof, and the creditors of an individual member of the copartnership are to be preferred to those of another member, and one member to another, or to his creditors for any amount paid in by the one in excess of the share he was bound to contribute, or in excess of his proportion of the debts of the concern.⁵⁴

§ 107. Mortgage by one partner of his interest in partnership real estate.—Where, in such a case, one of the apparent tenants in common mortgages his interest in the real estate for a present consideration to a *bona fide* mortgagee who has no notice that the land is partnership assets, such mortgage will be a valid lien and will take precedence of the claims of firm creditors. But if the mortgage is given for an antecedent debt, and the mortgagee parts with no value upon the faith of the security, or if he takes it with knowledge of the facts, in such a case the mortgage will be subject to all equities superior to his own of any person or persons interested in the land.⁵⁵

It is now well settled that a purchaser from one partner of his interest in the partnership, acquires no title to any share of the partnership effects, but only his share of the surplus after an accounting, and the adjustment of the partnership affairs.⁵⁶ But where the legal title to partnership lands is vested in one partner, his *bona fide* grantee or mortgagee for a present valuable consideration, takes his title free from the equities of the other partners or of copartnership creditors. But if he have notice that

⁵² Leary v. Boggs, N. Y. St. Rep. (G. T.) 571; Collumb v. Reid, 24 N. Y. 505; Hiscock v. Phelps, 49 N. Y. 97; Fairchild v. Fairchild, 64 N. Y. 471.

⁵³ Hiscock v. Phelps, 49 N. Y. 97, 103; Buchan v. Sumner, 2 Barb. Ch. 165.

⁵⁴ Hiscock v. Phelps, 49 N. Y. 97.

⁵⁵ Hiscock v. Phelps, 49 N. Y. 97, 103.

⁵⁶ Menagh v. Whitwell, 52 N. Y. 147. See also Beecher v. Stevens, 43 Conn. 587.

the land is partnership assets, he takes subject to their equities, since a partner cannot sell or mortgage his interest in partnership property so as to deprive his copartners or the copartnership creditors of their lien thereon for partnership liabilities.⁵⁷

So a mortgage on real estate of a firm, executed by the surviving partner to secure the payment of an individual liability, creates a lien only to the extent of his interest,⁵⁸ but where a mortgage was given by the survivor of a partnership to secure a loan of money to be used in the business and such mortgage contained a consent thereto by the executors of the deceased partner it was decided that the mortgage so given by the survivor was valid and binding and that any lien of the deceased partner's estate upon the firm property was thereby postponed to the lien of the mortgage.⁵⁹ Where one member of a firm held the legal title to real estate which, in equity, was the property of the firm, and mortgaged it to secure his own precedent debt, it was held that the lien of the mortgage was not superior to the prior liabilities of the firm.⁶⁰ And there would be no distinction between partnership debts incurred before or after the mortgage.⁶¹

Where the legal title to land held for partnership uses was in one member of the firm and another member executed a mortgage of all of his interest in said real estate, it was held that this created a lien only upon such balance as might be found due to the mortgagor upon the winding up of the concern; that the recording of it did not give any notice to a purchaser for value of the property from the legal owner, such transfer being made in the course of liquidation of the copartnership affairs, and that even if such purchaser had received actual notice of it, his title would not have

57 *Tarbell v. West*, 86 N. Y. 280; *Hiscock v. Phelps*, 49 N. Y. 97; *Buchan v. Sumner*, 2 Barb. Ch. 167.

See also following cases: *Hoxie v. Carr*, 1 Sumn. 183; *Warren v. Taylor*, 60 Ala. 218; *Jones v. Parsons*, 25 Cal. 102; *Henry v. Anderson*, 77 Ind. 361; *Kistner v. Sindlinger*, 33 Ind. 114; *Fargo v. Ames*, 45 Iowa, 491; *Whitmore v. Shiverick*, 3 Nev. 288; *Arnold v. Stevenson*, 2 Nev. 234; *Lovejoy v. Bowers*, 11 N. H. 404; *Burbank v. Wiley*, 79 N. C. 501; *Norwalk Bank v. Sawyer*, 38 Ohio St. 339; 27 Alb. L. J. 185;

Rammelsberg v. Mitchell, 29 Ohio St. 52; *Ludlow v. Cooper*, 4 Ohio St. 1; *Sumner v. Anderson*, 8 Ohio, 328; 32 Am. Dec. 722; *Martin v. Trumbull*, Wright, 386; *Cavander v. Bulteel*, L. R., 9 Ch. App. Cas. 79.

58 *Lang's heirs v. Waring*, 17 Ala. 145.

59 *Bell v. Hepworth*, 134 N. Y. 442; 31 N. E. 918.

60 *Lewis v. Anderson*, 20 Ohio St. 281.

61 *Lovejoy v. Bowers*, 11 N. H. 404.

been affected or impaired thereby.⁶² The fact that a partner's interest in partnership real estate is mortgaged for the purchase money of his share in the partnership is immaterial; he can only mortgage what he has, which is a share subject to partnership debts.⁶³ A mortgage by one partner of his interest in copartnership property is valid so far as to create a lien on what may be found to be his share after satisfying firm creditors and the claims of his copartners.⁶⁴ And such a mortgage of partnership real estate is relieved of all partnership equities as soon as the business of the partnership is closed and the firm debts are paid.⁶⁵

§ 108. Notice that real estate is partnership assets.—Knowledge that the real estate is used by the copartnership in carrying on its business will put a person dealing with one partner for a mortgage lien upon inquiry to ascertain the nature of the equitable rights of the other partners even if it will not operate as notice of such equitable rights.⁶⁶ In England it would amount to notice.⁶⁷

§ 109. As between the partners, each has a lien on the partnership assets for advances made to the concern or to the other partners in the course of carrying on the firm affairs, and the rights of the partner making the advances as against the common property are not dependent upon or increased by a mortgage executed to him thereon; his lien is, in any event, superior to charges created by his copartners for their individual debts, and is inferior to the claims of partnership creditors.⁶⁸

The application of partnership property to the payment of partnership debts is the equity of the partners and not of the creditors, and therefore the partnership, while it is solvent, may sell or mortgage its property to one of the partners; and if the sale or mortgage is made or given in good faith and for valuable considerations, it will be valid against the claims of the partnership creditors. And although if such mortgage be retained by

⁶² Tarbell v. West, 86 N. Y. 280; s. c. *sub nom.* Tarbell v. Bradley, 7 Abb. N. Cas. 273.

⁶³ Chase v. Steel, 9 Cal. 64.

⁶⁴ Thompson v. Spittle, 102 Mass. 207.

⁶⁵ Hewitt v. Rankin, 41 Iowa, 35; Shearer v. Shearer, 98 Mass. 107.

⁶⁶ Mechanics' Bank v. Godwin, 5 N. J. Eq. (1 Halst.) 334.

⁶⁷ Cavander v. Bulteel, 9 L. R. Ch. App. Cas. 79. And see McKinzie v. Perrill, 15 Ohio St. 162; 2 Lead. Cas. in Eq. (4th Am. ed.) 180; Norwalk Bank v. Sawyer, 38 Ohio St. 339; 27 Alb. L. J. 185.

⁶⁸ Warren v. Taylor, 60 Ala. 218; Irwin v. Bidwell, 72 Penn. St. 244.

the partner until the bankruptcy of the firm, he will not be allowed to enforce it against the company assets to the exclusion of the partnership creditors, because he is himself liable to these creditors, yet the assignee of such mortgage for value during the solvency of the firm, will hold it unaffected by the claims of the partnership creditors.⁶⁹

A mortgage given by a member of a firm to the firm is valid. It is in no sense a mortgage to himself.⁷⁰

§ 110. Dower in partnership real estate.—The rule of equity which treats partnership real estate as partnership assets, exempts it from the usual incidents of dower, and deprives the heir of a deceased owner of the fee from his inheritance until the partnership debts are fully paid. The land is said to be converted into personal property for the purpose of adjusting the partnership affairs. So, where certain real estate was purchased by partners with partnership means for partnership purposes, and was mortgaged to secure the payment of a partnership debt, and was afterward sold on a foreclosure of the mortgage and purchased by the partnership creditors, leaving a balance of the partnership debt unpaid, the firm and its members being insolvent, it was held in a partition suit by the widow of one of the partners, that she had no interest in the property, though she did not sign the mortgage and was not a party to the foreclosure.⁷¹

But the rule is not extended beyond the necessity of protecting firm creditors for their debts, and the individual partners for their shares in the firm assets. So far as the individual owners are concerned, after the property is relieved from the demands of firm creditors and of their copartners, the land is to be treated as real estate in which their wives have dower, and it descends to their heirs and does not pass to their personal representatives.⁷²

§ 111. Equities of individual partners and their several creditors.—The equitable rule which requires partnership assets to be first applied to liquidate partnership obligations, also requires that the individual property of the partners should not be taken for firm debts until the joint estate is first exhausted. And where

⁶⁹ *Smith v. Lusher*, 5 Cow. 688; *Waterman v. Hunt*, 2 R. I. 298; *Burney v. Lyman*, 1 Story, 423.

⁷⁰ *Galway v. Fullerton*, 17 N. J. Eq. 390.

⁷¹ *Huston v. Neil*, 41 Ind. 504.

⁷² *Hewitt v. Rankin*, 41 Iowa, 35; *Shearer v. Shearer*, 98 Mass. 107; *Wilcox v. Wilcox*, 13 Allen (Mass.) 252; *Foster's Appeal*, 74 Pa. St. 391.

a member of a partnership mortgaged his separate property to secure a partnership debt and became insolvent, his individual creditors were held to be entitled to have the partnership property first applied to discharge the debt so secured.⁷³

So, also, where a partner mortgages his private property to secure a partnership debt which is also secured by a mortgage on partnership property, he stands as surety for the partnership, and is entitled to be subrogated to the rights of the mortgagee; and the creditors of such surety are entitled to the same right of subrogation as the surety himself, the partnership property being the primary fund, the private property collateral.⁷⁴

But where one of two partners executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained without any showing by the plaintiff that the partnership is insolvent or that he has pursued his remedy upon the debt against the surviving partner.⁷⁵

A mortgage made by an individual to secure "any and all indebtedness" from the mortgagor to the mortgagee, does not secure a debt owing by the firm of which the mortgagor is a member. Partnership debts are joint and not joint and several.⁷⁶

§ 112. What real estate is partnership assets.—In order that land the title of which is owned in common by members of a partnership shall be treated as partnership assets, there should be proof either of an agreement to that effect between them, or it should be shown that the land was purchased with partnership funds. The mere circumstance of a joint ownership of title is not, in itself, a partnership, and the legal rights of tenants in common in land are not inconsistent with a partnership in which they have also invested personal property. So, where a partnership existed between tenants in common of land, and the property was sold and conveyed by their joint deed, but one partner received the entire consideration, he was held liable in an action at law brought by his partner for the moiety of such consideration, and it was determined that the rights of the plaintiff in such action did

⁷³ *Averill v. Loucks*, 6 Barb. 470.

⁷⁴ *Bank of Royalton v. Cushing*,
33 Vt. 321.

⁷⁵ *Saving and Loan Society v. Gibb*, 21 Cal. 595.

⁷⁶ *First National Bank of Batavia v. Tarbox*, 38 Hun, 57.

not in any way depend upon a settlement of the partnership accounts.⁷⁷

§ 113. Power of one partner to mortgage firm real estate.—It is within the power of any member of a partnership, notwithstanding the protest of his copartners, to mortgage any part of the firm assets to secure payment of a partnership obligation or to obtain a loan of money for partnership uses.⁷⁸ But one partner may not mortgage the individual property of his copartner without his consent or acquiescence under such circumstances as to create an estoppel.⁷⁹

A mortgage by one partner of partnership real estate standing in his own name as owner, to raise money to pay firm debts, is within such partner's implied authority and binding on the firm.⁸⁰ In such cases the presumption is that the firm's occupation is subordinate to the title of the partner holding the record title.⁸¹ In a case where partnership real estate was held by one partner, and another partner assumed to mortgage it in the name of the firm for a firm debt, this mortgage was held to create a valid lien which was superior to a subsequent mortgage executed by the record owner of the legal title.⁸²

§ 114. Mortgages by limited partnerships.—The statute of this State relating to limited partnerships provides "Every sale, assignment or transfer of any of the property or effects of such limited partnership, made by such partnership when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, or of any of the property or effects of a general or special partner, made by any general or special partner, when insolvent or after or in contemplation of the insolvency of such partnership or such partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of the partnership, and every judgment confessed, lien created, or security given, by such partnership or partner, under the like circumstances, and with like intent, is void as against the creditors of the partnership."⁸³

⁷⁷ Coles v. Coles, 15 Johns. 158.

⁷⁸ Nelson v. Drake, 14 Hun, 405;

Mabbett v. White, 12 N. Y. 454;

Graser v. Stellwagen, 25 N. Y. 315.

⁷⁹ Gates v. Bennett, 33 Ark. 475.

⁸⁰ Chittenden v. German Amer. Bank, 27 Minn. 143.

⁸¹ Hardin v. Dolge, 46 App. Div. 416; 61 N. Y. Supp. 753.

⁸² Wilson v. Hunter, 14 Wis. 683.

⁸³ Partnership Law, § 40; 1 R. S. 766, §§ 20, 21.

These provisions relate, of course, only to limited partnerships and to the general or special partners in limited partnerships.⁸⁴ They make preferences in contemplation of insolvency attempted to be created for the benefit either of a creditor of the firm or of an individual partner void, regardless of any knowledge of the creditor or the intent of the partner; the invalidity of the preference is not made to depend upon any knowledge of collusion or fraud on the part of the creditor. In this respect the provisions under consideration are unlike other statutes declaring transactions between debtor and creditor or third party void.⁸⁵

Under this statute a mortgage executed by a special partner upon his individual real estate to secure money loaned, part of which was used to pay an individual debt to the mortgagee and the balance of which was used to pay other individual debts of the mortgagor, was declared to be void upon a demurrer to the complaint. At the time of the giving of the mortgage the mortgagor had, by his acts, become liable as a general partner, and he was insolvent, and the mortgage was given with intent to give the mortgagee and other individual creditors a preference over the firm creditors, and it was received by the mortgagee with knowledge of such facts and intent.⁸⁶ An answer was afterward interposed in this case, and a trial having been had, a very different result was reached. The mortgage, though made by a special partner, on his individual property, for the purpose of raising money to pay his individual debts, was shown to have been executed for a present consideration to nearly its entire extent, and it was to the extent of such present consideration declared valid, the portion reserved by the mortgagor to satisfy his individual claim being rejected. Mortgages given for money advanced at the time were held to be valid, and the Court of Appeals declined to pass upon the general question as to whether a mortgage of individual property executed by a special partner would or would not be void.⁸⁷

⁸⁴ A very clear exposition and history of this statute may be found in *Fanshawe v. Lane*, 16 Abb. Pr. 71.

⁸⁵ Per POTTER, J., in *George v. Grant*, 20 Hun, 372.

⁸⁶ *George v. Grant*, 20 Hun, 372.

⁸⁷ *Id.*, 97 N. Y. 262, aff'g 28 Hun, 69.

MORTGAGES BY CORPORATIONS.

§ 115. **Mortgages by corporations organized under the manufacturing act.**—A statute passed in 1811 permitted the formation of corporations for certain manufacturing purposes.⁸⁸ In 1822 it was enacted, in order to remove doubts as to the power of the trustees of manufacturing companies formed under this statute, to secure debts contracted by them, by mortgaging their real estate, “that it shall be lawful for the trustees of any such company to secure the payment of any debt contracted or to be contracted by them in the business for which they were incorporated, by mortgaging all or any part of the real estate of such company; and every mortgage of such trustees shall be as valid to all intents and purposes as if executed by an individual owning the real estate: *provided*, that the written assent of the stockholders owning more than two-thirds of the stock of the company shall first be given.”⁸⁹

In 1848 the various laws then existing relating to manufacturing, mining, or chemical corporations were gathered together and re-enacted in a statute which, as amended, remained long in force. The second section of that statute provided that persons filing the required certificate should be a body politic and corporate, and they should by their corporate name be capable in law of purchasing, holding, and conveying any real and personal estate whatever, which might be necessary to enable the said company to carry on the operations named in such certificate, but might not mortgage the same or give any lien thereon.⁹⁰

Any corporation formed under that act might secure the payment of any debt contracted by it, in the business for which it was incorporated, by mortgaging all or any part of its real or personal estate; and every mortgage so made was as valid as if executed by an individual, provided that the written assent of the stockholders owning at least two-thirds of the capital stock of such corporation was first filed in the office of the clerk of the county where the mortgaged property was situated.⁹¹

§ 116. **What debts might be secured by manufacturing companies.**—The statutes permitting manufacturing corporations, upon procuring consent of stockholders, to mortgage their property “to

⁸⁸ Laws of 1811, ch. 67.

⁸⁹ Laws of 1822, ch. 213.

⁹⁰ Laws of 1879, ch. 200.

⁹¹ Laws of 1864, ch. 517; Laws of 1871, ch. 481; Laws of 1869, ch. 706; Laws of 1878, ch. 163.

secure the payment of any debt heretofore contracted or which may be contracted by it in the business for which it was incorporated,"⁹² were construed in two cases which have become famous and are frequently cited, although the precise point decided can not be raised under our present statute. In *Central Gold Mining Co. v. Platt* (3 Daly, 263), a mortgage had been made by such a corporation to trustees therein named, to secure coupon bonds. Some of these bonds were transferred at par in satisfaction of a debt of the company; others were sold at a discount of from 25 to 50 percent., and \$30,000 of such bonds were pledged for a loan of \$5,000, and, such loan not being paid, they were sold for that amount and interest. The question was raised as to the validity of the mortgage, and the General Term of the Common Pleas held, reversing the Special Term, that the corporation might lawfully execute a mortgage to secure a debt not yet made, and might authorize the sale of the bonds secured by the mortgage in order to raise money for use by the corporation. In *Carpenter v. Black Hawk Gold Mining Co.* (65 N. Y. 43, 49), a mining company, organized under that statute, authorized a mortgage to secure bonds, some of which were transferred to creditors of the company, and it was said by EARL, C., that the mortgage was valid only for such part of the bonds as had been used in securing debts of the company, though the company and the stockholders would probably be estopped as to such of the purchased bonds as were in the hands of *bona fide* holders. In the language of the learned judge: "A mortgage upon real estate is allowed only to secure the payment of debts. It cannot be made to raise money merely to carry on the operations of the company."

In a later case, the question of the validity of a mortgage executed by the trustees of a manufacturing company in pursuance of due consent of the required portion of stockholders, where bonds secured thereby were sold to raise money to pay debts of the corporation, was directly presented. It was then held that "there is nothing in the act which requires that in the case of a trust mortgage to secure negotiable bonds to be thereafter issued, the debts authorized to be secured should be in existence at the time the mortgage and bonds are prepared and executed. Every conceivable intent of the statute is effectuated,

provided the bonds are negotiated only for the purpose of paying debts contracted before the negotiation of the bonds. Where a bond of this description, having no previous vitality, is delivered to a creditor of the company to pay or secure his debt, the delivery of the bond is the act by which his debt becomes secure. The security to the creditor then for the first time comes into being, and is as effectual as if the mortgage were executed at the same time with the delivery of the bond. The effect is the same if the bond is sold to provide means to pay a debt existing at the time of the sale, and the proceeds are paid to the creditor.”⁹³

§ 117. **Act of 1877 as to mortgages prior to that date.**—By laws of 1875, Chapter 88, it was provided that in all cases where a corporation had theretofore executed a mortgage upon any of its real estate, and the written consent of persons owning two-thirds or more of the capital stock of such corporation had been given to the mortgaging of such real estate at or before the time of the giving of such mortgage, but from accident or mistake the said consent had not been filed in the office of the clerk of the county in which such real estate was situated as required by law, it should be lawful for the clerk of said county to receive and file in his office the written consent so given accompanied by the affidavit of any officer or stockholder of such corporation, showing that such consent was in fact made and signed at the time the same purported to have been made and signed, and that the signatures thereto were genuine. In such case, on filing such consent and affidavit, the said mortgage had the like validity and effect from and as of the time of the filing of such consent and affidavit as if the same had been given at that time and had been accompanied or preceded by the filing of such consent; provided that nothing therein contained affected any action or legal proceeding then pending, or impaired any intermediate right acquired by lien or otherwise, in or to the property of the corporation affected by such mortgage.

§ 118. **Under these statutes** corporations, unless restrained by their charters, had power to mortgage their property, whether real or personal, to secure debts either for borrowed money or for other

⁹³ Per RAPALLO, J., in *Lord v. 556*. See also *Jones v. Guaranty and Yonkers Fuel Gas Co.*, 99 N. Y. 547, *Indemnity Co.*, 101 U. S. 622.

considerations,⁹⁴ but no corporation could, without some statute allowing it to do so, either sell or mortgage its franchises.⁹⁵

So a mortgage of the real property and franchises of a mining corporation was held valid as to the real property included in it, but inoperative as to the franchises.⁹⁶

The franchises, privileges, rights, and liberties, which were not permitted to be mortgaged by a corporation,⁹⁷ were the corporate franchises and rights which become vested in the company by virtue of its organization as a corporation under a general law. These did not include patent rights, licenses, easements, or privileges acquired by the company after its incorporation, either from individuals or corporations, which were in the nature of property, of which the company has the power to dispose.⁹⁸

§ 119. Present Statute.—Upon the consolidation of 1909, the former Stock Corporation Law⁹⁹ with the intervening amendments¹ was taken over as sections six and seven of the Stock Corporation Law. By its terms every stock corporation, except moneyed corporations,² has power to borrow money when necessary for the transaction of its business or for any lawful purpose of its incorporation, and may mortgage its property and franchises to secure the payment of such obligations.

“Every such mortgage, except purchase-money mortgages . . . shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation, and a certificate under

94 *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43, 49; *King v. Merchant's Exchange Co.*, 5 N. Y. (1 Seld.) 547; *De Ruyter v. St. Peter's Church*, 3 N. Y. (3 Comst.) 238; *Barry v. Merchant's Exchange Co.*, 1 Sand. Ch. 280. See also *Richards v. Merrimack Railroad*, 44 N. H. 127.

95 *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43, 50. See also *New Orleans, etc., R. R. Co. v. Harris*, 27 Miss. 517; *Arthur v. Com'l. & R. R. Bank*, 9 Sm. & M. (Miss.) 394; *Stewart v. Jones*, 40 Mo. 140; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27.

96 *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43, 50.

97 *Laws of 1878*, ch. 163.

98 *Lord v. The Yonkers Fuel Gas Co.*, 101 N. Y. 614. See also *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn. 255; *Chicago R. Co. v. People*, 73 Ill. 541; *Morgan v. Louisiana*, 3 Otto (U. S.) 223.

99 *Laws of 1890*, ch. 564.

1 *Laws of 1892*, ch. 337; *Laws of 1892*, ch. 688; *Laws of 1901*, ch. 354; *Laws of 1905*, ch. 745.

2 *Stock Corp. Law*, § 6; *Hyde v. Equitable Life Assurance Soc.*, 61 Misc. 518, 527.

the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business.³

§ 120. Form of assent of stockholders.—The statute prescribes no form in which the required consent of the stockholders shall be given. The object of the legislature is the protection of the stockholders and to guard against the power of the officers of the company to incumber its property without the consent of at least two-thirds of the stockholders. The written assent is the evidence required by the statute, and as no particular form is specified or required, any form which they may choose to adopt and which contains reasonable evidence of the consent of two-thirds of the stockholders to the making of the mortgage in question, is sufficient. If the instrument contains enough to specify and identify the mortgage to which the stockholders intended to give their assent, it is sufficient. An instrument in the following form, which did not specify the amount of the intended mortgage, has been held a sufficient compliance with the law: “Know all men by these presents, that we, the undersigned stockholders of the Kings County Manufacturing Company, and owning more than two-thirds of the capital stock of the said company, do hereby severally consent that the Kings County Manufacturing Company execute to the Greenpoint Sugar Company a bond conditioned for the payment of —, and a mortgage to secure the same upon the lands and premises by them owned, situate in the city of Brooklyn, county of Kings, in the State of New York or any part thereof. Dated October 21, 1869.”⁴ A resolution authorizing the issuing of a mortgage, passed at a stockholders’ meeting by a vote of those holding more than two-thirds of the stock, and entered on the minutes and attested by the secretary, is also held to amount to the “written assent” required by the statute.⁵

³ Stock Corp. Law, § 6.

⁴ Greenpoint Sugar Co. v. Kings County Manfg. Co., 7 Hun, 44, aff’d 69 N. Y. 328.

⁵ Beebe v. Richmond Light, Heat & Power Co., 13 Misc. R. 737; 35 N. Y. Supp. 1.

The blank space left in the place where an amount was obviously intended to be inserted, was said not to be fatal to the sufficiency of the assent, and the legal import of the document was held to be to authorize the securing of the full amount of any valid debt which existed and which was permitted by law to be so secured. And parol evidence was held to be admissible to show the situation of the parties and the amount of the debt in contemplation of the parties at the time.⁶

The consent of the requisite proportion of the stockholders of a manufacturing company to the mortgaging of its "real and personal estate" will not sustain a mortgage of its "franchises, privileges, rights and liberties."⁷

§ 121. **Who must sign assent.**—For the purposes of the act the amount of stock actually issued and owned must be regarded as the amount of the capital stock. The design was to confer this power of assent upon those who represented two-thirds of the actual stock. They represent two-thirds of the pecuniary interest and property of the corporation. Otherwise it might happen that there would not be a sufficient ownership of the stock to enable the company to execute a mortgage at all.⁸

Where a part of the stock is owned by the corporation, it cannot give assent for the shares so owned by it to make up the requisite two-thirds, neither can the assenting stockholders be deemed to represent a proportionate amount of the stock owned by the corporation. It is also exceedingly doubtful as to whether the shares so held by the corporation may be deducted from the whole number in ascertaining if the assent of the requisite two-thirds has been obtained. But where the corporation has transferred part of the stock held by it as security for debt, by transfers absolute upon their face, the transferees must be counted as stockholders, and may sign the requisite consent.⁹

§ 122. **When assent must be made and filed.**—It is not requisite for the validity of the mortgage, that the written assent of the stockholders be filed before the mortgage is made. The reasonable

⁶ *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328, aff'g 7 Hun, 44.

⁷ *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547.

⁸ *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328.

⁹ *Vail v. Hamilton*, 85 N. Y. 453, aff'g 20 Hun, 355. See *Conkling v. Secor Sewing Machine Co.*, 55 How. Pr. 269.

construction of the statute is that the mortgage is valid from the filing of the assent. It provides in substance that any mortgage authorized by the act shall be as valid as if executed by an individual, provided that the assent is first filed, etc. The validity of the mortgage is made to depend upon the filing of the assent, and it follows that from the time of filing the mortgage is valid. There is no doubt that a filing at the time of recording the mortgage, which is the final step in perfecting the security, is sufficient.¹⁰ It is a sufficient compliance with the statute if the requisite consent is given, although not filed, before the execution of the mortgage.¹¹

§ 123. Validating Corporate Mortgages.—Whenever a corporate mortgage recites or represents that the stockholders have duly consented to its execution, such recital or representation, after the recording of the mortgage, shall be presumptive evidence that the execution of the mortgage was duly consented to by the stockholders as required by law. After such mortgage shall have been recorded for more than one year, and the corporation shall have received value for bonds issued under and secured by such mortgage, and interest shall have been paid on any of such bonds according to the terms thereof, such recital or representation shall be conclusive evidence that the execution of such mortgage was duly consented to.¹²

The object of the legislature in making the obtaining and filing of the assent of stockholders, conditions precedent to the mortgaging of corporate property was to protect the stockholders, and it does not preclude them from ratifying a mortgage and by a subsequent assent validate an originally unauthorized transaction. What the stockholders might originally have done, they may hereafter do, where there are no intervening rights. The purpose of the statute in requiring the assent to be filed seems to have been to perpetuate the evidence of the fact, and to free titles acquired under mortgages by corporations from the uncertainty which would attend them if the extrinsic fact of assent were not a matter of public record. The consent of the stockholders is the im-

¹⁰ *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328, *aff'g* 7 Hun, 44.

¹¹ *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165; 25 N. E. 303; *Welch v. Importers' and Trad-*

ers' National Bank, 122 N. Y. 177; 25 N. E. 269.

¹² *Stock Corp. Law*, § 7. See *Cook on Corporations*, § 782.

portant and essential thing. The filing is formal and subsidiary. The corporation could not be heard to allege as a defense to the mortgage that although assented to, the evidence of the assent was not recorded; and a subsequent mortgagee or purchaser stands in no better position.¹³ So if a corporation wishes to repudiate a mortgage, it should restore the benefits it has received under it,¹⁴ and until it does so it is estopped from raising the objection against its mortgagee. "It is obvious that these requirements were not prescribed in order to enable a corporation to acquire money and property upon the faith of its mortgage, and then repudiate the mortgage, but to protect the corporation, its stockholders, and, in proper case, its creditors, against the improvident and wrongful acts of the officers of the corporation."¹⁵

§ 124. Who may take advantage of lack of assent of stockholders.—The objection that a mortgage by a corporation is void by reason of the lack of the required assent of stockholders, may be made by a receiver of the corporation, appointed on the application of a creditor, who may bring an action to have it set aside,¹⁶ but it is at least doubtful whether such an objection would be available to a person claiming in hostility both to the corporation and to the mortgagee, as for instance the holder of a junior lien,¹⁷ or the creditors.¹⁸ A person taking a junior mortgage with knowledge of a prior mortgage, as to which a consent had been given which was not properly filed, is not in a situation to contest the earlier lien.¹⁹ And the purchaser of an equity of redemption under a judgment against the corporation has been declared not to be entitled to benefit by an omission to obtain or file the consent for the giving of the mortgage.²⁰ This rule was applied when the plaintiff became the purchaser at a sale under his own judgment, by the terms of which the property was sold

¹³ *Rochester Savings Bank v. Averell*, 96 N. Y. 467, aff'd 28 Hun, 643; *Black v. Ellis*, 129 App. Div. 140; 111 N. Y. Supp. 347.

¹⁴ *Duncomb v. New York, Housatonic & N. R. R. Co.*, 84 N. Y. 190.

¹⁵ *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152; 45 N. Y. Supp. 141.

¹⁶ *Matter of Wendler Machine Co.*, 2 App. Div. 16; *Vail v. Hamilton*, 20 Hun, 355, aff'd 85 N. Y.

453; *Astor v. Westchester Gaslight Co.*, 33 Hun, 333.

¹⁷ *Greenpoint Sugar Co. v. Whiting*, 69 N. Y. 328.

¹⁸ *Market & Fulton National Bank v. Jones*, 7 Misc. R. 207; 27 N. Y. Supp. 677.

¹⁹ *Rochester Savings Bank v. Averell*, 26 Hun, 643.

²⁰ *Per COOLEY, J.*, in *Beecher v. Marquette & Pacific Rolling Mill Co.*, 23 Alb. L. J. 316.

"subject to whatever sum might be due upon said property by virtue of the mortgage." ²¹ In *Paulding v. The Chrome Steel Co.*,²² the following language is used by ANDREWS, J.: "That assent has been considered by us as exacted for the benefit and protection of stockholders against improvident or corrupt acts of the officers of the corporation, and not because the legislature regarded the mortgaging of corporate property as improper *per se*, and it is at least doubtful whether any but stockholders can complain that the condition was not complied with."²³

A stockholder may impeach a mortgage of a manufacturing corporation for lack of the requisite assent of stockholders, or because not given for a debt of the corporation; but in an action to do this, the burden of proving all material facts will rest upon the plaintiff.²⁴

§ 125. Purchase-money mortgage by corporation.—Where a corporation buys real or personal property, and secures a part of the purchase money by a mortgage lien on the property thus acquired, such mortgage is part of the transaction upon which the title of the corporation depends, and does not require the assent of stockholders to render it valid.²⁵

§ 126. Executing mortgage by corporation.—Where the avails of a mortgage made by the officers of a corporation are applied to corporate uses, slight evidence of authority to execute it will be sufficient. The affixing of the corporate seal will in all cases raise a presumption of authority.²⁶

If a corporation receives benefits under a contract made by one of its officers, a part of which contract included the executing of a mortgage, the company will not be allowed to repudiate the mortgage without returning the consideration for it. In other words, the company holding the moneys and benefits derived under the mortgage would be estopped from questioning the authority of its officers to make the contract upon which its title to such moneys and benefits depends.²⁷

²¹ Conkling v. Secor Sewing Machine Co., 55 How. Pr. 269.

²² 94 N. Y. 334, 341.

²³ Citing Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328.

²⁴ Denike v. N. Y. & R. Lime, etc., Co., 80 N. Y. 599.

²⁵ Stock Corp. Law, § 6; Coman

v. Lakey, 80 N. Y. 345; Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328; Dusenbury v. Hurlbert, 50 N. Y. 541; Stow v. Tift, 15 Johns. 458; American v. Wile, 24 N. J. Eq. 13, 17.

²⁶ Whitney v. The Union Trust Co. of N. Y., 65 N. Y. 576.

²⁷ Whitney Arms Co. v. Barlow,

Where the trustees of a religious society mortgaged its property without signing the mortgage in proper form, parol evidence was held admissible to charge the society as principal in the mortgage.²⁸

§ 127. Mortgages of the lands of religious corporations.—By the common law of England, all corporations capable of acquiring property were also capable of aliening it or charging it with the payment of debts.²⁹ But in the reign of Elizabeth and of her successor, several statutes were passed restraining alienations of church property by religious corporations, and restricting the power of leasing. These statutes forming a part of the law of England at the time of the settlement of this State by colonists from England, under the charter of the Duke of York, became a part of the laws of the colony, although they were not afterward reenacted here.³⁰

§ 128. Supervisory power of the court.—By laws of 1813, c. 60, § 11, it was enacted that it should be lawful for the chancellor of this State, upon application of any religious corporation, in case he should deem it proper, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the moneys arising therefrom, by the said corporation to such uses as the same corporation, with the consent and approbation of the chancellor, shall conceive to be most for the interest of the society to which the real estate so sold did belong: *provided* that the act should not extend to any of the lands granted by this State for the support of the gospel.

63 N. Y. 62; *Nelson v. Drake*, 14 Hun, 465; *Steam Navigation Co. v. Weed*, 17 Barb. 378.

²⁸ *Scott v. First Meth. Ch.*, 50 Mich. 528; 15 N. W. 891.

²⁹ *Dutch Church v. Mott*, 7 Paige, 77, 83; *Matter of the Reformed Dutch Church in Saugerties*, 16 Barb. 237, 241.

³⁰ *Canal Commissioners v. The People*, 5 Wend. 423, 445; *Canal Appraisers v. The People*, 17 Wend. 571, 584.

"The better opinion and the weight of judicial authority is in favor of the view that the English statutes passed in the reign of Elizabeth, restricting religious and char-

itable corporations from alienating their real estate have been adopted and followed by the courts of this State in determining the powers which such corporations possess to alienate or incur their real property. It may be true . . . that these statutes, as such, were never introduced here, but the principle embodied in them became the rule of our courts and the policy of the legislature in dealing with questions of the same nature and character and, therefore, a part of our municipal law." *Dudley v. Congregation of the Third Order of St. Francis*, 138 N. Y. 451, Per O'BRIEN, J.

The powers formerly exercised by the chancellor are now vested in the Supreme Court.

This statute was a re-enactment of a statute passed in 1806, and furnishes evidence that the legislators believed that the common law restrained religious corporations from alienating their property, and that they thought it necessary to empower the chancellor to authorize such sales to be made.³¹ This statute has been repealed, but in substance re-enacted by the consolidation of 1909, providing for the sale or mortgage of real property of religious corporations.³²

The jurisdiction of the Supreme Court to make an order authorizing the conveyance of the lands of a religious corporation under this statute, depended upon the facts before the court when it made the order. Its jurisdiction could not be upheld by showing that facts existed which were in no way placed before the court or brought to its attention or considered by it.³³ And an unauthorized conveyance by a religious corporation of its real estate, could not be held valid because it had been executed and delivered, the purchaser put in possession, and the corporation paid the consideration therefor.³⁴ But under a recent amendment of the statute, a sale or mortgage executed and delivered without the authority of the court may be validated by a confirmatory order, and be of the same force and effect as if it had been consummated after due proceedings in accordance with the statute.³⁵

§ 129. When order of court is necessary.—The statute does not grant to the courts any power to direct the sale of any of the property of a religious corporation. The authority of the court is entirely negative, and it can only ratify or refuse to ratify the bargains which the corporations elect to make.³⁶ It was formerly thought to be necessary that the consent of the court should be

31 *De Ruyter v. The Trustees of St. Peter's Church*, 3 Barb. Ch. 119, aff'd 3 N. Y. (3 Comst.) 238; *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 46 N. Y. 131, 142.

32 *Religious Corp. Law*, § 12; amended by *Laws of 1912*, ch. 290.

33 *Madison Avenue Baptist Church*

v. Oliver Street Baptist Church, 73 N. Y. 82.

34 *Madison Avenue Baptist Church v. Oliver Street Baptist Church*, 73 N. Y. 82.

35 *Laws of 1912*, ch. 290.

36 *Matter of the Reformed Dutch Church of Saugerties*, 16 Barb. 237; *Wyatt v. Benson*, 23 Barb. 327; 4 Abb. 182.

obtained before any contract of sale had been entered into,³⁷ but the later decisions are to the effect that it is sufficient if such consent be obtained at any time before the conveying of the property.³⁸ The sale of a pew, where the purchaser acquires merely a limited usufructuary right,³⁹ or the conveyance of an easement or right of burial in the churchyard,⁴⁰ do not require to be approved by the court. So, the trustees of a religious corporation have the power to remove their house of worship from one lot to another, or from one village to another, without application to the court.⁴¹ Under the old statute where a mortgage was given to secure a debt legally contracted this was not considered such a sale of the property as required an order of the court to render it valid.⁴² The object of the law was to prevent a misapplication of the trust funds,⁴³ and it was not necessary to invoke the sanction of the court, in order to impose a specific lien where a valid general charge previously existed.

§ 130. By whom application to be made.—The application for permission to sell or mortgage church property could formerly be made by the trustees having control of the temporal affairs of the corporation, and it was not necessary that a majority of the corporators should authorize the trustees to initiate the proceeding.⁴⁴ By the Consolidated Laws of 1909⁴⁵ it is provided who shall make the application to all mortgage or lease the real property of a Protestant Episcopal or of a Roman Catholic church.

§ 131. Mortgages by clubs and societies.—By laws of 1854, c. 50, it was made lawful for the Supreme Court of this State, upon the application of any benevolent, charitable, scientific, or missionary society, incorporated by law, in case it should deem it proper, to make an order for the mortgaging of any real estate be-

37 Dutch Church in Garden Street v. Mott, 7 Paige, 77.

38 Muck v. Hitchcock, 149 App. Div. 324; Congregation Beth-Elohim v. Central Presbyterian Church, 10 Abb. N. S. 484.

39 Freligh v. Platt, 5 Cow. 494; Abernethy v. Society of the Church of the Puritans, 3 Daly, 1.

40 Richards v. Northwest Protestant Church, 32 Barb. 42; 20 How. Pr. 317; 11 Abb. 30.

41 Matter of the Second Baptist

Society in Canaan, 20 How. Pr. 324.

42 Manning v. Moscow Presbyterian Society, 27 Barb. 52; Lee v. Methodist Episcopal Church of Fort Edward, 52 Barb. 116.

43 South Baptist Society of Albany v. Clapp, 18 Barb. 36.

44 Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 46 N. Y. 131.

45 Religious Corp. Law, § 12, as amended by Law 1912, ch. 290.

longing to said corporation, with the consent and approbation of the moneys arising therefrom, by the said corporation, to such uses as the same corporation, with the consent and approbation of the said court, should conceive to be most for the interest of the society to which the real estate so mortgaged belonged.⁴⁶ From this and similar statutes⁴⁷ was evolved the provision of law now in force⁴⁸ by which it is provided that "no purchase sale, mortgage or lease of real property shall be made by a membership corporation, unless ordered by the concurring vote of at least two-thirds of the whole number of its directors, provided, however, that when the whole number of directors is not less than twenty-one, the vote of a majority of the whole number shall be sufficient. No real property of a membership corporation located within this state shall, without leave of the court, be leased for a longer period than five years, or sold or mortgaged. A mortgage may be executed to secure the payment of bonds issued or to be issued to different persons," and further that if a mortgage be executed and delivered by such a corporation without leave of the court, the court may thereafter, upon the application of the corporation or of the mortgagee or of any person claiming under him, confirm and validate such mortgage.

MORTGAGES TO MONEYED CORPORATIONS.

§ 132. **Mortgages to national banks.**—The statute of the United States under which national banking associations are permitted to be formed, authorizes such associations to loan money *upon personal security*, but the following restriction is made as to real estate:

"A national banking association may purchase, hold, and convey real estate for the following purposes and for no others: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts *previously contracted* in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees, or mortgages, held by the association, or shall

⁴⁶ See *Dudley v. Congregation of Third Order of St. Francis*, 138 N. Y. 451; 34 N. E. 281, holding that a mortgage executed without the order specified was void.

⁴⁷ Laws of 1869, ch. 629; Laws of 1875, ch. 267; Laws of 1884, ch. 68.

⁴⁸ Membership Corp. Law, § 13.

purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.⁴⁹

The language of the statute by implication prohibits a loan upon real estate security or the taking of mortgages for money to be advanced in the future, and for a time it was supposed that such mortgages were void, and could not be enforced against the persons making them.⁵⁰

§ 133. **Later decisions.**—These decisions were, however, reversed and overruled by the Supreme Court of the United States, and the doctrine now established is that the security taken is valid as between the bank and its debtor and can be enforced, and that whatever objection there may be to a mortgage for future advances from the prohibitory provisions of the statute, that objection can be urged only by the government.⁵¹

A mortgage to a national bank has, since the later decisions, been enforced for future advances.⁵²

So where a bond and mortgage is assigned to an employee of a national bank to secure a loan owing to it, the Federal statute does not render the security void nor deprive the bank of the right to enforce it. In such a case it is held that the bank becomes liable merely to the Federal government for exceeding its power.⁵³

It was also decided in this case that by virtue of the provisions of the United States Revised Statutes⁵⁴ a national bank, if it be an innocent holder for value, can recover the principal due on a bond and mortgage, even though the instrument be tainted with usury.⁵⁵

49 R. S. of U. S., § 5137.

50 Crocker v. Whitney, 71 N. Y. 161. See also Nat. Bank of Topeka v. Rowill, 2 Dillon C. C. 371; Ripley v. Harris, 3 Biss. C. C. 190; Woods v. People's Nat. Bank, 82 Pa. St. 57; Fowler v. Scully, 72 Pa. St. 456.

51 Schuyler Nat. Bank v. Gadsden, 191 U. S. 451; Fortier v. New Orleans Nat. Bank, 112 U. S. 439; National Bank of Genesee v. Whitney, 13 Otto, 99, rev'g Crocker v. Whitney, 71 N. Y. 161; 23 Alb. L. J.

355; First Nat. Bk. of Waterloo v. Elmore, 52 Iowa, 541; Union Nat. Bank v. Matthews, 19 Alb. L. J. 132, rev'g Matthews v. Skinker, 62 Mo. 329.

52 Simons v. First National Bank, 93 N. Y. 269.

53 Slade v. Squier, 133 App. Div. 666; 118 N. Y. Supp. 278.

54 §§ 5197, 5198.

55 Slade v. Squier, 133 App. Div. 666; 118 N. Y. Supp. 278.

Where a national bank lawfully held a mortgage on real estate, it was held that it might protect its interests by purchasing a prior mortgage on such real estate, and that it might compel the assignment to it of such prior mortgage, the circumstances of the case being such as would confer the right to such assignment independent of its corporate character.⁵⁶ So, when a national bank, holding a junior lien, pays the prior incumbrance, it may take a new mortgage for its indemnity.⁵⁷ It may also purchase at foreclosure sale the land which had been mortgaged to it,⁵⁸ or may sell its real estate and take back a mortgage for the purchase money.⁵⁹

A national bank organized as a successor to a State bank, may maintain an action to foreclose a mortgage executed to the State bank as security for a note and assigned to it by the State bank.⁶⁰

§ 134. **Similar restrictions** are imposed on banks organized under our state law⁶¹ and it is further provided that no corporation organized under the provisions of that act, except a building and mutual loan corporation or association or a co-operative savings and loan association shall hereafter make a loan, directly or indirectly, upon the security of real estate upon which there is a prior mortgage, lien or incumbrance, if the amount unpaid upon such prior mortgage, lien or incumbrance, or the aggregate amount unpaid upon all prior mortgages, liens and incumbrances exceeds ten per centum of the capital and surplus of such corporation, or if the amount so secured, including all prior mortgages, liens and incumbrances shall exceed two thirds of the appraised value of such real estate as found by a committee of the directors or trustees of such corporation; but this provision shall not prevent the acceptance of any such real estate securities to secure the payment of a debt previously contracted in good faith. Every mortgage and every assignment of a mortgage taken or held by such corporation shall immediately be recorded in the office of

⁵⁶ *Holmes v. Boyd*, 90 Ind. 332.

⁵⁷ *Ornn v. Merchant's National Bank*, 16 Kans. 341.

⁵⁸ *Heath v. Second Nat. Bank*, 70 Ind. 106.

⁵⁹ *New Orleans Nat. Bank v. Ray-*

mond, 29 La. Ann. 355; 29 Am. R. 335.

⁶⁰ *Scofield v. State Nat. Bank of Lincoln*, 9 Neb. 316; 2 N. W. 888; 31 Am. R. 412.

⁶¹ *Banking Law*, § 66.

the clerk of the county in which the real estate described in the mortgage is located.⁶²

The Personal Property Law ⁶³ prescribes the securities in which trust funds generally may be invested, including "bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned."⁶⁴

§ 135. **A Trust Company** may lease, hold, purchase and convey any and all real property necessary in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation under sales, judgments or mortgages, or in settlement or partial settlement of debts due the corporation by any of its debtors.⁶⁵

It is provided, however, that the capital of every such corporation shall be invested, among other classes of securities, in bonds and mortgages on unincumbered real property in this state not exceeding sixty per centum of the value thereof.⁶⁶

§ 136. **Savings Banks** may invest in bonds and mortgages on unincumbered real property situated in this state, to the extent of sixty per centum of the value thereof. Not more than sixty-five per centum of the whole amount of deposits shall be so loaned or invested. If the loan is on unimproved and unproductive real property, the amount loaned thereon shall not be more than forty per centum of its actual value. No investment in any bonds and mortgages shall be made by any savings bank except upon the report of a committee of its trustees charged with the duty of investigating the same, who shall certify to the value of the premises mortgaged or to be mortgaged, according to their best judgment, and such report shall be filed and preserved among the records of the corporation.⁶⁷

Such a corporation may hold such real property as shall have been purchased by it at sales upon the foreclosure of mortgages owned by it, or on judgments or decrees obtained or rendered for debts due to it, or in settlements effected to secure such debts. All such real property shall be sold by such corporation within five years after the title to the same shall be vested in it, unless,

62 Banking Law, § 27.

63 § 21.

64 See *Waydell v. Hutchinson*, 146 App. Div. 448.

65 Banking Law, § 185.

66 Banking Law, § 193.

67 Banking Law, § 146. See *Rome Savings Bank v. Krug*, 102 N. Y. 331.

upon application by the board of trustees, the Superintendent of Banks shall extend the time within which such sale shall be made.⁶⁸

In all cases a sufficient bond shall be required of the borrower, and all expenses of searches, examinations and certificates of title, and of drawing, perfecting and recording papers, shall be paid by him.⁶⁹

Furthermore, whenever buildings are included in the valuation of any real property upon which a loan shall be made by any such corporation, they shall be insured by the mortgagor in such company or companies as the directors shall direct, and the policy of insurance shall be duly assigned, or the loss made payable as its interest may appear, to such corporation; and any such corporation may renew such policy of insurance in the same or any other company or companies as they may elect, from year to year, or for a longer or shorter term, in case the mortgagor shall neglect to do so, and may charge the amount paid to the mortgagor. All the necessary charges and expenses paid by such corporation for such renewal or renewals shall be paid by the mortgagor to the corporation, and shall be a lien upon the property mortgaged, recoverable with interest from the time of payment as part of the moneys secured to be paid by the mortgage.⁷⁰

§ 137. **Co-operative savings and loan** associations may loan money to its members, on their bond, secured by a first mortgage on real estate, and secured also by a transfer and pledge to the association of the shares borrowed upon. Such an association may purchase at any sale, public or private, any real estate upon which it may have a mortgage, judgment lien or other incumbrance, taken or obtained in good faith in the regular transaction of the business of the association, and may sell, exchange, convey, lease or mortgage the same or any real estate it now owns at pleasure to any person or persons; it may also hold and own real estate for the purpose of occupying the same with its own business office.⁷¹

⁶⁸ Banking Law, § 147.

⁶⁹ Banking Law, § 150.

⁷⁰ Banking Law, § 151. See *Heal v. Richmond County Savings Bank*,

127 App. Div. 428, 431; 111 N. Y. Supp. 602.

⁷¹ Banking Law, § 221. See *Leighton v. Leighton Lea Association*, 146 App. Div. 255.

§ 138. Mortgages to Insurance Companies.—The Consolidated Laws provide that the cash capital of every domestic insurance corporation shall be invested in national, state, county or city bonds or “in bonds and mortgages on improved, unincumbered real property in this state, worth fifty per centum more than the amount loaned thereon.”⁷²

The intent of these provisions is to add to the protection of policy holders in insurance companies by requiring the companies to invest the moneys entrusted to their care in securities of unquestionable soundness. Where such provisions have been violated it is for the government, and not for the mortgagor, who seeks to escape from his obligation, to challenge the ultra vires act of the insurance company. The principle upon which this has been decided is the same as that which controls in cases of loans made by National Banks.⁷³

Furthermore the insurance law makes it lawful for insurance companies to hold such real property as shall have been mortgaged to it in good faith by way of security for loans previously contracted or for moneys due, and such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts. But the same law also provides that all real estate so acquired, which is not necessary for the company in the transaction of its business, shall be sold and disposed of within five years after the acquisition of the title thereto, unless the certificate of the superintendent of the insurance department⁷⁴ shall be procured to the effect that the interest of the company would suffer materially by a forced sale thereof. It has been held that on a purchase by an insurance company under this statute the title vests absolutely in the company, and that its power of alienation is without limit, and that the failure to obtain the certificate does not invalidate or affect the title in any way.⁷⁵

MORTGAGES TO THE COMMISSIONERS OF THE UNITED STATES DEPOSIT FUND.

§ 139. Origin of the fund.—By act of Congress entitled “An act to regulate the deposits of the public money,” passed June 23,

⁷² Insurance Law, §§ 13, 16.

⁷³ Washington Life Ins. Co. v. Clason, 162 N. Y. 305.

⁷⁴ Insurance Law, § 20; Laws of 1853, ch. 466; Laws of 1859, ch. 366.

⁷⁵ Home Insurance Co. v. Head, 30 Hun, 405.

1836, the surplus money in the treasury of the United States was divided among the several States. By Laws of 1837, chapter 2, this State agreed to receive in deposit for safe keeping its share of such surplus money, upon the terms, conditions, and provisions in said act of Congress contained; and the faith of the State was inviolably pledged for the safe keeping and repayment of all sums of money thus received, from time to time, whenever the same should be required by the Secretary of the Treasury of the United States, under the provisions of said act.

§ 140. By Laws of 1837, chapter 150, it was enacted that the moneys which had been or might thereafter be deposited with this State, under the act of Congress already mentioned, should be apportioned among the several counties of this State, according to the population thereof, as ascertained by the last State census, for the purpose of being loaned therein in the manner directed by the act. Provision was made for the appointment of two reputable inhabitants, resident in each of the counties of this State, who should be commissioners for loaning such moneys, and who should be known and distinguished by the name and style of "the commissioners for loaning certain moneys of the United States of the county" of which they were respectively commissioners. The commissioners were to give bonds to the State, and then to loan such moneys on "improved lands in the same county," upon mortgages at seven per cent.⁷⁶ per annum; the sufficiency of the securities and the validity of the titles to be determined by them.

§ 141. Loans were made by this State to its citizens under statutes passed in 1786, 1792, and 1808, and loan commissioners had been appointed in the various counties of the State to attend to the investments.⁷⁷ By Laws of 1850, c. 337, these loans were consolidated, and the loan commissioners in the several counties in this State were authorized to transfer and deliver to "the commissioners for loaning certain moneys of the United States" in the same county, all the mortgages remaining in their hands.

The laws regulating the government and control of the fund

⁷⁶ Interest after October 1, 1879, reduced to six per cent. Chap. 517, Laws of 1880.

⁷⁷ See note to 3 Edm. Stat. p. 119.

were frequently amended,⁷⁸ and upon the consolidation were included in the State Finance Law with the Education Fund.⁷⁹

On account of the inefficiency or dishonesty of the Loan Commissioners, resulting in large losses to the fund, that office was abolished on August 9th, 1911,⁸⁰ and its investment and management placed in the sole charge of the State Comptroller.⁸¹

§ 142. These mortgages are now enforced by the customary statutory action of foreclosure with the Comptroller of the State as plaintiff. The time when he shall request the Attorney-General to institute the proceedings and the manner of conducting the action and sale are briefly set forth in the statute.⁸²

No provision of law exists authorizing the investment of any part of the fund in bond and mortgage, and it is the obvious policy of the statute that the small amount still so invested⁸³ be converted into other forms of security as expeditiously as possible.

The entire question was treated at length in Chapter XIII of the second edition of this work. The extreme scarcity of reported cases on the subject since that date, and the likelihood that, in a few years, it will be of historical interest only, lead the present editor to abridge the statement and to refer inquirers to that revision.

§ 143. Mortgages to or by aliens.—Aliens lawfully seized of real estate were empowered by the Revised Statutes⁸⁴ to mortgage it or upon selling it to take back mortgages on it and to enforce the mortgage in the usual way. Independent of this provision an alien may take and hold a mortgage on real estate, as a mortgage is no longer an estate, but collateral security for the payment of a debt only. A mortgage of lands within the state to citizens thereof in trust for aliens is legal.⁸⁵

⁷⁸ Laws 1887, ch. 245; Laws 1888, ch. 464; Laws 1889, ch. 50; Laws 1898, ch. 360; Laws 1903, ch. 350.

⁷⁹ Laws 1909, ch. 58, § 80 *et sequi*.

⁸⁰ Report of the State Comptroller, Jan., 1913.

⁸¹ Laws 1911, ch. 634.

⁸² State Finance Law, §§ 26 *et sequi*, 88.

⁸³ On January 1, 1913, there were 1,121 outstanding mortgages with an aggregate principal of \$910,943.21.

⁸⁴ 1 R. S. 721, § 18; Real Prop. Law, §§ 10, 13.

⁸⁵ Ludlow v. Van Ness, 8 Bosw. 178.

MORTGAGES OF THE LANDS OF INFANTS.

§ 144. **Ratification of mortgage made during infancy.**—A mortgage made by an infant is voidable but not void, and he may, after coming of age, ratify and confirm it. If the mortgage is given on the purchase of the mortgaged property, the mortgage and the deed constitute part of the same transaction and it is not competent for him to ratify the deed and repudiate the mortgage. By retaining the land he will make himself bound by the mortgage.⁸⁶

A conveyance of mortgaged property by an infant after coming of age in which the mortgage is recognized as valid will amount to a ratification,⁸⁷ and a repudiation of the mortgage will not necessarily be implied by a conveyance which does not mention it.⁸⁸ So, where an infant, with the approval of his father, obtained money upon a mortgage, and after reaching maturity died, leaving a will in which he directed "all his just debts to be paid and satisfied," and then devised the property to his mother without mentioning the mortgage, it was held that the court was justified by the circumstances under which the loan was made, in laying hold of any equitable construction which could possibly be given to the will, and to hold it to be a confirmation instead of an avoidance of the bond and mortgage.⁸⁹

A part payment of a mortgage executed during infancy, made after coming of age, will constitute a ratification of it.⁹⁰

Where an infant executed a mortgage, and after becoming of age executed a deed of the property to a trustee without receiving any consideration, and afterward redelivered and reaffirmed the mortgage, this latter act was held to establish the mortgage as a valid security from its date, and to render it paramount to the title under the deed.⁹¹

§ 145. **Disaffirmance of a mortgage made during infancy must**

⁸⁶ *Henry v. Root*, 33 N. Y. 526, 533; citing *Lynde v. Budd*, 2 Paige, 191; *Kitchen v. Lee*, 11 Paige, 107. See also *New York Building & Loan Co. v. Fisher*, 23 App. Div. 363; 48 N. Y. Supp. 152. See also *Curtis v. McDougal*, 26 Ohio St. 67; *Collis v. Day*, 38 Wis. 643.

⁸⁷ *Lynde v. Budd*, 2 Paige, 191.

See also *Losey v. Bond*, 94 Ind. 67; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Allen v. Poole*, 54 Miss. 323.

⁸⁸ *Palmer v. Miller*, 25 Barb. 399.

⁸⁹ *Merchant's Ins. Co. v. Grant*, 2 Edw. Ch. 544; *Hampson v. Suydenham*, *Nelson's Ch. R.* 55.

⁹⁰ *Keegan v. Cox*, 116 Mass. 289.

⁹¹ *Palmer v. Miller*, 25 Barb. 399.

be by some act clearly expressing an intention to do so performed promptly after coming of age.⁹²

If this is attempted to be accomplished by a deed, the document must be of such a nature as to be inconsistent with the mortgage, so that both cannot stand together.⁹³ In this connection it has been decided that where an infant, who mortgages land and receives back other land in fee and also money which he squanders, disaffirms the transaction on coming of age, a tender lack of a deed with the grantee's name in blank is a sufficient tender.⁹⁴

Where a mortgage executed by a person who was an infant when it was executed, but who has since come of age, is attempted to be foreclosed, the defense of infancy must be interposed before judgment. The defendant cannot wait to ascertain whether there will be a surplus before questioning his personal liability.⁹⁵

§ 146. Subrogation.—A person advancing money to pay off an incumbrance on the real estate of a person mentally incapable to contract, is entitled to be subrogated to such incumbrance, and the same rule would prevail in the case of an infant.⁹⁶

§ 147. A mortgage executed by a guardian of an infant to himself, as such guardian, is valid as against him, and on the foreclosure of such mortgage, if the entire amount is realized and the rights of the infant are thus protected, a valid title will pass which a purchaser will be required to accept.⁹⁷

Where the ward's funds are invested by a guardian in a mortgage upon property of the latter and such mortgage subsequently proves to be an insufficient security, the transaction may be repudiated by the ward who may in such case recover the amount of the funds so invested.⁹⁸

§ 148. Proceedings under the statute to mortgage lands of infants and incompetents.—The Code of Civil Procedure prescribes the cases in which the land of infants, lunatics, idiots and habitual drunkards may be sold, mortgaged or leased, by the direction

92 Loomer v. Wheelwright, 3 Sandf. Ch. 135.

93 Buchanan v. Griggs, 18 Neb. 121; 24 N. R. 452; Eagle Fire Ins. Co. v. Lent, 1 Edw. 301.

94 Kane v. Kane, 13 App. Div. 544; 43 N. Y. Supp. 662.

95 Flynn v. Powers, 35 How. Pr. 279; aff'd 36 How. Pr. 289.

96 Coleman v. Fraser, 3 Ky. 300.

97 Lyon v. Lyon, 67 N. Y. 250.

98 Matter of Terry, 31 Misc. R. 477; 65 N. Y. Supp. 655.

of the court.¹ Who may make the petition is specified in the Code,² together with other matters of practice.³

It is provided by the General Rules of Practice that the petition on proceedings to sell, mortgage or lease real estate belonging to an infant or lunatic, idiot or habitual drunkard, shall state, besides the particular grounds for sale, mortgage or lease of the property, and the other matters required by the Code, the age and residence of the infant, lunatic, idiot or habitual drunkard, and the name and residence of the person proposed as a special guardian or committee, the relationship, if any, which he bears to the infant, lunatic, idiot or habitual drunkard, and the security proposed to be given; and also whether any previous application has been made, and, if so, the time thereof, and what disposition was made of the same.⁴

The form and contents of the report of the referee appointed on such petition is specified in the General Rules of Practice.⁵

Although the statute authorizes the mortgaging of the lands of infants as well as the sale of them, in practice, it is seldom proper to mortgage when a sale can be made, and it is not a common thing to do. The reason for this may be found in the fact that to mortgage an infant's land is to run him into debt, and it does not often happen that the interests of such person "require, or will be substantially promoted by," the imposing upon him of an obligation to pay interest on borrowed money.

§ 149. Such proceedings must strictly conform to the letter of the law, for the court has no authority outside of the enactment.⁶ Its jurisdiction in respect to such a proceeding is special and limited, and is not enlarged by the fact that it may be a court of general jurisdiction; and no presumption can be indulged in its favor.⁷ Although it has been said that courts of equity have an inherent jurisdiction, independent of statute, to

¹ Craver v. Jermain, 17 Misc. R. 244; 40 N. Y. Supp. 1056; Code, § 2348.

² Code Civ. Proc., § 2349.

³ Code Civ. Proc., §§ 2351-2364.

⁴ Rule 55. See Code Civ. Proc., § 2350.

⁵ Rule 56.

⁶ Losey v. Stanley, 147 N. Y. 560; 42 N. E. 8; Battell v. Torrey, 65 N. Y. 294; Moran v. James, 21 App.

Div. 183; 47 N. Y. Supp. 486; Rogers v. Dill, 6 Hill, 415; Baker v. Lorillard, 4 N. Y. (4 Comst.) 257; Onderdonk v. Mott, 34 Barb. 106.

Where proceedings are the result of collusion the adjudication and mortgage may be set aside. Warren v. Union Bank of Rochester, 157 N. Y. 259; 51 N. E. 1036.

⁷ Warren v. Union Bank of Rochester, 157 N. Y. 259; 51 N. E. 1036.

order a sale of the equitable estate of infants, and upon a similar reason may also authorize the mortgaging of such equitable interests,⁸ yet it is decided by the Court of Appeals that such a court has no inherent power to direct a mortgage of the real property of infants.⁹

Each and every one of the steps prescribed by the statute must be observed in order to make the mortgage valid. Thus, it is required that before a mortgage can be made, the special guardian of the infant must enter into an agreement therefor subject to the approval of the court, and must report the agreement to the court upon oath.¹⁰ A disregard of this formality has been held to make the mortgage void.¹¹ The infant must be *seized* of the estate, that is, he must hold the legal title, or the proceedings cannot be taken at all.¹² An equitable claim on the part of a general guardian against his infant ward furnishes no basis for the maintenance of a statutory proceeding to mortgage the latter's real estate.¹³ Likewise, where there is no proof or claim that the personal property and income of the infant are insufficient for the payment of all his own debts and for the necessary education of himself and family, but on the contrary the proof tends to show that they are sufficient, the court does not acquire jurisdiction to direct his property to be mortgaged.¹⁴

The report of the referee on an application to mortgage the lands of infants, should contain within itself a specification of the objects to which the avails should be applied without requiring an examination of the evidence or of any other papers. The final order authorizing the mortgage ought also to specify these objects. The duty of the special guardian is to apply the money received by him in conformity with the order under which he acts, and he cannot refuse to pay a debt directed by such order to be paid on the ground that, in his opinion, the infant is not liable therefor.¹⁵

⁸ Wood v. Mather, 38 Barb. 473; In re Turner, 10 Barb. 552.

⁹ Losey v. Stanley, 147 N. Y. 560; 42 N. E. 8.

¹⁰ Code, § 2356.

¹¹ Battell v. Torrey, 65 N. Y. 294.

¹² Baker v. Lorillard, 4 N. Y. (4 Comst.) 257; Wood v. Mather, 38 Barb. 473.

¹³ Warren v. Union Bank of Roch-

ester, 157 N. Y. 259; 51 N. E. 1036, reversing 28 App. Div. 7; 51 N. Y. Supp. 27.

¹⁴ Warren v. Union Bank of Rochester, 157 N. Y. 259; 51 N. E. 1036.

¹⁵ Matter of Lampman, 22 Hun, 239.

The vested interests in remainder of infants which are not included in a trust estate for life cannot be included in a mortgage by the trustee by direction of the court under the provisions of the statute permitting a trustee under the direction of the court or judge to mortgage or sell the real estate held in trust.¹⁶

§ 150. **Costs in proceedings to mortgage lands of infants, lunatics, etc.**—There is no statute providing for commissions to be paid to special guardians appointed in proceedings to sell or to mortgage infants' real estate. Nor is there any fixing the cost and expense which may be allowed in conducting the same, and no provision is made for attorney's fees or the expenses of a reference. All the costs and allowances which can be charged upon the fund are within the discretion of the court, and are fixed and provided for in the standing rules. From the time the proceedings are initiated for the purpose of securing a sale, mortgage, or lease of an infant's real estate he is made a ward of the court and the proceeds of the sale are under its care and protection.¹⁷ The special guardian who is to represent the infant, is named by the court to do such service and make such inquiries as may be required of him, and he has no other duty to perform. He is entitled to such compensation for his services as the court may deem reasonable.¹⁸ In this respect he stands in the same relation to the court as special guardians who are appointed in actions and other proceedings.¹⁹

INSANE PERSONS.

§ 151. **A mortgage executed by a person of unsound mind, who has been duly found by inquisition to be insane, is presumably void.** This presumption may be overcome by evidence, and where the evidence shows that such persons, though weak in body and feeble in mind, is not devoid of reason and judgment, and has a fair memory, he will be held competent to make a valid mortgage.²⁰ Such an instrument may stand if the person executing it is shown to have had capacity to understand the general nature

¹⁶ *Losey v. Stanley*, 147 N. Y. 560; 42 N. E. 8, decided under Statutes of Uses and Trusts, § 65 (1 R. S. 730), as amended by Laws of 1886 (chap. 257).

¹⁷ Code, § 2360.

¹⁸ Rule 50.

¹⁹ *Matter of Matthews*, 27 Hun, 254, aff'd 90 N. Y. 688.

²⁰ *Hughes v. Jones*, 116 N. Y. 67; 22 N. E. 446; *Hardy v. Berger*, 76 App. Div. 393; 78 N. Y. Supp. 709; *Hirsch v. Trainer*, 3 Abb. N. C. 274, and note.

of the transaction. It is not necessary that such person comprehended all of the details.²¹

In an action upon a contract made by a person found by inquisition to have been insane at the time of making it, the plaintiff can recover only by showing that the defendant was sane at that time, or that the consideration moving to him was of such a nature that justice and equity require the claim to be paid out of his estate.²² Where a bond and mortgage were executed by one who was, in fact, insane, to secure a loan made to her in good faith, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry, of which loan the lunatic had the benefit, they were held to be valid and binding, and that the fact that she was afterward, upon inquisition taken, declared to be insane, did not affect their validity.²³

So where one in good faith and without notice of the incompetency of a grantor takes a mortgage from the grantee, such mortgage will be enforced although the deed is set aside.²⁴ A mortgage made by a lunatic in a lucid interval can be sustained only when the proof is full and clear.²⁵ Mere weak intellect, in the absence of all improper influences will not invalidate a mortgage,²⁶ while it has been held that habitual drunkenness, causing a condition verging on insanity, will.²⁷

§ 152. Mortgages of the lands of lunatics and habitual drunkards.—Any idiot, lunatic, or habitual drunkard, seized of any interest in real estate, may, by committee duly appointed, apply to the Supreme Court for the sale or disposition of them. Proceedings must be taken similar to those on an application to dispose of the real estate of an infant; a bond should be given by the committee, and the court will make the order whenever it shall be made to appear to be for the interest of such idiot, lunatic, person of unsound mind, or habitual drunkard.²⁸

As in the case of the estates of infants, it is generally better

²¹ *Merritt v. Merritt*, 32 Misc. R. 21; 66 N. Y. Supp. 123.

²² *Hicks v. Marshall*, 8 Hun, 327.

²³ *Mutual Life Ins. Co. of N. Y. v. Hunt*, 79 N. Y. 541, *aff'd* 14 Hun, 169.

²⁴ *Reilly v. Reilly*, 63 App. Div. 169; 71 N. Y. Supp. 287.

²⁵ *Ripley v. Babcock*, 13 Wis. 425; *Day v. Seeley*, 17 Vt. 542.

²⁶ *Marmon v. Marmon*, 47 Iowa, 121.

²⁷ *Van Horn v. Keenan*, 28 Ill. 445.

²⁸ Code Civ. Proc. §§ 2345-2364. See *ante*, § 148.

to relieve the necessities of lunatics and drunkards by selling their property than by mortgaging it.

A sale, however, is not authorized by an order permitting the committee of a lunatic to mortgage the latter's real estate in order to pay his debts.²⁹

§ 153. Jurisdiction of the court over lands of insane persons.—

The filing of a petition which shows the existence of a valid outstanding debt of the lunatic, requiring the disposition of his real property to enable the committee to pay, vests the court with jurisdiction of the subject matter under the act,³⁰ and such jurisdiction would not be diverted by subsequent irregularities in the proceeding, unless they were taken in violation of some express provision of the statute.³¹ The Supreme Court is invested with general jurisdiction over the persons and property of lunatics and persons of unsound mind, and except as restrained and limited by statutory provisions, has power and authority to direct the plan and method of their custody, and such disposition of their property as in its judgment is for the best interest of the lunatic. This jurisdiction is in no sense a limited jurisdiction to be exercised as in the case of special proceedings authorized by statute, but pertains to the general jurisdiction of the court, and is limited only by the express requirements of law.³² The powers conferred are similar to those formerly vested in the Court of Chancery, and the care and custody of the persons and property of lunatics and others of unsound mind, which was formerly exercised by the chancellor is now confided to the Supreme Court. These powers are usually exercised by the court through a committee, and he acts as the officer of the court, and is always sub-

²⁹ *Reals v. Weston*, 28 Misc. R. 67; 59 N. Y. Supp. 807, holding, however, that where the purchaser has acted in good faith and paid a full consideration, equity will award him a lien upon the premises for all moneys paid to or for the committee in the matter of the sale.

³⁰ Code Civ. Proc. §§ 2345-2364; Laws of 1874, ch. 446, title 2.

Under the Insanity Law the real property of a lunatic can be sold or mortgaged, as prescribed in the Code, for a debt contracted for his maintenance in a state lunatic asylum.

³¹ *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525, 531; *Fisher v. Hepburn*, 48 N. Y. 50; *Bangs v. Duckinfield*, 18 N. Y. 592; *Matter of Empire City Bank*, 18 N. Y. 199; *D'Ivernois v. Leavitt*, 8 Abb. Pr. 59; *Cole v. Hall*, 2 Hill, 625; *People ex rel. Johnson v. Nevins*, 1 Hill, 154. See also *Mohr v. Manniere*, 101 U. S. 418.

³² Per RUGER, Ch. J., in *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525, 531, rev'g 26 Hun, 302.

ject to its control and direction.³³ Even the entire omission by the committee to give a bond on the application was held not to affect the validity of the proceeding.³⁴

The jurisdiction given to the court under the Code in reference to the sale, mortgage, or lease of the real estate of a lunatic, is, however, a special statutory one, and can be exercised only as the statute directs. So, where an order to sell and convey the real estate of a lunatic recited the necessity of the sale to be only for the support of the family of the lunatic, it was presumed that the court made the order for that purpose and disregarded other grounds stated in the petition. The act of 1864 did not authorize the sale for that purpose, but only for the support and education of the lunatic himself and the promotion of his interests for the reasons specified in the statute.³⁵

The portion of the Revised Statutes and the statutes giving to the court power to sell or mortgage the lands of lunatics and other incompetent persons, were repealed in 1880,³⁶ at the time of the enactment of the portions of the Code of Civil Procedure having reference to the same subject.³⁷ A mortgage of the real property of a lunatic must be executed in strict compliance with the provisions of the Code of Civil Procedure in regard to the execution of such mortgages.³⁸

MORTGAGES OF LANDS OF DECEASED PERSONS TO PAY DEBTS.

§ 154. **Jurisdiction of surrogate.**—At any time within three years after letters testamentary or of administration are first granted upon the estate of a decedent an executor or administrator, a person holding a judgment lien upon the decedent's real property at the time of his death, or any other creditor of the decedent other than a creditor by mortgage, which is a lien upon the decedent's real property, or any person having a claim for the funeral expenses of the decedent, may apply to the surrogate for authority to mortgage, lease or sell so much of the real estate of the decedent as shall be necessary to pay such debts.³⁹

33 *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525; *Matter of Lynch*, 5 Paige, 120.

34 *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

35 *Matter of Valentine*, 72 N. Y. 184.

36 *Laws of 1880*, ch. 245.

37 § 2345 *et. seq.*

38 *Corbin v. Dwyer*, 30 Misc. R. 488; 63 N. Y. Supp. 822. See §§ 2351, 2356 of Code of Civ. Proc. as to mortgages of land of lunatics.

39 Code of Civ. Pro. §2749 *et seq.*

The application to the surrogate should be by petition, and the method of procedure intended for the protection of the rights of the various parties in interest, is quite fully set forth in the Code of Civil Procedure.⁴⁰ The jurisdiction of the surrogate in respect to such proceedings can only be exercised in the manner and by the procedure prescribed by the statute.⁴¹ So the consent of the attorneys for the parties to a contested probate proceeding cannot confer upon a surrogate jurisdiction to authorize a temporary administrator to mortgage the decedent's real estate in order to raise money to pay the costs of the proceeding.⁴² After the expiration of the three years the debts of the decedent may be enforced against the heirs and devisees in the mode specified in the statute and they then cease to be a lien or charge upon the real estate.⁴³

§ 155. Right of heir or devisee to mortgage.—During the three years after the testator's death his creditors have a kind of statutory lien upon the real estate left by him and such real estate cannot be so aliened by his heirs or devisees during that time as to defeat the claims of creditors thereon.⁴⁴ Therefore a mortgagee who, prior to the expiration of the three years, takes his mortgage from a devisee under the will, who claims no title except through it, cannot be treated as a bona fide incumbrancer or purchaser so as to place his lien upon the premises prior to the claims of the creditors of the deceased deviser.⁴⁵ But if a mortgage subject to such a lien has been foreclosed, and a surplus remains after paying the mortgage debt, such surplus is the primary fund for the payment of debts, and must be resorted to before any attack can be made on the lands in the hands of the purchaser, even though the administrator was not a party to the foreclosure.⁴⁶

Statute of limitations not extended by § 2950. *Church v. Olendorf*, 49 Hun, 439.

40 Code of Civ. Pro. § 2749 *et seq.*

41 *Duryea v. Mackey*, 151 N. Y. 204; 45 N. E. 458.

A temporary administrator cannot be authorized to mortgage. *Duryea v. Mackey*, 151 N. Y. 204; 45 N. Y. Supp. 458.

42 *Duryea v. Mackey*, 151 N. Y. 204; 45 N. E. 458.

43 *Platt v. Platt*, 105 N. Y. 488;

8 N. Y. St. R. 77; *Cunningham v. Whitford*, 56 N. Y. St. R. 285.

44 *Platt v. Platt*, 105 N. Y. 488; 8 N. Y. St. R. 77; *Hyde v. Tanner*, 1 Barb. 75. See *Wilson v. Wilson*, 13 Barb. 252; *Fonda v. Chapman*, 23 Hun, 119.

45 *Cunningham v. Whitford*, 56 N. Y. St. R. 285 26 N. Y. Supp. 575; *Olyphant v. Phyfe*, 48 App. Div. 1; 62 N. Y. Supp. 688.

46 *Brevoort v. McJimsey*, 1 Edw. 551.

MORTGAGE OF BURIAL AND CEMETERY LOTS.

§ 156. **Cancelling exemption of private burial lots.**—The Code of Civil Procedure made a change in the law relative to the mortgaging of exempt property, including private or family burying lots and homesteads. A mortgage executed after May 1, 1877, upon property so exempt, is ineffectual until the exemption has been cancelled by the recording of a certificate subscribed and acknowledged by the mortgagor, except that such mortgage is valid to the extent of the purchase money of the same property secured thereby.⁴⁷

Such exemption may be created under Sections 1396 to 1399 of the Code as to land set apart as a family or private burial-ground, as to a lot of land occupied as a residence by a householder having a family, or a married woman. The terms upon which such exemptions may be secured, and its extent, are set forth in the sections cited. Previous to this provision of the Code, it had been held that an agreement to waive an exemption, when made part of the transaction out of which the indebtedness arose, was void as against public policy.⁴⁸ It had also been held that a homestead exemption could be waived by a separate instrument executed simultaneously with a mortgage given to secure a precedent debt, and accompanied with the surrender of collateral securities; but that such waiver in favor of the mortgagee operated to discharge the exemption so as to let in the lien of a prior judgment.⁴⁹

This provision of the Code was amended in 1894⁵⁰ in respect to the manner in which the owner of exempt property might cancel the exemption. It is also provided that nothing in this section as amended shall be so construed as to prevent the husband and wife from jointly conveying or mortgaging property so exempt.⁵¹

§ 157. **Lots in public cemeteries.**—A statute declaring that cemetery lots shall not be liable to sale on execution does not preclude mortgaging such lots, nor does it prevent a foreclosure of such mortgage by their sale. Such a statute does not apply to a

⁴⁷ Code of Civ. Pro. § 1404.

⁴⁸ *Harper v. Leal*, 10 How. Pr. 276; *Kneettle v. Newcomb*, 31 Barb. 169, aff'd 22 N. Y. 249.

⁴⁹ *Smith v. Brackett*, 36 Barb. 571.

⁵⁰ Laws 1894, ch. 202.

⁵¹ Code Civ. Pro. § 1404.

voluntary act of the owner affecting the title, and a mortgage of a burial lot is not void as against public policy. A mortgage of a burial lot in Greenwood Cemetery was on these principles enforced by a judgment of foreclosure and sale.⁵²

In the case above referred to there had been no interment in the lot mortgaged, and, in a later case, it was held at special term, by VAN VORST, J., that where a person has taken a conveyance of a burial lot and has made interments therein of the dead of his family, it is in such condition that it cannot be mortgaged to secure payment of a debt or the return of money borrowed. The mortgage was in the form of an absolute conveyance, and the mortgagee notified the mortgagor to remove the bodies of his buried children, with a threat that if the mortgagor did not he would. An injunction to restrain such removal was sustained. The burial lot was situated in Greenwood Cemetery, the charter of which did not contain, in terms, any absolute restraint upon the power of voluntary alienation of a cemetery lot by an owner.⁵³

By section 11 of chapter 133 of the Laws of 1847, entitled "An act authorizing the incorporation of rural cemeteries," it was provided that when plots or lots should be transferred to individual owners, and after there should be an interment in a lot or plot so transferred to individual owners, such plot or lot, from the time of such interment, should be forever after inalienable, and should, upon the death of the holder or proprietor thereof, descend to the heirs at law of such holder or proprietor, and to their heirs at law forever.

It is now expressly provided by statute that "No land actually used and occupied for cemetery purposes shall be sold under execution or for any tax or assessment, nor shall such tax or assessment be levied, collected or imposed, nor shall it be lawful to mortgage such land, or to apply it in payment of debts, so long as it shall continue to be used for such cemetery purposes."⁵⁴

§ 158. Mortgages of burying-grounds by church or religious corporations.—It was provided by Laws of 1842, c. 215, that it should not be lawful for any church or religious corporation to mortgage any burying-ground used for the interment of human

⁵² Lantz v. Buckingham, 11 Abb. N. S. 64; s. c. *sub nom.* Lantz v. Buckingham, 4 Lans. 484.

⁵³ Thompson v. Hickey, 59 How. Pr. 434.

⁵⁴ Real Prop. Law, § 450. See Laws of 1879, ch. 310.

remains, for the use of which they should have received compensation, without the previous consent, in writing, of three-fourths in number of the congregation or society of such church or corporation; which consent should be proved or acknowledged, in the same manner as deeds were required by law to be proved or acknowledged, and should thereupon be recorded in the office of the register of the city, or clerk of the county in which such burying-ground was situated.

By the Consolidated Laws this act was repealed and it is now provided that "no cemetery lands of a religious corporation shall be mortgaged while used for cemetery purposes."⁵⁵

55 Religious Corp. Law, § 12.

CHAPTER V.

EXTENT OF THE LIEN, AND REMEDIES ON ACCOUNT OF WASTE.

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LIEN OF A MORTGAGE ON A RIGHT OF ACTION FOR
DAMAGES TO THE ESTATE.

§ 159. A mortgage carries with it the prior right to damages awarded for an injury done to the freehold, whereby the security has been impaired, especially where the debtor is insolvent. When damages are awarded for a public improvement, they arise from or grow out of the land, by reason of the injury which has diminished its value. In equity they are the land itself, for the award takes the place of the reduced value of the land.¹ The title to the land, to the extent of his lien, is in the mortgagee,² and he has an equitable lien on the award for the amount of his debt.³

If an award be made to the mortgagee for lands taken for a public improvement, the lien of the mortgage is thereby transferred to the award; it cannot be foreclosed as against the lands thus taken, and the proper remedy is by a regular proceeding to obtain the award.⁴ But if no award is made, he cannot bring an action against the public to obtain the award, and, his lien not being destroyed or taken away, his only remedy is by foreclosure.⁵

The lien of a mortgage has been held to extend to damages awarded to owners of land for depreciation of the value of mill property, occasioned by the abandonment of a canal.⁶

Where land, under the charter of a railroad was condemned for the use of the company, and the mortgagor alone was made a party to the proceeding, it was held that the mortgagee was en-

¹ Bank of Auburn v. Roberts, 44 N. Y. 192, aff'g s. c. 45 Barb. 407.

² Stow v. Tift, 15 Johns. 458.

³ Matter of City of Rochester, 134 N. Y. 83; Utter v. Richmond, 112 N. Y. 610; 20 N. E. 854; Matter of Mayor (Morris Ave.), 118 App. Div. 117; 103 N. Y. Supp. 180; Caccia v. Brooklyn Union El. R. R. Co., 98 App. Div. 294. See also Gates v. De La Mare, 142 N. Y. 307; 37 N. E. 121; Bank of Auburn v. Roberts, 44 N. Y. 192, aff'g s. c. 45 Barb. 407; Astor v. Hoyt, 5 Wend. 603; Park Commissioners v. Todd, 112 Ill. 379; Gimbel v. Stotle, 59 Ind. 446; Wood v. West-

borough, 140 Mass. 403; *contra* under special statute. Whitney v. City of New Haven, 45 Conn. 303; City of Norwich v. Hubbard, 22 Conn. 587; Mills v. Shepard, 30 Conn. 101.

See ch. xxx. herein.

⁴ Shepard v. The Mayor, etc., of New York, 13 How. Pr. 286; Hooker v. Martin, 10 Hun, 302. See also Solehour v. State Savings Institution, 90 Ill. 152.

⁵ Sherwood v. The Mayor, etc., of New York, 11 Abb. 347.

⁶ Bank of Auburn v. Roberts, 44 N. Y. 192, aff'g 45 Barb. 407.

titled to have the sum awarded applied toward the payment of the mortgage and the rest of the land held for the balance.⁷

Where the charter of a city provides that, where lands are to be taken for a street opening, compensation shall be made to owners and also to persons having an interest in the property proposed to be taken, mortgagees of such lands are entitled to notice of the proceedings.⁸

§ 160. The remedy of mortgagee where land is condemned.—

Where, by a regular proceeding, title to mortgaged land is taken for public use, the municipal corporation acquiring such title cannot thereafter be foreclosed for the reason that it holds by a right paramount to the mortgage. The mortgagee has his remedy against the award or against the person who has collected it,⁹ or may still maintain an action on the bond.¹⁰ The title of the mortgagor to the land being extinguished by the proceedings of eminent domain, the purchaser under a subsequent foreclosure of the mortgage acquires no title either to the land taken or to the award representing it, which may still be resorted to by the mortgagee, or his assignee, if necessary to satisfy his demand, and the balance after payment of the debt is the property of the owner of the equity of redemption.¹¹ Nor does a right of action for injuries sustained prior to the foreclosure pass to the purchaser on the foreclosure sale. Such right is personal to the mortgagor.¹²

In *Slicer v. Hyde Park* (55 Vt. 481), it was held that a mortgagee of a farm is not entitled to a decree of foreclosure against a town as to its interests in a highway, although it was laid through the mortgaged premises after the execution of the mortgage; the damages were paid to the mortgagor, no notice was given to the mortgagee, and the property was worth less than the debt, for the reason that the town did not acquire the title to the highway, but the people only secured an easement.

⁷ *Wood v. Westborough*, 140 Mass. 403; *Bright v. Platt*, 32 N. J. Eq. 362; *Wheeler v. Kirtland*, 12 C. E. Gr. (N. J.) 534.

⁸ *Matter of Oneida Street*, 22 Misc. R. 235; 49 N. Y. Supp. 828.

⁹ *Hooker v. Martin*, 10 Hun, 302; *Matter of Opening Eleventh Avenue*, 81 N. Y. 437, 453; *Home Ins. Co. v.*

Smith, 28 Hun, 296, 300. See also *Slicer v. Hyde Park*, 55 Vt. 481.

¹⁰ *Hill v. Wine*, 35 App. Div. 520; 54 N. Y. Supp. 892.

¹¹ *Home Ins. Co. v. Smith*, 28 Hun, 296, 301.

¹² *Porter v. Metropl' an Elev. Ry. Co.*, 120 N. Y. 284; 24 N. E. 454.

§ 161. **Dedication to public use.**—While the mortgagee cannot be bound by a donation of a portion of the mortgaged property for a public use made by the mortgagor without his consent, still he may be bound by his express consent thereto by acts equivalent to a positive donation or by way of estoppel, and his consent may sometimes be implied from his making no objection or by his subsequent acts.¹³ Thus, where lands covered by a mortgage were in part afterward laid out by the mortgagor as a public street and occupied and treated as such by the municipal authorities, and subsequently the mortgagee released part of the premises adjoining the street and described it as bounding on the street, it was held that the lands lying in the street were, as against the mortgagee, subject to the public rights acquired by the dedication.¹⁴

§ 162. **New York City streets.**—The terms of the statutes regulating the opening of streets and avenues in the city of New York show that the report of the commissioners is not to be conclusive as to the persons entitled to the damages to be awarded, because it is provided that, even after payment to the person named in the award, the rightful claimant of the damages may recover them of the person thus paid.¹⁵

The final report of the commissioners, when confirmed by the court, is conclusive so far as to determine the value of the property taken, and to preclude all persons from thereafter making any claim to the land, their exclusive remedy being against the award.¹⁶ When land is so acquired by the City of New York all pre-existing titles and interests become extinguished, the award of the commissioners standing as a substitute for the land taken. If the lands are mortgaged, the mortgagee is entitled to have the award applied upon his mortgage to the extent necessary for his protection.¹⁷ The ascertainment of the names of the persons whose lands are taken, and to whom damages are to be paid, is merely incidental to the main purpose, which is for the guidance of the city authorities and the protection of the city. The city will be justified in paying the person named in the award, unless

¹³ *Smith v. Heath*, 102 Ill. 130.

¹⁶ *Matter of Munson*, 29 Hun,

¹⁴ *Vreeland v. Torrey*, 34 N. J. Eq. 312.

325, 337.

¹⁵ *Charter of New York City*, § 1002; *Spears v. Mayor*, etc., of N. Y., 87 N. Y. 359, 373.

¹⁷ *Gates v. De La Mare*, 142 N. Y. 307; 37 N. E. 121.

it has received notice of an adverse claim; but after such notice, and certainly after suit commenced for the award, by a mortgagee or other person, the city would pay at its peril; and in the case of conflicting claims the city may compel an interpleader, and thus relieve itself from embarrassment or double responsibility.¹⁸

§ 163. Mortgage lien on undivided interest.—The Code provides, with reference to actions to partition real estate, that “the plaintiff may, at his election, make a creditor, having a lien on an undivided share or interest in the property, a defendant in the action. In that case, he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be first charged with its just proportion of the costs and expenses of the action, in preference to the lien.”¹⁹

MORTGAGES ON LEASEHOLD ESTATES.

§ 164. Lien on lease and renewals.—When a leasehold interest is mortgaged, the mortgagee acquires a lien upon the entire rights of the mortgagor under the lease, including the covenants of renewal. If the mortgagor obtains a renewal of the lease, either because of the covenants contained in it, or from his being in possession as tenant, or from his having such particular interest, such renewal inures to the benefit of the mortgagee, and his lien attaches to it;²⁰ and the mortgage lien extends to a right of renewal even if no renewal has been obtained.²¹ This is particularly so in the case of church leases, leases from trustees of charities, or from other persons where there is but a slight probability of the renewal being refused, if the tenant consents to pay the increased rent which the landlord may think proper to require.²²

¹⁸ *Spears v. Mayor, etc., of N. Y.*, 87 N. Y. 359, 374; *Hatch v. Mayor, etc.*, 82 N. Y. 436; *Barnes v. Mayor, etc.*, of N. Y., 27 Hun, 236.

¹⁹ Code of Civ. Pro. § 1540.

²⁰ *Slee v. Manhattan Co.*, 1 Paige, 48; *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Moller v. Duryee*, 21 W. Dig. 458.

²¹ *Moller v. Duryee*, 21 W. Dig. 458; *Sheehan v. Mayer*, 41 Hun, 609.

²² *Phyfe v. Wardell*, 5 Paige, 268, and cases cited; *Gibbes v. Jenkins*, 3 Sandf. Ch. 130, and cases cited; *Wunderlich v. Reis*, 31 Hun, 1, and cases cited; *Mitchell v. Reed*, 61 N. Y. 123.

Upon a similar equitable principle, it is also the rule that where a mortgagee, by reason of being in possession, obtains a renewal of a lease in his own name, it is treated as a continuance of the old lease, and he must hold it for the mortgagor, and subject to his right to redeem.²³

A mortgage given by a lessee upon the leasehold interest does not give the mortgagee any right to the rents coming from the tenants of the mortgagor.²⁴

The mortgagor cannot confess away or release the rights of the mortgagee in the premises; and if the lease contains a clause for forfeiture in case of waste, the mortgagee's rights cannot be divested without his consent or judicial decree.²⁵

§ 165. Liability of mortgagee for rent.—The mortgagee of a term, who has never taken possession, is not an assignee of the whole term or liable for the rent, the mortgage being but a security, and the legal title remaining in the mortgagor.²⁶ A naked right and a beneficial enjoyment are distinguishable,²⁷ and it is only where a mortgagee takes possession that he has the estate *cum onere*, and becomes liable as assignee upon the covenants contained in the lease.²⁸ But a mortgagee who forecloses and purchases the property, and goes into possession, is liable for rent, and may be dispossessed for non-payment.²⁹

§ 166. Redemption by mortgagee from default of mortgagor.—It is provided by the Code of Civil Procedure, that, in case the mortgagor of a term be removed from the premises by summary proceedings where such proceeding is founded upon an allegation that a lessee holds over, after a default in the payment of rent, and the unexpired term of the lease, under which the premises

23 *Holridge v. Gillespie*, 2 Johns. Ch. 30.

24 *Polhemus v. Trainer*, 30 Cal. 685.

25 *Allen v. Brown*, 60 Barb. 39.

26 *Astor v. Miller*, 2 Paige, 68; *Walton v. Cronly*, 14 Wend. 63; *Astor v. Hoyt*, 5 Wend. 603; *Evertson v. Sawyer*, 2 Wend. 507; *Broman v. Young*, 35 Hun, 173, 180; *Levy v. Long Isld. Brewery*, 26 Misc. R. 410. See also *Johnson v. Sherman*, 15 Cal. 287.

Liability of receiver for rent, see § 906.

27 *Demainville v. Mann*, 32 N. Y. 207.

28 *Tallman v. Bressler*, 65 Barb. 369; *Astor v. Miller*, 2 Paige, 68; *Walton v. Cronly*, 14 Wend. 63; *Broman v. Young*, 35 Hun, 173, 180; *Eaton v. Jaques*, Doug. 454.

29 *People ex rel. Grissler v. Stuyvesant*, 3 N. Y. Sup. (T. & C.) 179; s. c. 1 Hun, 102, aff'd 58 N. Y. 323; *Post v. Kearney*, 2 N. Y. (2 Comst.) 394. See also *State v. Martin*, 14 Lea (Tenn.) 92.

are held, exceeds five years, at the time when the warrant is issued; the lessee, his executor, administrator, or assignee, may, at any time within one year after the execution of the warrant, pay or tender to the petitioner, his heir, executor, administrator, or assignee, or if, within five days before the expiration of the year, he cannot, with reasonable diligence, be found within the city or town, wherein the property, or a portion thereof, is situated, then to the judge or justice who issued the warrant, or his successor in office, all rent in arrears at the time of the payment or tender, with interest thereupon, and the costs and charges incurred by the petitioner. Thereupon the person, making the payment or tender, shall be entitled to the possession of the demised premises, under the lease, and may hold and enjoy the same, according to the terms of the original demise, except as otherwise prescribed in section 2258 of the Code.³⁰

In such a case, and unless the mortgagor has redeemed, a mortgagee of the lease, whose mortgage was duly recorded, in the county, before the precept was issued, may, at any time before the expiration of one year after the execution of the warrant, file with the judge or justice who made the warrant, or with his successor in office, a notice, specifying his interest and the sum due to him; describing the premises; and stating that it is his intention to redeem. If a redemption is not made by the lessee within a year after the execution of the warrant, the person so filing a notice, or if two or more persons have filed such notices, the one who holds the first lien, may, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding the last day of the year, redeem for his own benefit, in like manner as the lessee might have redeemed; where two or more mortgagees have filed such notices, the holder of the second lien may so redeem, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which the holder of the first lien might have redeemed; and the holder of the third and each subsequent lien, may so redeem at any time before two o'clock of the day not a Sunday or a public holiday, next succeeding that in which his predecessor might have redeemed. But a second or subsequent redemption is not valid, unless the person redeeming pays or tenders to each of his predecessors who has redeemed, the sum paid by him

30 Code Civ. Proc. § 2256; *Whitbeck v. Van Rensselaer*, 64 N. Y. 27.

to redeem, and also the sum due upon his mortgage, or deposits those sums with the judge or justice, for the benefit of his predecessor or predecessors.³¹ But in order to bar a mortgagee of the lessee from a right to redeem, the writ of possession must be executed by an open, visible, and notorious change of possession, and unless such possession is given it is not sufficient to set the limitation running.³²

§ 167. The giving of a mortgage on a lease is not a violation of a covenant not to assign, inasmuch as a mortgage of land in this State is not a grant of the legal title or of the possession, but a mere security.³³ Neither is such a covenant violated by a sale under a judgment of foreclosure. Such a sale is a judicial sale in a hostile proceeding, a sale *in invitum*, and such sales are held not to violate this covenant.³⁴ Such covenants are restraints which courts do not favor. They are regarded with the utmost jealousy, and very easy modes have always been countenanced for defeating them.³⁵

MORTGAGES BY RAILROAD COMPANIES.

§ 168. After acquired rolling stock.—The question as to whether the rolling stock of a railroad, that is to say, the cars and locomotives used with the road, are fixtures, so as to pass under a mortgage of the track or roadway, has been much discussed, and though there were conflicting decisions in this State, the Commission of Appeals put an end to the controversy by deciding in *Hoyle v. Plattsburgh & Montreal R. R. Co.* (54 N. Y. 314), that the cars used on a railroad are personal property, and do not pass with a mortgage of the real estate. The rolling stock of a railroad is originally personal in its character; it is subservient to a mere personal trade, the transportation of freight and passengers, and the track exists for the use of the cars rather than the cars for the use of the track. There is no annexation, no immobility

31 Code Civ. Proc. § 2257.

32 *Newell v. Whigham*, 102 N. Y. 20; 23 W. Dig. 543; *Keeler v. Keeler*, 102 N. Y. 30.

33 *Riggs v. Purcell*, 66 N. Y. 193, 200; *Taylor's Landlord and Tenant* (2d ed.) 406; *Platt on Leases*, 258; *Doe v. Hogg*, 4 Dowl. & Ry. 226; *Doe v. Beavan*, 3 Maul. & Sel. 353.

34 *Riggs v. Purcell*, 66 N. Y. 193, 200; *Jackson v. Corliss*, 7 Johns. 531; *Smith v. Putnam*, 3 Pick. 221. See also *Doe v. Carter*, 8 Term. R. 57.

35 *Church v. Brown*, 15 Ves. 265; *Blencow v. Bugby*, 2 W. Black. 766; *Taylor's Landlord and Tenant*, §§ 402, 403; 2 *Platt on Leases*, 250.

from weight, there is no localization in use. The only element on which an argument can be based to support the character of realty is adaptation to use with and upon the track. Even in respect to this were the same contrivances adopted by a tenant for use in his trade upon leased lands, his right to remove both cars and track would be beyond question.³⁶

It being established that rolling stock is personal property, it would seem to follow that, even if rolling stock be described in a mortgage, the mortgage would not cover such cars as might subsequently be acquired by the road, though as to this point a contrary view has been taken in a number of cases outside of this State.³⁷

§ 169. **After acquired real estate.**—Neither a man nor a corporation by general terms only can mortgage so far as subsequent purchasers and creditors are concerned, everything that it may thereafter acquire through all time; for this would be a mere pledge of its capacity of acquisition, and would afford no sort of indication of what was to pass under the instrument. A distinction is made by some of the authorities between mortgages of future acquisitions executed by railroad companies and similar instruments made by natural persons. It is said that a mortgage of a railroad and its future property will carry all after-acquired property appurtenant to and necessary for building and operating the road, and carrying out the purposes for which it was created, while a similar instrument will be inoperative if executed by a private person. This is true if the mortgage executed by the private person is upon a specified piece of property, without reference to any accretion or addition to it; because there can be no accretions of property appurtenant to the person of the mort-

36 Per JOHNSON, C., in *Hoyle v. Plattsburg & Montreal R. R. Co.*, 54 N. Y. 314, aff'g 51 Barb. 45; s. c. *sub nom.* *Bement v. Plattsburgh & Montreal R. R. Co.*, 47 Barb. 104; *Stevens v. The Buffalo & N. Y. R. R. Co.*, 31 Barb. 590; *Beardsley v. The Ontario Bank*, 31 Barb. 619. See also *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, and note; *Pierce v. Emery*, 32 N. H. 484. *Contra*, that the rolling stock passes with the mortgage of the real estate, *The*

Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484.

37 *Williamson v. N. J. South. R. R. Co.*, 15 Alb. L. J. 503, and cases cited; *Shaw v. Bill*, 95 U. S. 15; *Coe v. Pennock*, 23 How. 117; 6 Am. Law. Reg. 27; *Buck v. Seymour*, 46 Conn. 146; *Walker v. Vaughan*, 33 Conn. 577; *Phillips v. Winston*, 1 B. Mon. 431; *Morrell v. Noyes*, 56 Me. 458; *Pierce v. Emery*, 32 N. H. 484; *Philadelphia, etc., R. R. Co. v. Welper*, 64 Pa. St. 366.

gagor; but it is untrue, if the individual has mortgaged his business and the property there appurtenant to, or afterward to grow out of and be added by accretion to the particular business that is pledged. Thus, a natural person equally with a corporation can execute a valid mortgage of a ship and the profits of its voyage, or of a factory and the machinery then in it and to be placed in it, or of a farm and the products to be produced upon it, or of a flock of sheep and its natural increase and future-grown wool. And so a railroad company can execute in general terms a valid mortgage of its roadbed and franchises, and all of its real and personal property then owned or thereafter acquired: *provided* the future acquisitions be such as belong naturally to the business of constructing and maintaining the road and its primary end as a common carrier of passengers and freights. The things which may be deemed essential or useful, and therefore appurtenant to the great work of building and operating a railroad, will frequently be more extensive and varied in their character than those which can properly be regarded as accretions to the business of a private person; but the principle is the same, and where the facts concur, the law must be the same as to both.³⁸

§ 170. In the case of *United States Mortgage and Trust Co. v. Eastern Iron Co.*³⁹ the court said "The law seems to be well settled, at least in this state, that a mortgage given by a railroad corporation which purports to cover after-acquired real estate, and such real estate is acquired, creates in equity a lien upon such property superior to the lien of a subsequent encumbrancer by mortgage or judgment."⁴⁰ And this seems to be the rule adopted in the Federal Courts.⁴¹

§ 171. In other jurisdictions it has been held that a mortgage of all the railroad of said company "as the same is now or may

³⁸ Per CHALMERS, J., in *Mississippi Valley Railway Co. v. Chicago, St. Louis & New Orleans Railway Co.* (Miss.), 24 Alb. L. J. 269; *People's Trust Co. v. Schenck*, 195 N. Y. 398; 88 N. E. 647, aff'g *People's Trust Co. v. Brooklyn R. B. R. R. Co.*, 121 App. Div. 604; 106 N. Y. Supp. 782; *Elwell v. Brand St. & Newtown R. R. Co.*, 67 Barb. 83.

³⁹ 120 App. Div. 679; 105 N. Y. Supp. 291.

⁴⁰ See *Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 284; *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 Barb. 447; *Stevens v. Watson*, 4 Abb. Ct. App. Dec. 302; *Platt v. New York & Sea Beach Railway Co.*, 9 App. Div. 87; 41 N. Y. Supp. 42, aff'd 153 N. Y. 670.

⁴¹ *Mitchell v. Winslow*, 2 Story (U. S.) 630; *Central Trust Co. v. Kneeland*, 138 U. S. 419.

be hereafter located or constructed, and all the lands that are or may be included in the location of the road or required by said company for the purpose of the railroad," etc., covers lands purchased after making the mortgage if within the lay-out of the road, or needed for the purposes of the road, but not otherwise.⁴²

Where a railroad is mortgaged by a description which minutely designates the line of road, specifying the land on which it is located necessary for the use and occupation of the road, its rolling stock, etc., and adds, "and all rights, privileges, franchises, and property whatsoever, now belonging or to be acquired by said," etc., this will not include property owned by the corporation not used or to be used in connection with its railroad.⁴³ Such a mortgage does not cover the future earnings of the road.⁴⁴

A mortgage given by a railroad will not override a lien given for purchase money on property thereafter acquired, though such lien be not recorded.⁴⁵

LIEN UPON EMBLEMENTS.

§ 172. A mortgage is a lien upon growing crops and emblements even though they be sown after its execution, and they will pass to a purchaser upon foreclosure as against either the mortgagor or his vendee or lessee.⁴⁶ This appears to be in accordance with the principle that where the determination of an estate depends upon the voluntary act of the owner thereof, or where the estate is defeasible by a right paramount, or by a forfeiture or breach of condition depending on his own act or omission, he who has the paramount right, or who enters for the forfeiture or breach of condition, is entitled to the emblements.⁴⁷ By the common law, the non-payment of the mortgage money at the time fixed upon by the parties was in the nature of a forfeiture of the estate by the

⁴² *Boston & N. Y. Air Line R. R. Co. v. Coffin*, 50 Conn. 150.

⁴³ *Morgan v. Donovan*, 58 Ala. 242; *State v. Glenar*, 18 Nev. 34.

⁴⁴ *Emerson v. European & N. A. R. R. Co.*, 67 Me. 387; 24 Am. R. 39.

⁴⁵ *United States v. New Orleans R. R. Co.*, 12 Wall. (U. S.) 362.

⁴⁶ *Sexton v. Breese*, 135 N. Y. 387; *Sherman v. Willett*, 42 N. Y. 146; *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Den. 174; *Al-*

drich v. Reynolds, 1 Barb. Ch. 613; *Gillett v. Balcom*, 6 Barb. 370; *Hamilton v. Austin*, 36 Hun, 138; *King v. Wilcomb*, 7 Barb. 263, 267. See also *Montgomery v. Merrill*, 65 Cal. 432; *Maples v. Millon*, 31 Conn. 598; *Adams v. Beadle*, 47 Iowa, 439; 29 Am. Rep. 487; *Downard v. Groff*, 40 Iowa, 597; *Price v. Brayton*, 19 Iowa, 309; *Bryant v. Pennell*, 61 Me. 108.

⁴⁷ *Coke*, Litt. 55.

mortgagor, and authorized the mortgagee to enter immediately and take the emblements; but in equity he held them, as he did the land, only as security for the mortgage debt, and upon redemption he was bound to account for such emblements. Having the legal right, however, and the land and its products being a security to the mortgagee for his debt, a court of equity will not deprive him of his legal right to the emblements until the mortgage money and interest are fully paid.⁴⁸

Growing crops pass to the purchaser at the foreclosure sale in the absence of an express contrary agreement or waiver.⁴⁹ Though in a sense, a growing crop of grain is a part of the real estate it nevertheless possesses the characteristics of a chattel and is salable and transferable as other personal property is. Therefore one to whom the owner of the land sells such a crop has the right of ingress to gather and carry it away as against a mortgagee not in possession. And though the mortgagee may be in possession yet the purchaser may have such right even against him.⁵⁰

§ 173. Use of emblements by mortgagor.—Before foreclosure the mortgagor may lawfully use the mortgaged property in the usual and customary way without incurring liability. If the mortgaged property consists of agricultural lands, he may gather his crops or take the fruit of the trees growing upon it or he may use the land for the rearing of trees, which he may dig up and sell. It is not waste for a mortgagor of agricultural lands to sell timber or to remove or change fixtures, if done in good faith, in the usual course of good husbandry, and before foreclosure has been begun or before default has occurred upon the mortgage. Nor is it waste for him to sell stone from open quarries or minerals from open mines, if done in the usual course of such business, though the product removed may exceed the value of the remaining freehold.⁵¹ After foreclosure is begun, the plaintiff may, if the security is in jeopardy, intercept, through the aid of a receiver the rents or emblements, or both, upon the theory that the whole estate is pledged as security for the debt, and that the creditor

⁴⁸ Aldrich v. Reynolds, 1 Barb. Ch. 613.

⁴⁹ Beckman v. Sikes, 10 Pac. 592; Garanflo v. Cooley, 33 Kan. 137; 5 Pac. 766; Smith v. Hague, 25 Kans. 246; Kerr v. Hill, 27 W. Va. 576.

⁵⁰ Sexton v. Breese, 135 N. Y. 387.

⁵¹ Hamilton v. Austin, 36 Hun, 138, 142.

is immediately entitled to his money or the property pledged.⁵² But in such a case a receiver is not entitled to recover for rents collected or emblements removed prior to the date of his appointment, his right being confined to subsequent rents and profits and to rents uncollected or emblements ungathered at the time of his appointment.⁵³ The mortgagor may also be restrained by injunction from removing fixtures, emblements, or the like.⁵⁴

§ 174. **Remedies of mortgagee.**—If the mortgagee is restrained from foreclosing by injunction, at the instance of the owner of the equity of redemption, and the growing crops are in the meantime removed, he is entitled to their value as an element of damage if there be a deficiency;⁵⁵ and while the mortgagor may, if he acts in good faith, cut timber upon the mortgaged premises, whenever he can do so without committing waste, and appropriate the timber thus cut to his own use, even though he be insolvent, he may be restrained by injunction from doing so if it can be shown that the timber is being cut in a fraudulent and unconscientious attempt to strip the mortgaged premises of the timber thereon, with the intention of defrauding the mortgagee out of his security.⁵⁶ And it is said that the mortgagee has a lien on timber fraudulently cut down and removed after the commencement of foreclosure.⁵⁷

§ 175. **Growing crops and timber.**—Although growing crops will ordinarily pass to the purchaser at a foreclosure sale⁵⁸ they will not so pass if they are expressly excepted, on the principle that the mortgaged premises may be sold in separate parcels, and a purchaser can only claim what has been offered and bid upon.⁵⁹

While timber, after it is cut, becomes personal property, a mortgage on real estate for part of the purchase money, which expressly provided that the mortgagee should have a lien upon timber cut on the premises, has been held valid as against a judg-

⁵² *Hollenbeck v. Donnell*, 94 N. Y. 347; *Bank v. Arnold*, 5 Paige, 40.

⁵³ *Hamilton v. Austin*, 36 Hun, 138.

⁵⁴ See Post, §§ 181 to 187.

⁵⁵ *Aldrich v. Reynolds*, 1 Barb. Ch. 613.

⁵⁶ *Ensign v. Colburn*, 11 Paige, 503. See also *Emmons v. Hinderer*, 24 N. J. Eq. 39.

⁵⁷ *Mosher v. Vehue*, 77 Me. 169; *Higgins v. Chamberlain*, 32 N. J. Eq. 566.

⁵⁸ *Sexton v. Breese*, 135 N. Y. 387, citing *Shepard v. Philbrick*, 2 Denio, 174. See § 160.

⁵⁹ *Sherman v. Willett*, 42 N. Y. 146.

ment creditor of the mortgagor who claimed under a debt antecedent to the mortgage.⁶⁰

§ 176. **Nursery trees.**—Emblements may partake of the character of both real and personal property; as where the owner of land and another enter into the business of farming or of rearing young trees. In such a case, the plants, while affixed to the soil, are personal property as between the copartners, but a part of the realty as between the owner and his subsequent mortgagee; and it has been held, contrary, it is thought, to the general principle, that a mortgagee with notice, or a purchaser under the mortgage without notice, takes a lien upon or acquires an interest in the trees, subject to a settlement of the partnership affairs.⁶¹

Where a tenant has a right to crops he may mortgage them as personal property.⁶²

Where a mortgagor planted nursery trees and mortgaged them as chattels, and the mortgage on the land was foreclosed, it was held that the purchaser at the foreclosure sale acquired title to the trees.⁶³

§ 177. **Rights of purchaser at foreclosure sale.**—The mortgagor's lessee is not entitled to crops growing on the premises as against a purchaser at a sale in foreclosure under the mortgage; and the mortgagee becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops.⁶⁴

As between the mortgagor and a purchaser at the foreclosure sale under the mortgage, the manure belongs to the latter. The rules as between landlord and tenant do not apply.⁶⁵ The manure of the cattle on the land is regarded as a fixture, and the same remedies exist against removing it as would apply in case of the removal of a substantial part of the real estate.⁶⁶

WHAT ARE FIXTURES AS BETWEEN MORTGAGOR AND MORTGAGEE.

§ 178. **General rule.**—In determining whether chattels affixed to land or to erections upon land, will pass under a mortgage of the

⁶⁰ Wood v. Lester, 29 Barb. 145.
See also Chiles v. Wallace, 83 Mo. 84.

⁶¹ King v. Wilcomb, 7 Barb. 263.
But see this case criticised in Om-boney v. Jones, 19 N. Y. (5 Smith) 240.

⁶² Smith v. Jencks, 1 Den. 580; 1 N. Y. (1 Comst.) 90.

⁶³ Adams v. Boadle, 47 Iowa, 439; 29 Am. R. 487.

⁶⁴ Lane v. King, 8 Wend. 584; 24 Am. Dec. 105.

⁶⁵ Chase v. Wingate, 68 Me. 204; 28 Am. R. 36.

⁶⁶ Vehue v. Mosher, 76 Me. 469; 31 Alb. L. J. 103.

realty, the same rules will apply which control when similar questions arise between grantor and grantee, and whatever will pass by a conveyance will also be bound by a mortgage.⁶⁷ As in the case of a grant, the greatest rigor is exercised in favor of considering the property as realty, and as against treating it as personalty, and the less stringent rules which prevail as between landlord and tenant do not apply.⁶⁸

§ 179. **Time of annexation.**—It is immaterial as to whether the chattels are affixed to the land before or after the execution of the mortgage, and as a general rule they become bound by the mortgage whenever they become a part of the realty.⁶⁹ This rule is subject to some exceptions, and a mortgage on real estate will not always bind chattels which do not belong to the mortgagor or which have previously been mortgaged as chattels;⁷⁰ neither will it bind personal property which has been annexed subsequent to the mortgage, if equities in favor of third persons require that it shall continue to be personal.⁷¹

A house or other addition or improvement of a permanent character erected by the owner of the equity of redemption without any agreement with the mortgagor, becomes part of the realty and passes with it to a purchaser under the foreclosure of the mortgage.⁷² It is also decided that a building will pass to the pur-

67 *McFadden v. Allen*, 134 N. Y. 489; 32 N. E. 21; *Voorhees v. McGinnis*, 48 N. Y. 278; *Snedeker v. Warring*, 12 N. Y. (2 Kern.) 170; *Bishop v. Bishop*, 11 N. Y. (1 Kern.) 123; *Pfluger v. Carmichael*, 54 App. Div. 153; 66 N. Y. Supp. 417; *Miller v. Plumb*, 6 Cow. 665; *Robinson v. Preswick*, 3 Edw. 246; *Main v. Schwarzwaelder*, 4 E. D. Smith, 273; *Babcock v. Utter*, 32 How. Pr. 439; 1 Abb. App. Dec. 27; *Clove v. Lambert*, 78 Ky. 224; *Union Bank v. Emerson*, 15 Mass. 159.

68 *Snedeker v. Warring*, 12 N. Y. (2 Kern.) 170; *Day v. Perkins*, 2 Sand. Ch. 359. See also *Maples v. Millon*, 31 Conn. 598; *Climie v. Wood*, L. R. 3 Exch. 257; 2 Kent's Comm. 343 *et seq.*

69 *Gates v. De La Mare*, 142 N. Y. 307; 37 N. E. 121; *McFadden v. Allen*, 134 N. Y. 489; 32 N. E. 21;

Raht v. Altrel, 106 N. Y. 423; 13 N. E. 282; *Snedeker v. Warring*, 12 N. Y. (2 Kern.) 170; *Gardner v. Finley*, 19 Barb. 317; *Rice v. Dewey*, 54 Barb. 455; *Sullivan v. Toole*, 26 Hun, 203. See also *Phinney v. Day*, 76 Me. 83; *Corliss v. Van Sagin*, 29 Me. 115; *Butler v. Page*, 48 Mass. (7 Metc.) 40; *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Metc.) 306; *Pierce v. Goddard*, 39 Mass. (22 Pick.) 359; *Curry v. Schmidt*, 54 Mo. 515; *Powers v. Dennison*, 30 Vt. 752; *Preston v. Briggs*, 16 Vt. 124.

70 *Sheldon v. Edwards*, 35 N. Y. 279; *Ford v. Cobb*, 20 N. Y. 344; *Astor Mortgage Co. v. Milton Construction Co.*, 151 App. Div. 557.

71 *Tift v. Horton*, 53 N. Y. 377.

72 *Matzon v. Griffin*, 78 Ill. 477; *Wood v. Whelen*, 93 Ill. 153; *Baird v. Jackson*, 98 Ill. 78.

chaser of premises under a contract of sale by which the owner reserved the right to remove the building before the date of closing title, it appearing that the building was not in fact removed before such date, though it was sold by the owner to a third party, and possession of both the land and building was given to the purchaser of the realty.⁷³ So, as between mortgagor and mortgagee, a frame building resting on wooden blocks laid on the ground, designed as an office in connection with a mill, but detached therefrom and intended by the mortgagor to be removed, is subject to the lien of the mortgage, although erected after the mortgage was executed, and its removal will be restrained by injunction.⁷⁴ The same rule was held to apply to a frame building erected on the mortgaged premises by the mortgagor's husband.⁷⁵

One who buys mortgaged premises without actual knowledge of the mortgage, the mortgage being recorded, and puts betterments thereon, subjects them to the lien of the mortgage, and can have no compensation for them except from the surplus after the payment of the mortgage.⁷⁶

§ 180. *Tests.*—There are several tests in the form of general principles that will aid in the determination of questions as to what are fixtures:

1. The rule is quite uniform that to give to articles, personal in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule in those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character, such as mill-stones, fences, statuary, and the like.

2. A second test, but not so certain in its character, is that of adaptability to the use of the freehold.

3. A third test is that of the intention of the parties at the time of making the annexation.⁷⁷

These are tests, and valuable ones, but they cannot always be relied upon, and it would be difficult to frame any statement of principle, however elaborate, which would reconcile all of the

⁷³ *Brown v. Fox*, 12 Misc. R. 147; 33 N. Y. Supp. 57.

⁷⁴ *State Savings Bank v. Kicheval*, 65 Mo. 682; 27 Am. R. 310.

⁷⁵ *Wright v. Gray*, 73 Me. 297.

⁷⁶ *Wharton v. Moore*, 84 N. C. 479; 37 Am. R. 627.

⁷⁷ *Per HUNT, C.*, in *Voorhees v. McGinnis*, 48 N. Y. 278, 282, and cases cited; *Potter v. Cromwell*, 40 N. Y. 287, and cases cited; *McRea v. Cent. Nat. Bank of Troy*, 66 N. Y. 489.

cases. Each case stands upon its own special facts, and the indefiniteness of the law allows an ingenious judge to find reasons for administering in almost any case what the circumstances which surround it lead him to believe to be substantial justice.

§ 181. **The permanent character of the annexation** will always be an important element in determining whether the chattel becomes a part of the realty or not, and it will not be presumed to be the intention of a party to remove an article from a building when such removal could not be effected without injury to it. But this in itself will not be conclusive.

The provisions of section 112 of the Lien Law and section 62 of the Personal Property Law that if a contract of conditional sale of chattels attached to a building be not filed it shall be void as against subsequent bona fide purchasers or encumbrancers of the premises, apply irrespective of whether the attachment is of such nature as to make the chattels part of the freehold. Those statutory provisions are not unconstitutional.⁷⁸

§ 182. **Intention in making annexation.**—In many cases the intention of the annexation is held to be more important than the character of it.⁷⁹ As an illustration of this principle, it may be mentioned that the keys of a house, which are not annexed to it at all, or the doors and blinds, which are affixed to it in such a way as to be capable of easy removal, are, beyond question, parts of the realty, the purposes of their use and the evident intention of the person who affixed them being controlling considerations.⁸⁰ So a sun-dial and a monument, which were not affixed to land except as they were held in their places by their own weight on the pedestals on which they stood, were held to pass under a mortgage of the real estate.⁸¹ The question of intention enters into

⁷⁸ *Central Union Gas Co. v. Browning*, 146 A. D. 783. See *Barwin v. Union Stove Works*, 146 App. Div. 319.

⁷⁹ *Tyson v. Post*, 108 N. Y. 217; 15 N. E. 316; *Richmond v. Freemans National Bank*, 86 App. Div. 152; 83 N. Y. Supp. 632; *Durkee v. Powell*, 75 App. Div. 176; 77 N. Y. Supp. 368; *Condee v. Lee*, 55 App. Div. 401; 67 N. Y. Supp. 157; *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. 276; 46 N. Y. Supp. 329; *Duntz v. Granger Brewing Co.*, 41 Misc. R.

177; 83 N. Y. Supp. 957; *Hirsch v. Graves Elevator Co.*, 24 Misc. R. 472; 53 N. Y. Supp. 664.

⁸⁰ *Geirke v. Schwartz*, 20 Misc. R. 361; 45 N. Y. Supp. 928. See *Durkee v. Powell*, 75 App. Div. 176; 77 N. Y. Supp. 368, holding that roller shades in the windows of a house are personal property and that window and door screens may be made such by an agreement.

⁸¹ *Snedeker v. Warring*, 12 N. Y. (2 Kern.) 170.

and evolves an element in each case and this is to be determined not from the testimony of the mortgagor as to what he intended nor from any undisclosed purpose or intent which he may have had but from his acts and conduct and from all the surrounding facts and circumstances.⁸² If, for example, machinery were put into a building for use with a water-power existing upon the land,⁸³ or if it were attached at the time of the erection of the building,⁸⁴ it would form a part of the realty, and would pass with a mortgage of the land; but if the same machinery were put into a barn, there to be moved by a horse traversing in a circle around a beam, the presumption would be that the intention was to remove it, and that it retained its character of personalty.⁸⁵ While a mortgagor and a mortgagee may agree whether property shall be considered as real or personal so far as it affects their personal interests, they cannot alter the nature of the mortgaged property so as to affect the rights of others and render nugatory statutory provisions relating to the filing of mortgages for the protection of other creditors and persons interested.⁸⁶

§ 183. Examples of what does not pass with the land.—In *Cresson v. Stout* (17 Johns. 116), spinning and carding machines in a mill, fastened to the floor by cleats, nails, and stout wooden pins, were held to be personal property. So in *Vanderpoel v. Van Allen* (10 Barb. 157), machinery in a cotton-mill was secured to the building by cleats tacked to the floor to keep them level, and they were held to be fixtures. So in *Murdock v. Gifford* (18 N. Y. 28), looms in a woolen factory, fastened to the floor by screws to keep them steady, were adjudged to retain their character of personalty.

So, also, machines resting upon the floor of a building by means of iron legs fastened to the floor by screws only for the purpose of steadying them when in use, and which, although of great weight, connected with shafting, and adapted for use and necessary in the business carried on in the building, can be removed without injury to the building, so that they may be used elsewhere, are not covered by the mortgage on the land.⁸⁷

⁸² *Cosgrove v. Troescher*, 62 App. D. 123; 70 N. Y. Supp. 764.

⁸³ *Breese v. Bange*, 2 E. D. Smith, 474.

⁸⁴ *Lafin v. Griffiths*, 35 Barb. 58.

⁸⁵ *Farrar v. Chauffetete*, 5 Den. 527, 531.

⁸⁶ *Matter of Munson*, 70 Misc. R. 461; 128 N. Y. Supp. 1106.

⁸⁷ *Hubbell v. East Cambridge*

A Baltimore heater, and an iron frame in the nature of a weathervane fastened to the roof, both remain personal property notwithstanding their use with the land.⁸⁸ So a written agreement, made between the mortgagor and the vendor of a steam-heating plant and hot-water generating plant placed on the mortgaged premises and duly filed in the office of the register of the city of New York, providing that all materials placed in the building should remain the property of the vendor until full payment, has the effect of preserving to the things sold their character as personalty, and the mortgagee has no lien on them.⁸⁹ So, also, do gas fixtures which are simply screwed on to the gas-pipes of a building, and can be detached by unscrewing them; and mirrors which are not set into the walls, but are put up after the completion of the building, being supported by hooks or other supports driven in or attached to the wall, and which can readily be detached from these supports without interfering with or injuring the walls, form no part of the realty, and do not pass under a mortgage of the premises.⁹⁰ So, a shingle machine standing on a box the size of the machine, made of four-inch plank about sixteen inches high, not framed, nor fastened to the floor, except that on one side there was a strip, so that it could not slip; and a planing-machine, not fastened to anything, but held in its place by its own weight, have been held not to pass on the foreclosure of a mortgage on the land.⁹¹ And a portable iron furnace for heating purposes in the cellar of a building, and capable of being detached with its pipes without injury to the building, is not subject to a mortgage on the building.⁹²

An engine and boiler, steam-gauge, water-tank, steam-pump, and shafting, designed permanently to increase the value of a building for occupation as a manufactory, become subject to the lien of a mortgage on the land; but this is not so as to machines not es-

Savings Bank, 132 Mass. 447; *McConnell v. Blood*, 123 Mass. 47; 25 Am. R. 47; *Allen v. Mooney*, 130 Mass. 155; *Winslow v. Merchant's Ins. Co.*, 45 Mass. (4 Met.) 306.

⁸⁸ *Harmony Building Association v. Berger*, 99 Pa. St. 320.

⁸⁹ *Condit v. Goodwin*, 44 Misc. R. 312; 89 N. Y. Supp. 827.

⁹⁰ *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; 37 Am. R. 471,

aff'g 16 Hun, 239; *Condit v. Goodwin*, 44 Misc. R. 312; 89 N. Y. Supp. 827.

⁹¹ *Wells v. Maples*, 15 Hun, 90.

⁹² *Duffus v. Howard Furnace Co.*, 8 App. Div. 567; 40 N. Y. Supp. 925, reversing 15 Misc. R. 169; 37 N. Y. Supp. 169; *Rahway Sav. Inst. v. Irving St. Bap. Church*, 36 N. J. Eq. 61.

sential or especially adapted to the use of the building as a manufactory.⁹³

Machinery in a bedstead manufactory and grist-mill, consisting of a planing-machine, a machine for cutting screws, a turning-lathe, a circular saw and frame, and a boring-machine, which, though spiked to the floor, studs, and parts of the building, could be removed, and were in fact removed without difficulty, or injury to the building or machinery and used in another building, were held to be personal property as between the mortgagor and mortgagee of the land.⁹⁴ Carpets nailed to the floors of the halls and stairways, window shades, gas fixtures, detached ash cans, and gas ranges in apartment houses are personal property. Whether refrigerators, gas logs, window awnings or iron clothes poles upon the roof are personal property depends on the intention of the mortgagor.⁹⁵

§ 184. **Examples of what passes with the land.**—As between mortgagor and mortgagee platform scales fastened to sills laid upon a brick wall set in the ground for weighing stock and grain and intended for permanent use, are part of the realty.⁹⁶ So are boilers, engines, shafts, and steam-pipe used for heating purposes, and attached to the freehold for its permanent improvement.⁹⁷ The same principle includes engines, boilers, etc., used in a flour-mill, and permanently fastened to the building which has its foundation in the ground, and they pass under the foreclosure of a mortgage, which was a lien on the property previous to their annexation to it.⁹⁸ And, in general, when machinery is so attached as to show that it was designed for the permanent benefit of the freehold, it will pass with the land.⁹⁹

A kettle in a fulling-mill used for dyeing cloth, being set in brick-work, passed to the mortgagee of the mill.¹⁰⁰

An iron table weighing thirty-three tons, resting on brick

⁹³ *McConnell v. Blood*, 123 Mass. 47; 25 Am. R. 12; *Winslow v. Merchant's Ins. Co.*, 45 Mass. (4 Metc.) 306.

⁹⁴ *Fullam v. Stearns*, 30 Vt. 443.

⁹⁵ *Cosgrove v. Troescher*, 62 App. Div. 127; 70 N. Y. Supp. 764.

⁹⁶ *Arnold v. Crowder*, 81 Ill. 56; 25 Am. R. 260.

⁹⁷ *Quinby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. 260.

⁹⁸ *Sands v. Pfeiffer*, 10 Cal. 258.

⁹⁹ *Richmond v. Freemans National Bank*, 86 App. Div. 152; 83 N. Y. Supp. 632; *Berliner v. Pigue Club Association*, 32 Misc. R. 470. See also *Bremen v. Whitaker*, 15 Ohio St. 446.

¹⁰⁰ *Union Bank v. Emerson*, 15 Mass. 159.

foundations, and placed in a factory for the manufacture of plate glass, and adapted only for use in such factory, has been held to be bound by a mortgage of the real estate though it could be removed without injury to the realty.¹

Where a mortgagor of a mill, after making the mortgage, put into the mill a shingle-machine and apparatus attached to it, it was held to become a part of the freehold.²

Mirrors set into the walls of a house at the time of its erection, and not merely hung upon hooks, are part of the land,³ as is also plumbing work installed in a building,⁴ and ornamental hand painted canvases firmly cemented to the ceilings of a building.⁵ And hop-poles used in cultivating a farm are subject to the mortgage upon it.⁶ Fixtures and improvements upon a railroad right of way are also subject to the same rule.⁷

RULE AS TO FIXTURES BETWEEN LESSOR AND LESSEE.

§ 185. As between lessor and lessee, the rule as to what are fixtures is more favorable to the tenant than is the rule between grantor and grantee, or mortgagor and mortgagee. And where a tenant of a mortgagor affixes machinery or other fixtures to the mortgaged property for a temporary purpose incident to his tenancy, he may remove them, though, as between mortgagor and mortgagee, the mortgage lien would attach to them.⁸ Where a lease provides that all alterations which may be made by either of the parties, except movable fixtures shall be the property of the lessor, the lessee gives up his legal right of removal of trade fixtures except such as can be taken out without detriment to the walls, floors or ceilings of the building.⁹

§ 186. Structures erected by a lessee on the leased property, in such a way as to be capable of removal, do not come within a sub-

¹ Smith Paper Co. v. Servin, 130 Mass. 51.

² Corlies v. McLagin, 29 Me. 115.

³ Ward v. Kilpatrick, 85 N. Y. 413; compare McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; 37 Am. R. 471.

⁴ McMillian v. Leaman, 101 App. Div. 436; 91 N. Y. Supp. 1055.

⁵ Cohn v. Hewsey, 8 Misc. R. 384; 29 N. Y. Supp. 1107.

⁶ Sullivan v. Toole, 26 Hun, 203.

⁷ Philadelphia R. & N. E. R. R. Co. v. Bowman, 23 App. Div. 170; 48 N. Y. Supp. 901.

⁸ Globe Marble Mills v. Quinn, 76 N. Y. 23; Robinson v. Pratt, 151 App. Div. 738. See also Kelly v. Austin, 46 Ill. 156.

⁹ Excelsior Brewing Co. v. Smith, 125 App. Div. 668; 110 N. Y. Supp. 8.

sequent mortgage of the premises, although the lessee neglects to remove them during the term and accepts a renewal of the lease from the mortgagor.¹⁰ But when the lessee makes a mortgage of his leasehold interest, his rights as between him and his mortgagee must be tested by the principles which obtain between mortgagors and mortgagees of real estate.¹¹

Where a tenant puts machinery upon the demised premises which were incumbered by a mortgage, and afterward purchased the property subject to such mortgage, and the mortgage was subsequently foreclosed, it was held that the right to remove the machinery was not extinguished by the merger of the lease in the fee, although the machinery was so annexed that, as between vendor and vendee, it would be part of the realty. The estate which the tenant had was merged in the estate in fee. But the ownership of the chattels, which was vested in him before the conveyance of the land, was separate from and independent of the lease, and was not derived from the lessor. The chattels were not a part of the inheritance. This ownership was not merged, because it was not carved out of the fee, and the doctrine of merger did not apply. The machinery did not become a part of the fee in the absence of any evidence of intention on the part of the owner that the character of the property should be changed.¹²

Trade fixtures set up by partners on realty owned in undivided interests by the individuals who composed the partnership, the firm having only the use of it, though fastened by screws and bolts, were held not to be covered by a mortgage on the land as against a creditor of the firm claiming under a bill of sale for a partnership debt. It was said by COOLEY, J.: "No doubt had the real estate been partnership property, fixtures attached by the partners might have become part of it."¹³

A mortgagee cannot hold as a fixture an embossing-press owned and put into a building by a lessee of the mortgagor.¹⁴ In this

¹⁰ Kerr v. Kingsbury, 39 Mich. 150; 33 Am. R. 362.

¹¹ Day v. Perkins, 2 Sand. Ch. 359; Shuart v. Taylor, 7 How. Pr. 251; Walker v. Sherman, 20 Wend. 636. See also Merritt v. Judd, 14 Cal. 59.

¹² Globe Marble Mills Co. v. Quinn, 76 N. Y. 23. See *contra*,

Jones v. Detroit Car Co., 38 Mich. 92; 31 Am. R. 314; Preston v. Briggs, 16 Vt. 124; Frankland v. Moulton, 5 Wis. 16; Cullinick v. Swindell, 3 L. R. 249.

¹³ Robertson v. Corsett, 39 Mich. 777.

¹⁴ Pope v. Jackson, 65 Me. 162.

case the press weighed about 5,000 pounds, and had no other substantial attachment to the realty than its weight.¹⁵

Where a tenant adds fixtures to mortgaged real estate, and mortgages them as chattels, and afterwards surrenders the term, this does not effect such a merger as will defeat the claims of the owner of the chattel mortgage.¹⁶

A tenant at will of the mortgagor who adds fixtures to the mortgaged property acquires no right to remove them that would not belong to the mortgagor, and the rules as to fixtures which prevail between mortgagor and mortgagee have application.¹⁷

CONFLICTING CLAIMS TO CHATTELS AFFIXED TO MORTGAGED REALTY.

§ 187. **As against chattel mortgage.**—If, after the chattels are affixed to the land, a mortgage of the real estate is executed, and subsequently the chattels are mortgaged as personal property, the question as between the mortgagee of the land and the mortgagee of the chattels will be as to whether, when the chattel mortgage was executed, the property covered by it was real or personal estate.¹⁸

But if the chattel mortgage were executed before the mortgage on the land, the mortgagee of the land having notice of the prior incumbrance, the act of the parties in treating the property as personal would, as between them, make it so.¹⁹ So a mortgage of growing trees would create a valid lien upon them, and upon forfeiture of the condition of the mortgage, they would, in law, be severed from the land.²⁰ So, too, where a mortgage of real estate was executed subsequently to the making of an agreement by which a third person became a partner with the mortgagor in the business of nurserymen, it was held that such third person might enforce the partnership right to nurse the trees and shrubs planted until fit for market, as against a pur-

¹⁵ Pope v. Jackson, 65 Me. 162.

¹⁶ London & Westminster Loan & Discount Co. v. Drake, 6 Com. B. N. S. 798.

¹⁷ Clary v. Owen, Gray (Mass.) 522; Hunt v. Bay State Co., 97 Mass. 279.

¹⁸ Kribbs v. Alford, 120 N. Y. 519; 24 N. E. 811; Excelsior Brewing Co. v. Smith, 125 App. Div. 668;

110 N. Y. Supp. 8; Massachusetts Nat. Bank v. Shinn, 18 App. Div. 276; 46 N. Y. Supp. 329; Vanderpoel v. Van Allen, 10 Barb. 157.

¹⁹ Griffin v. Allen, not reported, but cited in Clinton's Digest; Voorhees v. McGinnis, 46 Barb. 242.

²⁰ Bank of Lansingburgh v. Crary, 1 Barb. 542.

chaser with notice under the foreclosure of the mortgage.²¹ And the priority of the lien of a chattel mortgage upon a frame building subsequently removed by the mortgagor to and upon other lands, is not defeated or affected by a subsequent mortgage upon such other lands given by the same mortgagor to a mortgagee having full knowledge of the prior chattel mortgage.²²

§ 188. If chattels affixed to land become bound by a mortgage of the real estate, they cannot be removed except by consent of the mortgagee, who may restrain their removal or destruction by injunction, even as against the owner of the equity of redemption, if such removal will render his security inadequate or precarious.²³ The mortgagee may also maintain an action against a wrongdoer who removes such fixtures, and that either before or after foreclosure, and whether he is in possession or not.²⁴

But the question whether a subsequent mortgagee of a building and its improvements, including two elevators, has title to the elevators, as fixtures, as against a corporation which installed them under a written contract with the mortgagors and owner of the building that it should retain the title to the elevators until he had fully paid for them, will not be decided upon a motion by the mortgagee for an injunction restraining the corporation from its threatened removal of the elevators.²⁵ The lien of a mortgage covers all that was realty when the mortgage was accepted as security, and all accessions to the realty except where by a valid agreement to which the mortgagee is a party, the character is impressed upon the accessions.²⁶ But one who has affixed chattels to real estate and who has made a party defendant in an action to foreclose a mortgage upon the premises must, if he intends to assert title to the fixtures, do so in such action, and is estopped by a default therein from making such a claim against the purchaser on the foreclosure sale or his grantee.²⁷

²¹ King v. Wilcomb, 7 Barb. 263. But see Thomas v. Vinton, 121 Mass. 139.

²² Simons v. Pierce, 16 Ohio St. 215.

²³ Robinson v. Preswick, 3 Edw. 246.

²⁴ Laflin v. Griffiths, 35 Barb. 58;

Van Pelt v. McGraw, 4 N. Y. (4 Comst.) 110.

²⁵ Hirsch v. Graves Elevator Co., 24 Misc. R. 472; 53 N. Y. Supp. 664.

²⁶ Mechanics' & Traders' Bank v. Bergen Heights Realty Corp., 137 App. Div. 45; 122 N. Y. Supp. 33.

²⁷ McFadden v. Allen, 134 N. Y. 489.

§ 189. A curious question was presented in *Kelsey v. Lyon* (97 N. Y. 629), which was an action for the conversion of certain machinery in a planing-mill. Plaintiff claimed title under a chattel mortgage from one Matthias. Matthias had a mortgage upon the premises upon which the planing-mill was located. The mortgagors executed to him a bill of sale of the personal property in the mill, not including the machinery in question, which they considered as part of the realty, and put him in possession of the real estate. He subsequently foreclosed his mortgage, and bid in the property. Thereafter he executed the chattel mortgage. The real estate was afterward sold upon foreclosure of a prior mortgage held by defendant, who became the purchaser, and entered into possession. FINCH, J., said: "The plaintiff's title to the machinery was derived from the chattel mortgage of Matthias, and is dependent upon it. If that machinery was so annexed to the realty as to become parcel of it, Matthias acquired title by the foreclosure of his real estate mortgage, but subject, nevertheless, to the prior mortgage, the foreclosure of which cut off and destroyed his lien and resulting title. The appellant avoids this difficulty only to encounter another. He argues that the machinery was personal property, but if so, Matthias got no title by foreclosure of his real estate mortgage and never acquired in any other way."

§ 190. The intention of the owner in affixing chattels to the freehold is frequently held to be controlling. Thus, where a combined boiler and engine of six-horse power, standing on wheels six inches in diameter, the wheels resting on the ground and not in any way annexed to the building, was placed in a tub manufactory, and a prior mortgagee of the land claimed a lien upon the boiler and engine, and a subsequent holder of a chattel mortgage also claimed such lien, it was held to be erroneous to direct a jury to find that the chattel mortgagee was entitled to them. It was said by the General Term of the Fifth Department that the court should have submitted the question to the jury as to whether it was the intention of the owner of the property to permanently attach and use the boiler and engine with the premises, and that, if he did so, they became fixtures, and subject to the lien of the mortgage upon the real estate. The method of attaching them, whether by their mere weight or by screws or nails or masonry,

was to be regarded as material only as evidence bearing on the question of intention.²⁸

Where a chattel mortgage for the purchase money of a steam boiler was taken, and the boiler was afterward attached to the freehold, it was held that the chattel mortgage itself could be resorted to as evidence of the intention of the parties to have it remain personal property.²⁹

Boilers and engines, not attached to the realty, although in a shed which would have to be removed in order to take away the former, and machines fastened to the floor by cleats, screws, and nails, and connected by the belting to the shafting, are personal property as between a mortgagee of the land and a mortgagee of the machinery. "The latter decisions establish that machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil."³⁰

§ 191. **Character of annexation.**—The distinction between cases where the chattels may continue to be personal property after being affixed to the land and where they may not, seems frequently to rest upon their essential character, and whether they can be removed without serious damage to the freehold, or substantially destroying their own quality and value.³¹ If they can be so removed, they will continue personal if the rights of third persons so require, even though as between the mortgagor

²⁸ *Hart v. Sheldon*, 34 Hun, 38. Citing *Tift v. Horton*, 53 N. Y. 377; *Voorhees v. McGinnis*, 48 N. Y. 278; *Potter v. Cromwell*, 40 N. Y. 287; *Winslow v. Merchant's Ins. Co.*, 4 Met. 306; *Sands v. Pfeiffer*, 10 Cal. 258; *Hill v. Wentworth*, 28 Vt. 428; *Harris v. Haynes*, 34 Vt. 220; *Sweitzer v. Jones*, 35 Vt. 317; *Fullam v. Stearns*, 30 Vt. 443; *Voorhis v. Freeman*, 2 Watts & Sergt. (Pa.) 116; *Pyle v. Pennock*, 2 Watts & S. (Pa.) 390.

As to intent see § 182.

²⁹ *Kinsey v. Bailey*, 9 Hun, 452; *Sisson v. Hibbard*, 75 N. Y. 542, aff'g 10 Hun, 420. See also *Tibbetts v.*

Moore, 23 Cal. 208; *Eaves v. Estes*, 10 Kan. 314, Pac.; *Davenport v. Shanks*, 43 Vt. 546.

³⁰ *Carpenter v. Walker*, 140 Mass. 416; 33 Alb. L. J. 318; *McConnell v. Blood*, 123 Mass. 47; *Hubbell v. East Cambridge Sav. Bank*, 132 (Mass.) 447; *Maguire v. Park*, 140 Mass. 21; 1 N. E. 750.

³¹ *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377; 13 Am. R. 537; *Sisson v. Hibbard*, 75 N. Y. 542, aff'g 10 Hun, 420; *Richmond v. Freemans National Bank*, 86 App. Div. 152; 83 N. Y. Supp. 632; *Duntz v. Granger Brewing Co.*, 41 Misc. R. 177; 83 N. Y. Supp. 957.

and mortgagee they would pass with the land; but if they cannot be removed without substantial injury to the real estate or to themselves, they cease to be personal, and become real estate, liable to the burdens which rest upon the land and subject to be transferred with it. If the rights of third persons are invaded by this change of the character of the property, they must seek their remedy against those who wrongfully converted the personal into real property.³²

§ 192. *Examples.*—Where a chattel mortgage was executed on fixtures prepared to be attached to a building, as essential parts of it, and which were thereafter so attached, the lien of the chattel mortgage was held to be subordinate to a mortgage afterward given on the land.³³ But where an engine was built for a mill, and before it left the owner's shop a mortgage was taken on it with a stipulation that it might be removed at any time, it was held that the engine continued to be personal property as against a previous mortgage of the land.³⁴ In a similar case where the mortgage on the real estate was executed after the machinery was affixed to the real estate, the mortgagee of the land having no notice of the chattel mortgage, it was held that the machinery was bound by the mortgage of the land.³⁵ And where a boiler was sold under an agreement that the title to it should remain in the vendor until payment, and it was then placed by the vendee in a machine-shop and so annexed to the realty as to become part of it, it was held that the lien of a subsequent mortgage of the real estate attached to it.³⁶

Machinery so attached to the mortgaged premises as to become part of it, becomes subject to a mortgage thereon even against a partner of the mortgagor who paid half of the cost under an agreement with the mortgagee that it should be treated as personalty.³⁷

32 Voorhees v. McGinnis, 48 N. Y. 278; Fryatt v. The Sullivan Co., 5 Hill, 116. See also Pierce v. Goddard, 22 Pick. (Mass.) 559.

33 Voorhees v. McGinnis, 48 N. Y. 278. See also Frankland v. Moulton, 5 Wis. 1; Pierce v. George, 108 Mass. 78; 11 Am. R. 310; Trull v. Fuller, 28 Me. 545.

34 Eaves v. Estes, 10 Kans. 314; 15 Am. R. 345; Tift v. Horton, 53

N. Y. 377; 13 Am. R. 537; Crippen v. Morrison, 13 Mich. 23.

35 Bremen v. Whitaker, 15 Ohio St. 446; Pierce v. George, 108 Mass. 78.

36 Southbridge Savings Bank v. Exeter Machine Works, 127 Mass. 542; Davenport v. Shauts, 43 Vt. 546. But see Sowden v. Craig, 26 Iowa, 156.

37 Thomas v. Vinton, 121 Mass. 139.

If one erect a building for his own use upon the land of another by virtue of a parol license from the owner with privilege of removal, the lien of a subsequent mortgagee of the land will attach to it.³⁸ And the lien of a prior mortgagee will also attach to it.³⁹

In a case where machinery was attached to a building in such a way as to show that it was designed to be permanent, and such annexation was made by the owner with the consent of the owner of a chattel mortgage thereon, such chattel mortgage, though duly filed and recorded, was held to be inoperative as against a subsequent *bona fide* mortgagee of the real estate.⁴⁰

Where a person, being in possession of machinery belonging to another, affixed it to and used it in connection with his saw-mill, which had previously been mortgaged, in a way so that it was capable of being removed without material injury to the building, and the owner of the machinery having no actual knowledge of the mortgage, and not consenting to the annexation any further than his assent could be inferred from the nature of the property and the use for which it was designed, it was held that the lien of the mortgage on the land did not extend to the machinery.⁴¹

Where the owner of a sash and blind factory purchased and placed in it a moulding-machine and a planing-machine to be used therein, which rested on the main floor of the building, one of which was bolted to the floor for greater firmness in use, and the other of which was of sufficient weight to be steady without fastenings, and executed a mortgage on the real estate and afterward executed a chattel mortgage upon the machines, it was held that the machines were not subject to the mortgage of the real estate, but passed under the chattel mortgage.⁴²

INJUNCTION TO RESTRAIN WASTE.

§ 193. When injunction allowed.—The owner of the equity of redemption is entitled to the possession and enjoyment of the mortgaged property, even after the condition is said to be forfeited at law, but good faith will require him not to use the

38 Powers v. Dennison, 30 Vt. 752.

39 Preston v. Briggs, 16 Vt. 124.

40 Bremen v. Whitaker, 15 Ohio St. 446.

41 Cochran v. Flint, 57 N. H. 514.

42 Blancke v. Rogers, 26 N. J. Eq. 563. See Wells v. Maples, 15 Hun, 90.

estate in such a way as to injure the security of the mortgagee. Where the security is ample he will ordinarily be allowed to enjoy the property in his own way,⁴³ but if it be scanty or doubtful, an injunction may be obtained by the mortgagee to restrain him from committing waste.⁴⁴ And even where the right to cut timber is specially reserved to the mortgagor by the terms of the mortgage, he will be restrained if his conduct shows that he is exercising such right in bad faith.⁴⁵

§ 194. Provision of the Code.—It is provided by the Code of Civil Procedure in the title affecting actions relating to real property, that “if, during the pendency of an action specified in this title, the defendant commits waste upon, or does any other damage to, the property in controversy, the court, or judge thereof, may, upon the application of the plaintiff, and due proof of the facts by affidavit, grant, without notice or security, an order, restraining him from the commission of any further waste upon or damage to the property. Disobedience to such an order may be punished as a contempt of the court. This section does not affect the plaintiff’s right to a permanent or a temporary injunction in such an action.”⁴⁶

§ 195. Who may apply for injunction.—Where a mortgagee is in possession, he may be stayed by injunction from committing any act which would injure the estate of the mortgagor.⁴⁷ So, too, where a mortgage is a lien on two parcels of land, or where a person not in possession is a surety for the mortgage debt, an injunction may be procured by any person interested in the preservation of the security afforded by the estate primarily liable for the debt, which will restrain the person in possession of that estate from diminishing its value.⁴⁸ This latter proposition may, perhaps, be received with some caution, for Chancellor KENT, in

⁴³ Story’s Eq. Jur. § 915; King v. Smith, 2 Hare, 239; Ingell v. Fay, 112 Mass. 451.

⁴⁴ Brady v. Waldron, 2 Johns. Ch. 143; Selden v. Mann, 2 N. Y. Leg. Obs. 328; Ensign v. Colburn, 11 Paige, 503; Robinson v. Preswick, 3 Edw. 246; Brown v. Keeney Settlement Cheese Association, 59 N. Y. 242; Vandermark v. Schoonmaker, 9 Hun, 16. See also Door v. Dudderar, 88 Ill. 107; Nelson v. Pinegar, 30

Ill. 473; Vanderslice v. Knapp, 20 Kans. 647.

⁴⁵ Ensign v. Colburn, 11 Paige, 503. See also Ingell v. Fay, 112 Mass. 451; Penn. Mut. Life Ins. Co. v. Semple, 38 N. J. Eq. 314; Emmons v. Hinderer, 24 N. J. Eq. 39.

⁴⁶ Code of Civ. Pro. § 1681.

⁴⁷ Brady v. Waldron, 2 Johns. Ch. 148.

⁴⁸ Johnson v. White, 11 Barb. 194.

Brumley v. Fanning (1 Johns. Ch. 501), stated it to be the rule that a mortgagor who has sold his equity of redemption without taking any indemnity against his bond, cannot have an injunction against his vendee to stay waste on the ground that he will be answerable for what the land may fail to satisfy of the mortgage debt.

The committing of waste may be restrained at the suit of any person having an interest to protect, including a surety for the mortgage debt, or one whose property is secondarily liable for its payment.⁴⁹

After a sale pursuant to a judgment of foreclosure, but before the delivery of the deed thereunder, the court may, upon application of the purchaser, restrain the mortgagor who remains in possession from removing machinery claimed by the purchaser to constitute a part of the realty. But the court should not in granting such injunction insert phrases in the order which might be construed to impose a perpetual restraint upon the mortgagor from asserting a right to the possession and ownership of such machinery. The order should be without prejudice to the right of either party to bring an action to determine the question whether the machinery did or did not pass by the referee's deed.⁵⁰

§ 196. Inadequacy of security.—The mortgagee of land on which a house is standing is not entitled to an injunction against the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot without the house would be inadequate for the mortgage debt.⁵¹

§ 197. Insolvency of mortgagor.—The right to restrain the impairing of the security may exist though the mortgagor be solvent, since the creditor bargained for both the obligation of the debtor and the security of the land,⁵² but the insolvency of the mortgagor must be established where the use of the property which is sought to be enjoined is one which is usual and customary, and

⁴⁹ *Johnson v. White*, 11 Barb. 194. See also *Knarr v. Conaway*, 42 Ind. 260.

⁵⁰ *Mutual Life Ins. Co. v. Bigler*, 79 N. Y. 568, modifying s. c. *sub nom.* *Mutual Life Ins. Co. v. Nat. Bank of Newburgh*, 18 Hun, 371.

⁵¹ *Van Wyck v. Alliger*, 6 Barb. 507, 511; *Buckout v. Swift*, 27 Cal. 434; *Hill v. Gwin*, 51 Cal. 47.

⁵² *Eden on Inj.* 119; *Triplett v. Parmlee*, 16 Neb. 649; *Fairbank v. Cudworth*, 33 Wis. 358.

only becomes improper because of the danger caused thereby to the rights of the mortgagee.⁵³

§ 198. **Limitations of injunction.**—The remedy by injunction is only intended to restrain the committing of future waste. If property has wrongfully been detached from the freehold, and has thereby been converted from real to personal property, it will be relieved from the lien of the mortgage,⁵⁴ and, whatever may be the remedy of the mortgagee for the wrongful severance, a court of equity will not enjoin against its removal at the instance of the mortgagee. The mortgagee had no right to its custody even while it was annexed to the land, and no good reason could be given for keeping it on the real estate after it had been separated from it, except that such a course might perhaps be a convenience to the mortgagee when he came to enforce his judgment for deficiency.⁵⁵

Neither will the mortgagor be compelled to rebuild or repair buildings on the mortgaged premises which, without his fault, as by the action of fire or of storms, have been destroyed or become ruinous. It is the duty of the mortgagee, if he wishes to provide against such contingencies, to do so in his contract or by insurance.⁵⁶

§ 199. **General principle.**—The jurisdiction of courts of equity to interfere by way of injunction, in cases of waste, may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject matter.⁵⁷

ACTION FOR DAMAGES CAUSED BY WASTE.

§ 200. **Remedy of mortgagee against persons who have committed waste.**—Where waste is committed by the mortgagor, or by his

⁵³ Robinson v. Russell, 24 Cal. 467.

⁵⁴ Wilson v. Maltby, 59 N. Y. 126.

⁵⁵ Johnson v. White, 11 Barb. 194; Spear v. Cutter, 5 Barb. 486; Watson

v. Hunter, 5 Johns. Ch. 169; Selden v. Mann, 2 N. Y. Leg. Obs. 328.

⁵⁶ Campbell v. Macomb, 4 Johns. Ch. 534.

⁵⁷ Story's Eq. Jur. § 919.

grantee, or by any other person on the mortgaged premises, by removal of fixtures upon which the mortgage has attached as a lien, or otherwise, and the value of the security is reduced so that the mortgagee will not be able to obtain complete satisfaction for his debt; and the person committing such waste having knowledge of the existence of the mortgage, and that the value of the security will be injured by his wrongful acts, and the waste being committed either for a fraudulent purpose to cheat the mortgagee, or for the purpose of making a gain at the expense and to the injury of the mortgagee; in such the mortgagee may have an action for damages against the person committing such waste, in the nature of an action on the case at common law.⁵⁸

Such an action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be, and it will therefore be of no consequence whether the injury occurred before or after forfeiture.⁵⁹

A complaint which in substance alleges that after the execution or delivery of a mortgage the defendant, a third person, knowing that the mortgage was unpaid, entered upon the lands and committed waste, with an intention to diminish the security and that the plaintiff cannot collect a deficiency judgment from the mortgagors, who were insolvent to the knowledge of the defendant, states a cause of action.⁶⁰ It seems, however, that in an action to recover for injury done to the mortgaged premises, it is not incumbent upon the plaintiff to allege the insolvency of the mort-

⁵⁸ *Wilson v. Maltby*, 59 N. Y. 126; *Van Pelt v. McGraw*, 4 N. Y. (4 Comst.) 110; *Morgan v. Waters*, 122 App. Div. 340; 106 N. Y. Supp. 882; *O'Dougherty v. Felt*, 65 Barb. 221; *Lafin v. Griffiths*, 35 Barb. 58; *Southworth v. Van Pelt*, 3 Barb. 347; *Gardner v. Heartt*, 3 Den. 232; *Lane v. Hitchcock*, 14 Johns. 213; *Yates v. Joyce*, 11 John. 156. See also *Hutchins v. King*, 1 Wall. 53. L. Ed.; *Smith v. Rice*, 56 Ala. 417; *James*

v. Worchester, 141 Mass. 361; *Allison v. McCune*, 15 Ohio St. 726; 45 Am. Dec. 605; *Atkinson v. Hewett*, 63 Wis. 396; N. W.

⁵⁹ *Van Pelt v. McGraw*, 4 N. Y. (4 Comst.) 110, 112. See *Peterson v. Clark*, 15 Johns. 205, where it was held that a mortgagee could not maintain trover for trees cut by the mortgagor before forfeiture.

⁶⁰ *Morgan v. Waters*, 122 App. Div. 340; 106 N. Y. Supp. 882.

gagor, the foundation of the action being the impairment of the security of the mortgage with knowledge of the lien.⁶¹

§ 201. **Intent to injure security.**—This action is not maintainable upon the ground of mere negligence, but it must be shown that the defendant intended to injure the plaintiff's security.⁶² It is not necessary that the primary object of the defendant was to injure the plaintiff; if he knew that such would be the consequence of his acts, and if he still did them for his own unlawful gain, he will be liable.⁶³

A mortgagee cannot recover against a purchaser of a house on mortgaged land who removes it, where the latter had no knowledge of the insolvency of the mortgagor, and there is no proof that the purchaser acted fraudulently.⁶⁴ Neither can a mortgagee enforce his lien against buildings which have been removed from the mortgaged land, or have become parts of another freehold.⁶⁵

In analogy to the right of action which the mortgagee has against a person who wilfully injures the security, he might probably also have a right of action against a sheriff who should intentionally omit to satisfy a judgment out of the chattels of the mortgagor, in consequence of which the judgment became a charge upon the real estate prior to the mortgage; but no action of this kind would lie against a sheriff for mere negligence, unless the act were done fraudulently and with intent to diminish the security of the mortgage creditor.⁶⁶

§ 202. **Measure of damages.**—Previous to the enactment of the Code the remedy of the mortgagee against parties who had injured the security was confined to the amount of damage which the mortgagee had suffered, however great the damage to the land might be, and he could succeed without alleging and proving that the remainder of the mortgage security and the personal responsibility of the mortgagor was insufficient to afford him complete indemnity.⁶⁷

⁶¹ *Ogden Lumber Co. v. Busse*, 92 App. Div. 143; 86 N. Y. Supp. 1098.

⁶² *Gardner v. Heartt*, 3 Den. 232; *Bank of Rome v. Mott*, 17 Wend. 554.

⁶³ *Van Pelt v. McGraw*, 4 N. Y. (4 Comst.) 110; *Wilson v. Maltby*, 59 N. Y. 126.

⁶⁴ *Tomlinson v. Thomson*, 27 Kans. 70, Pac.

⁶⁵ *Harris v. Barmore*, 78 Ky. 568;

Pierce v. Goddard, 22 Pick. 559; 33 Am. Dec. 764.

⁶⁶ *Bank of Rome v. Mott*, 17 Wend. 554.

⁶⁷ *Lane v. Hitchcock*, 14 Johns. 213; *Gardner v. Heartt*, 3 Den. 232; *Levy v. The Mayor, etc., of N. Y.*, 3 Robt. 194; *Southworth v. Van Pelt*, 3 Barb. 347.

In the case of *Ogden Lumber Co. v. Busse*, more recently decided,⁶⁸ the complaint contained no allegation of the insolvency of the mortgagor, but alleged that the value of the plaintiff's security was diminished by the acts of the defendant. At the trial of the action the plaintiff was permitted to introduce evidence tending to show the insolvency of the mortgagor. It was held that this was not error, for the action rests upon the impairment of the security and the admission of the evidence could do no possible harm. The Court said "a mortgagor, in taking the security of a mortgage for the payment of a bond, is looking to the security which he obtains by the mortgage, and not necessarily to the responsibility of the maker of the bond. Any other rule would be compelling a mortgagee to rely upon a personal obligation, when he supposed he was obtaining the security of real estate for the loan of his money."

§ 203. *Miscellaneous examples.*—Where a second mortgagee, being in possession of the mortgaged property, known to him to be an inadequate security and the mortgagor being known to be insolvent, cut timber from the land, thereby lessening its value, the holder of the first mortgage seized such timber and converted it to his own use, and on being sued for such conversion was held entitled to allege the foregoing facts as a valid counter-claim.⁶⁹

In a case where, with intent to injure the mortgagee's security, the owner of a chattel mortgage on certain hop-poles, who had parted with no new consideration on receiving such chattel mortgage, removed them from the land, the mortgagee of the land was held justified in selling the poles under a judgment for deficiency obtained on a foreclosure of his mortgage. It was said that an action of trover could have been sustained, and that the rule in this State, which considers a mortgage of real estate as creating a lien rather than vesting a title, does not change this question.⁷⁰ It may be remarked that if trover could be sustained, so also could replevin, and it has been held in Rhode Island that a mortgagee may maintain replevin against a mortgagor in possession for wood and timber cut upon the mortgaged estate in

⁶⁸ 92 App. Div. 143; 86 N. Y. Supp. 1098.

⁶⁹ *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, aff'd 22 Hun, 49.

⁷⁰ *Sullivan v. Toole*, 26 Hun, 203, citing *Watson v. Hunter*, 5 Johns. Ch. 169. See also *Holland v. Hodgson*, L. R. 7 C. P. 328.

waste of the same and in substantial diminution of the security.⁷¹ Under the theory of mortgages which prevails in this State and pursuant to which a mortgage is not a title, but a lien, and that without any right to possession, it may be doubted, notwithstanding the case of the hop-poles already cited, as to whether any action in the nature either of trover or replevin would lie by the mortgagee, his remedy being an action for damages in the nature of an action on the case.⁷²

It has been held that timber, posts, rails, and cord-wood made from trees on the mortgaged premises fraudulently cut down by the mortgagor after the commencement of the foreclosure and removed to neighboring lands, may be sold to make up any deficiency in the mortgage debt after the sale of the land.⁷³ And when, after a decree of foreclosure against an insolvent corporation, it quarried stone on the premises, which stone still remained on the ground, it was held that as between the mortgagor and mortgagee such stone was subject to the mortgage.⁷⁴

After the foreclosure of a senior mortgage and a sale thereunder, it is unnecessary for a junior mortgagee to foreclose and sell under his mortgage in order to maintain an action against a grantee of the mortgagor for an injury to his mortgage interest.⁷⁵

⁷¹ *Waterman v. Matteson*, 4 R. I. 439.

⁷² *Peterson v. Clark*, 15 Johns. 205; *Wilson v. Maltby*, 59 N. Y. 126. See also *Hill v. Gwin*, 51 Cal. 47; *Clark v. Reyburn*, 1 Kans. 281; *Kirchner v. Schalk*, 39 N. J. L. 335.

⁷³ *Higgins v. Chamberlin*, 32 N. J. Eq. 566.

⁷⁴ *American Trust Co. v. North Belleville Quarry Co.*, 31 N. J. Eq. 89.

⁷⁵ *Wharton v. Webster*, 56 Wis. 356. N. W.

CHAPTER VI

MORTGAGES FOR FUTURE ADVANCES OR OBLIGATIONS

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| § 204. Validity of mortgages for future advances. | § 211. Priority of mortgages for future advances. |
| 205. Parol evidence. | 212. Where mortgagee is not obligated to make the advances. |
| 206. When no sum is mentioned. | 213. Notice to charge mortgagee. |
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| 208. Construction. | 215. Recording of mortgages for future advances. |
| 209. Agreement for further advances made subsequent to mortgage. | |
| 210. A mortgage is enforceable only for the amount actually advanced. | |

§ 204. Validity of mortgages for future advances.—Mortgages may be given to secure any valid debts or obligations, and they may as well be given to secure future advances or contingent debts as those which already exist and are certain and due. It is not necessary that such a mortgage should express that object on its face, it being sufficient that the extent of the intended lien is clearly defined.¹

The giving of a mortgage to secure future advances by a debtor

¹ Craig v. Tappin, 2 Sandf. Ch. 78, holding, however, that the omission to state the object, renders the mortgage liable to suspicion, and imposes upon the mortgagee stricter proof of the payment of the consideration.

Farr v. Nichols, 132 N. Y. 327; 30 N. E. 834; McPherson v. Rollins, 107 N. Y. 316; 14 N. E. 411, 12 St. R. 488; 27 W. D. 402; Ackerman v. Hunsicker, 85 N. Y. 43; Brown v. Kiefer, 71 N. Y. 610; Robinson v. Williams, 22 N. Y. 383; Truscott v. King, 6 N. Y. 160; Bank of Utica v. Finch, 3 Barb. Ch. 297; Monell v. Smith, 5 Cow. 441; Livingston v. McInlay, 16 Johns. 165; Brinckerhoff v. Marvin, 5 Johns. Ch. 320; Barry v.

Merchants' Exchange Co., 1 Sandf. Ch., 280, 314; Lansing v. Woolworth, 1 Sandf. Ch. 43; Walter v. Snediker, Hoff. Ch. 145. See also Jones v. Guaranty etc., Co., 101 U. S. 622; Conrad v. Atlantic Ins. Co., 1 Pet. 386, 477; United States v. Hooe, 3 Cranch 73; Leeds v. Cameron, 3 Sumn. 448; Collier v. Faulk, 69 Ala. 58; Boswell v. Goodwin, 31 Conn. 74; Hubbard v. Savage, 8 Conn. 215; Bank v. Morsell, 1 MacArthur, 155; Nelson v. Boyce, 7 J. J. Marsh, 401; 23 Am. Dec. 411; Commercial Bank v. Cunningham, 24 Pick. 270; Berry v. O'Conner, 33 Minn. 29; 21 N. W. 840; Hook v. Creamer, 34 N. J. Eq. 181; Lyle v. Ducomb, 5 Binn. 585.

in failing circumstances is not, in itself, proof of a fraudulent intent.² The mortgagee in such a case is a purchaser for value, and his rights are not affected by a prior unrecorded mortgage.³ But when such a mortgage is executed in contemplation of insolvency for an amount in excess of the indebtedness from the mortgagor to the mortgagee, this throws upon the mortgagee the burden of proving the honesty of the transaction.⁴

§ 205. **Parol evidence.**—In order that a mortgage for future advances or liabilities may be valid, it is not absolutely necessary that the purpose and object of the security should be set out in the mortgage itself, or in the defeasance, although such a course is the more direct and open one, and is calculated to prevent the raising of questions by junior purchasers or incumbrancers. It is a general rule that parol evidence cannot be given to contradict or deny written evidence, but to this rule there are some exceptions. Parol evidence may be given to contradict or explain a mere receipt, and this rule was long since applied to the acknowledgment of the receipt of the consideration expressed in a deed.⁵

In *McCrea v. Purmort* (16 Wend. 460), the English and American cases were largely considered, and it was held that it might be shown that the consideration was iron, of a specified quantity, valued at a stipulated price, instead of money paid, as expressed in the deed. And it was said in the opinion that the cases decided surrendered the consideration clause to the utmost latitude of inquiry, whenever this should become material to a personal action between the parties.⁶

As was said by MARSHALL, Ch. J., in *Shirras v. Craig* (7 Cranch, 34), "it is not to be denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion, and it must sustain a rigorous examination. It is always advisable fairly and plainly to state the truth, but if, upon investigation, the real transaction should appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to de-

² *Newkirk v. Newkirk*, 56 Mich. 525.

³ *Moore v. Ragland*, 74 N. Car. 343.

⁴ *Tripp v. Vincent*, 8 Paige, 176;

Lombard v. Dows, 66 Iowa, 243; 23 N. W. 649.

⁵ *Shephard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 Johns. 338.

⁶ See also *Hebbard v. Haughian*, 70 N. Y. 54.

prive the person claiming under the deed of his real quitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.”⁷

It has been adjudged, in several cases, that parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though upon its face it should appear to be for the payment of a specified sum of money. It may be shown that its purpose was security for future advances or responsibilities, or for balances which might be due from time to time.⁸

A mortgage purporting to be given for a note, may be shown to have been given for indemnity only.⁹

A mortgage for a specific sum may be shown to be intended as security for a general balance of accounts or anticipated dealings, by the terms of a receipt for the security, given by the mortgagee and accepted by the mortgagor at the time of its delivery.¹⁰

Parol evidence is also admissible to show that the mortgage was given to secure advances to be made by a party not named in the mortgage,¹¹ or to a person other than the mortgagor.¹²

§ 206. When no sum is mentioned.—If no sum be mentioned, but if the purpose of the mortgage is stated to be to secure the payment of all future advances, or of all liabilities of a certain kind to be hereafter incurred, this will be sufficient, for, in a technical sense, that is certain which can be made certain,¹³ and if the instrument is sufficiently certain to be valid against the mortgagor, it will also be equally valid as against all persons claiming under him.¹⁴

⁷ See also *Craig v. Tappin*, 2 Sandf. Ch. 78.

⁸ *MARVIN, J.*, in *McKinster v. Babcock*, 26 N. Y. 378, 380; *Farr v. Nichols*, 132 N. Y. 327; 30 N. E. 834; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Hall v. Crouse*, 13 Hun, 557. See also *Lawrence v. Tucker*, 23 How. 14; *Brewster v. Clamfit*, 33 Ark. 72; *Tully v. Harloe*, 36 Cal. 302; *Bacon v. Brown*, 19 Conn. 29; *Darst v. Gale*, 83 Ill. 136; *Collins v. Carlile*, 13 Ill. 254; *Foster v. Reynolds*, 38 Mo. 553; *Bell v. Fleming's Ex'r.*, 12 N. J. Eq. 13; *Griffin v. N. J. Oil Co.*, 11 N. J. Eq. 49; *Hendrix v. Gore*, 8 Oreg. 406.

⁹ *Morrill v. Morrill*, 53 Vt. 74.

¹⁰ *Brackett v. Sears*, 15 Mich. 244.

¹¹ *Hall v. Crouse*, 13 Hun, 557.

¹² *Commercial Bank v. Cunningham*, 24 Pick. 270; 35 Am. Dec. 322.

¹³ *Robinson v. Williams*, 22 N. Y. 380; *Miller v. Lockwood*, 32 N. Y. 299; *Monell v. Smith*, 5 Cow. 441; *Kramer v. The Trustees of the Farmer's Bank*, 15 Ohio, 253. See also *Collier v. Faulk*, 69 Ala. 58; *Machette v. Warless*, 1 Colo. 225; *Ketchum v. Jauncey*, 23 Conn. 127; *Loews v. De Forest*, 20 Conn. 442; *Merrills v. Swift*, 18 Conn. 266; *Insurance Co. v. Brown*, 11 Mich. 266; *Witzinski v. Everman*, 51 Miss. 841; *McDaniels v. Colvin*, 16 Vt. 300.

¹⁴ *Youngs v. Wilson*, 27 N. Y. 351.

An absolute deed, intended as security for future advances or responsibilities, is valid as a mortgage, and the purpose for which it was given may be shown by parol.¹⁵

A mortgage given to a bank to secure the indebtedness of the mortgagor to the bank for all negotiable instruments discounted by the bank for his benefit and for all sums of money due from him to the bank upon any account whatever must be regarded as a commercial instrument and must be construed as ordinary commercial men would understand the language used. In commercial intercourse a firm is regarded as an entity or body distinguished from the individual members; so such a mortgage was held to secure only the mortgagor's individual obligations to the bank and not the obligations of a firm of which he subsequently became a member.¹⁶

§ 207. **Examples.**—In *Shirras v. Craig* (7 Cranch, 34), a mortgage purported to secure a debt of £30,000 sterling to all the mortgagees. It was shown by parol evidence that the intent and purpose of the mortgage was to secure different sums due at the time to different mortgagees, and advances afterward to be made and liabilities to be incurred to an uncertain amount.

In *Bank of Utica v. Finch* (3 Barb. Ch. 293), a mortgage for \$30,000 was recorded, and it was held that the holder might show that it was, as a matter of fact, made as security for future advances, and that he might be secure in his lien to the extent of his advances within that amount, except as such lien might be affected by the equities of subsequent grantees or incumbrancers attaching previous to any advance.

In *Truscott v. King* (6 N. Y. [2 Seld.] 147), a judgment was confessed for \$20,000. It was shown by parol evidence that the purpose of the judgment was security for future advances.

In *McKinster v. Babcock* (26 N. Y. 378), a chattel mortgage recited that the mortgagor was indebted to the mortgagee in the sum of \$1,000, being for money advanced, and that the mortgage was made to secure said debt. It was shown by parol evidence that the real consideration of the mortgage was the indorsement by the mortgagee of the mortgagor's note for \$1,000, and of other

¹⁵ Harper's Appeal, 64 Pa. St. 315; Fessler's Appeal, 75 Pa. St. 483; Myers's Appeal, 42 Pa. St. 518; v. McGuckin, 25 N. J. Eq. 433. ¹⁶ Bank of Buffalo v. Thompson, 121 N. Y. 280; 24 N. E. 473.

notes which were substituted therefor; and the mortgage was enforced for the amount which the mortgagee subsequently paid on account of such indorsements.

In *Brown v. Kiefer* (71 N. Y. 610.), a chattel mortgage for \$5,000 was given, payable on demand, which was intended by the parties to secure present and future indebtedness. It was held to be valid, not only as between the parties, but also as against creditors.

In *Price v. Grover* (40 Md. 102), a mortgage for \$30,000, proved by parol to be to indemnify the mortgagee, who was a broker, against loss in carrying a specified number of shares of stock, was held valid.¹⁷

In *Simons v. First National Bank* (93 N. Y. 269), the mortgage recited a consideration of \$5,000, and the condition was as follows: "This grant is intended as collateral security for the payment of any indebtedness of the said first parties to the said party of the second part, by note or otherwise; and whenever the said first party shall have paid all such indebtedness, this mortgage shall become null and void; which said sums, principal and interest, the said parties of the first part hereby covenant and agree to pay to the party of the second part, in the manner and at the time or times aforesaid, and this conveyance shall be void if such payment be made as herein specified."¹⁸

A mortgage to indemnify an indorser of "a note of \$2,000, made payable to the order of the grantor, and by him signed and indorsed," is sufficiently certain, and the note may be identified by parol.¹⁹

§ 208. Construction.—The rules applicable to the construction of all writings will control as to mortgages for future advances, but in cases where the language is ambiguous the courts lean toward a construction which will furnish to the creditor the most complete indemnity. Thus, if the condition of the mortgage is broad enough to cover future claims, and the language used does not forbid its application to existing debts and liabilities as well, both may be collected under it.²⁰

¹⁷ *Brinkmeyer v. Helbling*, 57 Ind. 435.

Mowry v. Sanborn, 68 N. Y. 153, 154.

¹⁸ See condition of a mortgage to secure a general balance for notes, drafts, or other commercial paper.

¹⁹ *Goddard v. Sawyer*, 9 Allen (Mass.) 78; *Benton v. Sumner*, 57 N. H. 117.

²⁰ *Page v. Ordway*, 40 N. H. 253.

Where the condition of a mortgage deed provided for payment by the mortgagor to the mortgagee in these words: "also what I may owe him on book," and it appeared that there was no account at the time, it was held that the condition referred to future accruing accounts.²¹

Where a mortgage was given to secure a note for \$5,500, and such advances as there had been or might be made within two years, not to exceed in all an indebtedness of \$6,000, and advances were made, the mortgage was held good to cover the advances and the note for \$5,500.²²

A mortgage expressed to be "given to secure whatever indebtedness may at any time exist from the mortgagor to the mortgagee," includes an obligation incurred by the mortgagor by indorsing the note of a third person.²³

A mortgage expressed to be "executed as a continuing security for an amount not exceeding \$93,600," secures future advances although the mortgagor was at the time of its delivery indebted to the mortgagee in a greater sum.²⁴

A mortgage drawn to cover any demands held by the mortgagee against the mortgagor will not authorize the mortgagee to buy up claims against the mortgagor and enforce them, unless such an intent is very clearly expressed in the mortgage.²⁵

Where the purpose of the security appears upon its face, only that purpose can be accomplished by it,²⁶ and if the limit of the amount for which it is to stand, or of the time within which the advances are to be made, is specified, that amount cannot be exceeded, and advances made after the time stipulated for will not be secured.²⁷

§ 209. Agreement for further advances made subsequent to mortgage.—When a mortgage is made in the form of an absolute deed, the agreement of defeasance being in parol, it is competent, as between the parties, that the transfer should be allowed to stand as security for further debts or advances subsequently incurred, even though the terms of redemption contemplated when the con-

²¹ *McDaniels v. Colvin*, 16 Vt. 300; 42 Am. Dec. 512.

²² *Lawrence v. Tucker*, 23 How. (U. S.) 14.

²³ *First Nat. Bank of Paterson v. Byard*, 26 N. J. Eq. 255.

²⁴ *Fassett v. Smith*, 23 N. Y. 252.

²⁵ *Lashbrooks v. Hatheway*, 52 Mich. 124.

²⁶ *Townsend v. Empire Stone Dressing Co.*, 6 Duer, 208. See also *Bell v. Radcliff*, 32 Ark. 645.

²⁷ *Miller v. Whittier*, 36 Me. 577.

veyance was first made did not provide for such subsequent demands. Indeed, if nothing be said, the presumption would be, in such a case, that the new credits or advances were given or made by the creditor on the faith of the security in his hands. It was a rule of the civil law that if a debtor pledged property to secure a debt, and afterward another debt was contracted, the creditor might retain for both debts, provided that there was nothing to negative the presumption of an implied contract that the pledge should be so applied,²⁸ and there is strong reason to enforce the same rule in cases where the jurisdiction of equity is invoked to enforce a redemption of lands which had in form been absolutely conveyed.

But when the mortgage recites the debts which it is made to secure, there is no implication of an intention to secure any further debt. In such a case, an agreement made subsequently to the execution of the mortgage, that it shall stand for a new debt, would not have any binding force, even as between the parties, for the instrument speaks for itself, and the written evidence of one contract cannot, upon any principle, be sustained as evidence of another. The lien, as created by the mortgage for the payment of one debt, ceases by the satisfaction of that debt, and a new lien can only be created by a new grant.²⁹ So, where a mortgage was made to a member of a firm as trustee for himself and his co-partners, as security for advances thereafter to be made by that firm, it was held not to operate as security for advances or credits given by a new firm formed in part of members of the old.³⁰

While there may be some question as to the effect of an agreement made subsequent to the execution of a mortgage for holding it as security for new advances, as between the parties to such an agreement, there can be no question as to its effect as against junior purchasers or incumbrancers. As to them, a mortgage which has been paid cannot be revived as a lien, and, whether they have notice of their rights or not, the titles or liens which have once vested in them cannot be taken from them without their consent.³¹

²⁸ *James v. Johnson*, 6 Johns. Ch. 417, 429. See also *Jarvis v. Rogers*, 15 Mass. 389.

²⁹ *Stoddard v. Hart*, 23 N. Y. 556; *Hubbell v. Blakeslee*, 8 Hun, 603; *Bank of Utica v. Finch*, 3 Barb. Ch.

293. See also *Johnson v. Anderson*, 30 Ark. 745; *Percival v. Gale*, 40 N. J. Eq. 440.

³⁰ *Taylor v. Post*, 30 Hun, 446.

³¹ *Walker v. Snediker*, Hoff. Ch. 146; *Craig v. Tappin*, 2 Sandf. Ch. 78, 83.

§ 210. A mortgage is enforceable only for the amount actually advanced upon it.³² Such amount together with interest also limits the amount which the mortgagee is entitled to receive from the proceeds of a foreclosure sale, though he may have advanced a sum in excess thereof.³³ A mortgage given by a married woman to indemnify the indorser of her husband's paper is in no manner for the benefit of the holder of the paper, and an assignment of such a mortgage will only carry the right to recover the amount actually paid on the paper by the mortgagee up to the time of the assignment; and a reassignment of the mortgage will have no effect to change the rule.³⁴

§ 211. Priority of mortgages for future advances.—Where a mortgage is executed to secure the payment of future advances, it being part of the contract under which the mortgage is made, that the mortgagee shall make the advances at certain definite periods, and that the mortgagor shall then accept them and pay interest upon them, the rights of the parties become fixed at the date of the delivery of the security, and the mortgage will protect the mortgagee against subsequent incumbrancers whose rights are acquired before the advances are actually made; provided, of course, such subsequent incumbrancers are not purchasers for value without notice either from the public records or otherwise. In such a case the debt is present, though the payment is future, and the security is as valid as if the advances were made at its date.³⁵

The circumstances that the agreement to make the advances is by parol, will not affect the mortgagee's right.³⁶

The same rule will apply where a mortgage is made to indemnify the mortgagee from becoming a surety or indorser, and such a mortgage will have priority over a lien subsequently acquired, although the mortgagee may not be called upon to pay anything until long afterward.³⁷

³² *Vogan v Caminetti*, 65 Cal. 438.

³³ *McComb v. Barcelona Apartment Ass'n.*, 134 N. Y. 598; 31 N. E. 613; 45 St. R. 784.

³⁴ *O'Hara v. Baum*, 88 Penn. St. 114.

³⁵ *Story's Eq. Jur.* § 1023c; *Griffin v. Burtnett*, 4 Edw. 673. See also *Crane v. Deming*, 7 Conn. 387; *Boswell v. Goodwin*, 31 Conn. 74; s. c. in 12 Am. Law Reg. 79 and note, 91, 92,

by Judge REDFIELD; *Rowan v. Sharpe's Rifle Mfg. Co.*, 29 Conn. 329; *Hubbard v. Savage*, 8 Conn. 215; *Nelson v. Iowa & Eastern R. R. Co.*, 8 Am. R. R. Rep. 82; *Brinkmyer v. Helbling*, 57 Ind. 435; *Brinkmyer v. Browneller*, 55 Ind. 487; *Witzinski v. Everman*, 51 Miss. 841.

³⁶ *Platt v. Griffith*, 27 N. J. Eq. 207.

³⁷ *Uhler v. Semple*, 20 N. J. Eq. 288.

So, where a mortgage is given to secure a person who is bound to accept drafts, the lien of the mortgage attaches from the date of the obligation to accept.³⁸

§ 212. Where mortgagee is not obligated to make advances.—Other questions will arise when the mortgagee is not obligated to make the advances. In such cases the mortgagee holds a lien upon the land, at any given time, for the actual amount of his advances at that time;³⁹ but if, with knowledge of a subsequent lien, he makes further advances, his rights as to the new advances would be inferior to such subsequent lien.⁴⁰

The rule here enunciated has been defined and limited by the Court of Appeals which says in the case of *Hyman v. Hauff*, decided in 1893,⁴¹ "It is quite clear that it (the rule stated) can operate only against a security for future advances purely and plainly optional, the holder of which has actual notice of a subsequent mortgage for an existing debt or liability," and later "when it appears as matter of law, from an inspection of the instrument, that the prior mortgagee may decline to make the advances at his pleasure, without taking the risk of subjecting himself to damages or loss, the rule can be defended on equitable principles. But where the obligation to advance exists, or where the right to decline depends on facts *dehors* the instrument, and which may be the subject of dispute or contention, the holder of the first

38 *Choteau v. Thompson*, 2 Ohio St. 114.

39 *Robinson v. Williams*, 22 N. Y. 380; *Bissell v. Kellogg*, 60 Barb. 617, aff'd 65 N. Y. 432; *Brinckerhoff v. Marvin*, 5 Johns. Ch. 320, 327; *Craig v. Tappin*, 2 Sandf. Ch. 90; *Lansing v. Woodworth*, 1 Sandf. Ch. 45. See also *Schulze v. Bolting*, 8 Biss. 174; *Ketchum v. Jauncey*, 23 Conn. 127; *Lewis v. DeForest*, 20 Conn. 442; *Merrills v. Swift*, 18 Conn. 266; *Ward v. Cooke*, 17 N. J. Eq. 93; *Kramer v. Trustees of Farmers' Bank*, 15 Ohio 253.

40 *Brinckerhoff v. Marvin*, 5 Johns. Ch. 320, 327; *Robinson v. Williams*, 22 N. Y. 380. See also *Ripley v. Harris*, 3 Biss. 199; *Boswell v. Goodwin*, 31 Conn. 74; *Frye v. Bank of*

Illinois, 11 Ill. 367, 381; *Brinkmyer v. Browneller*, 55 Ind. 487; *Nelson v. Boyce*, 7 J. J. Marsh, 401; 23 Am. Dec. 411; *Barnard v. Moore*, 90 Mass. (8 Allen) 466; *Ladue v. Detroit*, etc., R. R. Co., 13 Mich. 380; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Ward v. Cooke*, 17 N. J. Eq. 93; *Bell v. Fleming*, 1 Beasley, 1, 16; *Appeal of the Bank of Commerce*, 44 Pa. St. 423; *Bank of Montgomery County's Appeal*, 36 Pa. St. 172; *National Bank v. Gunhouse*, 17 S. C. 489; *Hopkinson v. Rolt*, 9 H. L. Cas. 514.

Story's Eq. Jur. § 1023c; 2 Am. Law Reg. N. S. 12.

41 *Hyman v. Hauff*, 138 N. Y. 48 (opinion by O'BRIEN, J.); aff'g. 2 Misc. R. 388.

security is warranted in making the advances in reliance upon his mortgage." And again, "all the cases hold that the principle does not apply when a party subjects himself to damages by declining to perform or to make the advances, and, if not, why should it apply to a case where the loss of the profit or fruits of the contract must follow a failure or omission to perform."

A mortgage for future advances is prior as a lien, for all advances made thereunder within the limit, to a judgment recovered subsequent to the giving of the mortgage, though the advances were made after the recovery of the judgment, but without notice of it.⁴²

§ 213. **Notice to charge mortgagee.**—The question still remains as to what notice is sufficient to charge the mortgagee with knowledge of the rights of the incumbrancer subsequent to his mortgage, and, as to this point, there has been some diversity of opinion. It cannot be claimed that, in the absence of any notice, either actual or constructive, such a prior incumbrancer will be subordinated.⁴³ And on the other hand there is no question that actual personal notice is sufficient. The authorities differ as to whether the recording of the subsequent incumbrance is notice to the holder of the mortgage of earlier date, so far as advances which may thereafter be made by him are concerned. On the one hand, it has been said that the record of the prior mortgage should put the junior incumbrancer upon inquiry, and that it is for him to be diligent in guarding his rights,⁴⁴ while, on the other, it has been held that the person holding the prior mortgage should be bound by the notice contained in the public records at the time when the advance is actually made.⁴⁵

In this State it was held at two General Terms that a mortgage was only valid for the amount actually advanced at any given

⁴² *Williams v. Gilbert*, 37 N. J. Eq. 84.

⁴³ *Farr v. Nichols*, 132 N. Y. 327; 30 N. E. 834.

⁴⁴ *Bank of Montgomery County's Appeal*, 36 Pa. St. 170; *Ward v. Cooke*, 17 N. J. Eq. 93; *Wilson v. Russell*, 13 Md. 495; *Nelson v. Boyce*, 7 J. J. Marsh (Ky.) 401. See *Truscott v. King*, 6 Barb. 346; s. c. rev'd 6 N. Y. (2 Seld.) 147. Article by Judge MITCHELL in 11 Am. Law Reg. N. S. 273; note by Judge RED-

FIELD, 12 Am. Law Reg. 79; *McDaniels v. Colvin*, 16 Vt. 300; 42 Am. Dec. 512.

⁴⁵ *Ledyard v. Butler*, 9 Paige 132. See also *Boswell v. Goodwin*, 31 Conn. 74; *Ladue v. Detroit & Milwaukee R. R. Co.*, 13 Mich. 380; *Parmentier v. Gillespie*, 9 Pa. St. 86; *Ten Hoven v. Kerns*, 2 Pa. St. 96. So held under peculiar language of the Ohio statute. *Spader v. Lawler*, 17 Ohio, 371; 49 Am. Dec. 461.

time, and that a junior incumbrancer acquired a lien as of the date of the recording of his security, which would take precedence of advances subsequently made upon the older lien, who was, in common with all other persons, bound by the notice given by the public records. These cases cited and approved the reasoning on this point contained in the first edition of this work.⁴⁶ But the Court of Appeals has settled the question in *Ackerman v. Hunsicker* (85 N. Y. 43; 39 Am. R. 621, rev'g s. c. 21 Hun, 53), by determining that a party who takes a mortgage to secure further optional advances, upon recording his mortgage, is protected against intervening liens for advances made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him. The opposite rule is said to impose the burden of diligence upon the wrong person. The party taking the subsequent security may protect himself by notice, and, as is said by Mr. Jarman in his notes to "Bytherwood's Conveyancing": "No person ought to accept a security subject to a mortgage authorizing future advances without treating it as an actual advancement to that extent."⁴⁷

§ 214. Extent of lien as against the grantee of the mortgagor.—

A purchaser of the equity of redemption of mortgaged property who takes, subject to a mortgage, the entire amount of which is allowed to him out of the consideration, has nothing to do with the bargain out of which the mortgage arose or as to whether the amount secured by it has already been or is intended to be advanced; in either event he must allow his estate to be subjected to the full amount of the mortgage lien, for that was his bargain.⁴⁸

Where a grantee takes subject to a mortgage for advances, which the mortgagee has, for a consideration, agreed to make on the performance of certain specified conditions, the mortgage is a lien for the full amount, though the advances have not been made, because the mortgagee has agreed to make them, and has assumed a liability on the faith of the security.⁴⁹

But if the mortgage is for voluntary advances, a stipulation in

⁴⁶ *Ketcham v. Wood*, 22 Hun, 64; rev'g 25 How. Pr. 327; 44 Barb. 14; *Ackerman v. Hunsicker*, 21 Hun, 53. 37 Barb. 587; *Ritter v. Phillips*, 53

⁴⁷ See also *Jones' Ex'r v. State* N. Y. 586.

Banking Co., 34 N. J. Eq. 543.

⁴⁹ *Cox v. Hoxie*, 115 Mass. 120.

⁴⁸ *Freeman v. Auld*, 44 N. Y. 50,

the conveyance of the equity of redemption to the effect that the property is subject to the mortgage, will not operate to give the mortgage any force beyond the amount actually advanced upon it; the property will be subjected to the lien as it really exists and to no greater extent.⁵⁰

It must be borne in mind, however, that the recording of the deed is not notice to the mortgagee, who may continue to increase his lien by making new advances until he shall receive actual notice of the transfer.⁵¹

§ 215. Recording of mortgages for future advances.—The record does not always show, neither is it intended to show, the amount actually due or unpaid on a mortgage. It only shows the utmost amount or sum which the mortgage was intended to secure, and the only remedy for a purchaser or incumbrancer, even in ordinary cases, on finding a large mortgage ahead of him, is to ascertain, by inquiry from the mortgagee, who is bound to state his claims fairly, what amount is actually owing or unpaid upon it.⁵²

If a mortgage for future advances shows upon its face the object for which it is given, the recording of it will put a *bona fide* purchaser or incumbrancer upon inquiry, and an application to the mortgagee will enable him to ascertain the extent of the claims made under it.⁵³ If the mortgage be nominally for the payment of a certain sum of money, it cannot be shown to have been intended as a lien for a greater amount, and moneys not mentioned in the mortgage cannot be covered by it to the prejudice of subsequent liens.⁵⁴

50 Russell v. Kinney, 1 Sand. Ch. 34; Jewell v. Harrington, 19 Wend. 471; Hartley v. Tatham, 26 How. Pr. 158; 1 Robt. 246; Lester v. Barron, 40 Barb. 297. See also Ladue v. Detroit & Milwaukee R. R. Co., 13 Mich. 380.

51 Ackerman v. Hunsicker, 85 N. Y. 43; 39 Am. R. 621, rev'g 21 Hun, 53.

52 Craig v. Tappin, 2 Sandf. Ch. 78.

53 Youngs v. Wilson, 27 N. Y. 351; Robinson v. Williams, 22 N. Y. 387; Williamson v. Brown, 15 N.

Y. 354; Witzinski v. Everman, 51 Miss. 841. See, *contra*, Babcock v. Bridge, 29 Barb. 427.

54 Truscott v. King, 6 N. Y. (2 Seld.) 147; Murray v. Barney, 34 Barb. 336; St. Andrew's Church v. Tompkins, 7 Johns. Ch. 14; Bank of Utica v. Finch, 3 Barb. Ch. 293; Walker v. Snediker, Hoff. Ch. 145. See also Pettibone v. Griswold, 4 Conn. 158; Stoughton v. Pasco, 5 Conn. 442; Shepard v. Shepard, 6 Conn. 37; Hubbard v. Savage, 8 Conn. 215; Hart v. Chalker, 14 Conn. 77; Garber v. Henry, 6 Watts (Pa.) 57.

CHAPTER VII

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EXTENSION OF TIME FOR PAYMENT.

§ 216. **Extension by parol agreement.**—The time for the payment of the mortgage debt may be extended by agreement of the parties. If the obligation be under seal, and still remains executory, it has been held that an agreement in writing of equal solemnity is necessary to alter the contract in any essential particular, and that, too, whether the substituted agreement be supported by a new consideration or not.¹ But after the breach of a sealed agreement, it may be modified or wholly rescinded by an executory parol agreement, upon a sufficient consideration.² Such an agreement is not within the statute of frauds.³ A subsequent agreement extending the time of the debtor does not operate to destroy the original agreement, but only to modify it in respect to the time of payment.⁴

Although a parol agreement may not be technically sufficient to alter the terms of a contract under seal if made before the breach of such a contract, it may operate as a waiver of a right to enforce the obligation for a limited time if made upon sufficient consideration, and no court would enforce a specialty contract at the time of its maturity where the debtor had bargained and paid for indulgence, on the mere ground that such bargain was by parol.⁵

Where an intending purchaser of mortgaged real estate called on the mortgagee, who promised that if he would purchase the

¹ *Allen v. Jaquish*, 21 Wend. 628; *Eddy v. Graves*, 23 Wend. 84; *Dodge v. Crandall*, 30 N. Y. 294.

² *Antisdel v. Williamson*, 165 N. Y. 372; 59 N. E. 207, aff'g 37 App. Div. 167; 55 N. Y. Supp. 1028; *Dodge v. Crandall*, 30 N. Y. 294; *Citizens' Permanent S. & L. Ass'n v. Rampe*, 68 App. Div. 556; 74 N. Y. Supp. 192; *Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Fleming v. Gilbert*, 3 Johns. 528; *Keating v. Price*, 1 Johns. Cas. 22; *Delacroix v. Bulkley*, 13 Wend. 71; *Townsend v. Empire Stone Dressing Co.*, 6 Duer, 208; *Fish v. Hayward*, 28 Hun, 456.

³ *Williams v. Bedford Bank*, 63

App. Div. 278; 71 N. Y. Supp. 539, so holding where a second mortgagee agreed to pay taxes if the first mortgagee would delay foreclosure.

⁴ *Hasbrouck v. Tappen*, 15 Johns. 200; *Dodge v. Crandall*, 30 N. Y. 294.

⁵ *Burt v. Saxton*, 1 Hun, 551; *Scott v. Frink*, 53 Barb. 533; *Macaulay v. Hayden*, 48 Misc. R. 21; 96 N. Y. Supp. 64. See also *Re Betts*, 4 Dillon, 93; *Frayser v. Trustees of Indiana Asbury University*, 39 Ind. 556; *Tompkins v. Tompkins*, 21 N. J. Eq. 338; *Margott v. Renton*, 21 N. J. Eq. 381; *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 127.

premises and pay an instalment the following spring and make certain improvements, and pay interest annually, he would extend the time of the payment for twenty years; and the purchase was accordingly made on the faith of this promise, the purchaser assuming the mortgage and making the payment and improvements agreed upon, this was held to extend the mortgage as agreed.⁶

The agreement of extension must be made after the delivery of the bond and mortgage, since no parol evidence can be given of an agreement before or at that time in contradiction of the writing.⁷

In the absence of evidence of collusion, an agreement executed by the general guardian of infant mortgagees, extending the time of payment of principal in consideration of a payment of interest in advance, is valid.⁸

§ 217. Effect of extension.—Parties to a mortgage may by agreement extend payment without losing priority over inferior lienors.⁹ If a valid agreement for the extension of the time of payment of the mortgage debt be made, it will constitute a defense to an action for the foreclosure or enforcement of the mortgage commenced before the expiration of the new term of credit, either by the mortgagee¹⁰ or by an assignee with notice.¹¹ An executor of the mortgagee may also make such an agreement which will operate to defeat an action to foreclose before the time stipulated has expired.¹² A mortgage cannot be foreclosed until the debt which it secures is due and payable, even though the security be impaired and rendered precarious by the delay.¹³ An assignee, however, of a past due mortgage for a valuable consideration is not bound by an agreement in writing executed by his assignor

⁶ Burt v. Saxton, 1 Hun, 551; 4 T. & C. 109.

⁷ Martin v. Rapelye, 3 Edw. Ch. 229.

⁸ Willich v. Taggart, 17 Hun, 511.

⁹ Hyman v. Hauff, 2 Misc. R. 388; 50 St. R. 603; 21 N. Y. Supp. 984, aff'd 138 N. Y. 48; 33 N. E. 735; 51 St. R. 731.

¹⁰ Dodge v. Crandall, 30 N. Y. 294; Krebs v. Carpenter, 124 App. Div. 755; 109 N. Y. Supp. 482; Briggs v. Weeks, 98 App. Div. 487; 90 N. Y. Supp. 853; Nicholson v. Cinque, 51 App. Div. 604; 64 N. Y.

Supp. 191; Beach v. Shanley, 35 App. Div. 566; 55 N. Y. Supp. 130; Grinnan v. Platt, 31 Barb. 328.

¹¹ Goldman v. Ehrenreich, 33 Misc. R. 433; 68 N. Y. Supp. 424.

¹² Goldman v. Ehrenreich, 33 Misc. R. 433; 68 N. Y. Supp. 424.

Executors personally bound if testator not personally liable for the debt. Olin v. Arendt, 27 Misc. R. 270; 57 N. Y. Supp. 429.

¹³ Campbell v. Macomb, 4 Johns. Ch. 534; Building Association v. Platt, 5 Duer, 675.

extending the time of the payment of the mortgage and reducing the rate of interest where he had no knowledge of such agreement and the instrument was not recorded until after the recording of the assignment.¹⁴

Where the time of the extension is not specified it will be presumed that a reasonable time was intended.¹⁵

§ 218. Consideration for extension.—A promise to forbear the collection of a debt, not founded upon a new consideration, is void;¹⁶ but it has sometimes been thought that mutual promises, on the one hand to waive payment at the time specified, and to accept of the money at a later date, and on the other to pay principal and interest at the expiration of the extended term of credit, furnished sufficient consideration for each other,¹⁷ even though no definite time of forbearance be fixed, provided there is forbearance for a reasonable time.¹⁸

A desire to procure an investment is also held to be a sufficient consideration to postpone a payment due on a security.¹⁹

In *Grinnan v. Platt* (31 Barb. 328), a grantee of the mortgagee, who was not personally liable for the payment of the mortgage debt, sent a check to the mortgagee of the amount of an instalment of interest then due, with a note asking for an extension of the time of payment, and telling the mortgagee to use the check if he would extend. The mortgagee used the check, and it was held that this amounted to an acceptance of the proposition and an extension of the mortgage, and that an injunction would lie to restrain foreclosure until the expiration of the time asked for.

An agreement to increase the interest to the legal rate from a

14 *Weideman v. Zielinska*, 102 App. Div. 163; 92 N. Y. Supp. 493.

15 *Citizens' Permanent S. & L. Ass'n v. Rampe*, 68 App. Div. 556; 74 N. Y. Supp. 192.

16 *Olmstead v. Latimer*, 158 N. Y. 313; 53 N. E. 5; *Moses v. Walker*, 23 App. Div. 91; 48 N. Y. Supp. 341; *Robertson v. Clocke*, 18 App. Div. 363; 46 N. Y. Supp. 87; *Miller v. Holbrook*, 1 Wend. 317; *Reynolds v. Ward*, 5 Wend. 501; *Patchin v. Pierce*, 12 Wend. 61; *Gibson v. Renne*, 19 Wend. 389; *Pabodie v. King*, 12 Johns. 426; *Fulton v. Mat-*

thews, 15 Johns. 433; *Hall v. Constant*, 2 Hall, 185.

17 *Clark v. Dales*, 20 Barb. 42; *Burt v. Saxton*, 1 Hun, 551; 4 N. Y. Sup. (T. & C.) 109. See also *Pierce v. Goldsberry*, 51 Ind. 52; *Bailey v. Adams*, 10 N. H. 162. Compare *Wakefield Bank v. Truesdell*, 55 Barb. 602; *Preston v. Henning*, 6 Bush (Ky.) 556.

18 *German Savings Bank v. Brodsky*, 39 Misc. R. 100; 78 N. Y. Supp. 910, aff'd 82 App. Div. 635; 81 N. Y. Supp. 1126.

19 *Goldman v. Ehrenreich*, 33 Misc. R. 433; 68 N. Y. Supp. 424.

smaller rate is sufficient consideration for an extension.²⁰ So, also, is payment of interest or of part of the principal in advance;²¹ or the assuming of the mortgage debt by a purchaser in reliance upon such an agreement;²² or the payment of an installment of interest either by a grantee of the mortgagee not personally obligated to make such payment;²³ or by the owner of a leasehold who has not assumed a prior mortgage thereon;²⁴ or the giving by the debtor of additional security for the debt.²⁵

The payment by the debtor of part of the debt, the whole being due, does not furnish a consideration for a stipulation to extend the balance, since, in making such part payment, the debtor only does what the law requires him to do.²⁶

Where the mortgagor advanced money to the mortgagee as consideration for the extension of the time of payment of the mortgage and interest, and the latter agreed to build a house and convey it to the mortgagor or in case of his failure to do so to credit the amount of such advance upon the mortgage, a complaint in an action by the assignee of the mortgage to foreclose the property was held to be properly dismissed where it appeared that the mortgagee had conveyed the house to another.²⁷

§ 219. Extension must bind both debtor and creditor.—Both mortgagor and mortgagee must be parties to any agreement for extension in order that they shall be entitled to rights under it. Thus, a mortgagor is not entitled to the benefit of an agreement between the mortgagee and his assignee pursuant to which the time for the payment of the mortgage is to be extended, and the assignee may foreclose notwithstanding.²⁸ Such an agreement to be bind-

²⁰ Haggerty v. Allaire Works, 5 Sand. 231.

²¹ Krebs v. Carpenter, 124 App. Div. 755; 109 N. Y. Supp. 482; Newsam v. Finch, 25 Barb. 175. See also Re Betts, 4 Dillon, 93; 7 Reporter, 225; Maher v. Lanfrom, 86 Ill. 513.

²² Burt v. Saxton, 1 Hun, 551; 4 T. & C. 109.

²³ Grinnan v. Platt, 31 Barb. 328; Jester v. Sterling, 25 Hun, 344.

²⁴ Krebs v. Carpenter, 124 App. Div. 755; 109 N. Y. Supp. 482.

²⁵ Jester v. Sterling, 25 Hun, 344.

See also Frayser v. Trustees Indiana Asbury University, 39 Ind. 556.

²⁶ Ritch v. Smith, 60 How. Pr. 13, 157; Lowman v. Yates, 37 N. Y. 601; Halliday v. Hart, 30 N. Y. 474; Scott v. Stockwell, 65 How. Pr. 249; Kellogg v. Olmstead, 25 N. Y. 189. See also Olendorf v. Union Bank, 31 Md. 126.

²⁷ Nicholson v. Cinque, 51 App. Div. 604; 64 N. Y. Supp. 191, holding also that the amount so advanced should be credited in payment of the mortgage.

²⁸ Lee v. West Jersey Land Co., 29 N. J. Eq. 377.

ing must be made by the parties themselves or by some one authorized to act.²⁹ The promise must be mutual.³⁰

EXTENSION BY RENEWAL OF NOTES.

§ 220. **Mortgage secures the renewal notes.**—Where a mortgage is given to secure the payment of a particular debt mentioned therein, the mortgagee cannot, as against subsequent purchasers or incumbrancers, hold it for an entirely distinct and different debt, upon parol proof that it was intended to cover that debt also; and when the original debt is paid, the mortgage will cease to be a lien.³¹ But where the mortgage is given to secure a particular debt, with a condition to be void on payment, the mortgagee does not lose his security by the mere extension of the time of payment, although the extension is in the form of a renewal of the note which is held as a collateral security for the payment of the same debt, where it is not the intention of either party to discharge the mortgage security.³²

If the debt secured by the mortgage is put in judgment, the lien is not thereby lost, but the mortgage still subsists as security for the judgment.³³

When a note secured by mortgage is indorsed and transferred, the acceptance by the indorsee of a new note, while it discharges the mortgagee as indorser of the old note, in the absence of an agreement to the contrary, does not extinguish the debt or impair the mortgage security.³⁴

29 *Piza v. Lubelsky*, 121 App. Div. 734; 106 N. Y. Supp. 481; *Rosche v. Kosmowski*, 61 App. Div. 23; 70 N. Y. Supp. 216.

30 *Rosche v. Kosmowski*, 61 App. Div. 23; 70 N. Y. Supp. 216; *Merritt v. Youmans*, 21 App. Div. 256; 47 N. Y. Supp. 664.

31 *Mead v. York*, 6 N. Y. (2 Seld.) 449; *Truscott v. King*, 6 N. Y. (2 Seld.) 147; *Purser v. Anderson*, 4 Edw. 17; *Marvin v. Vedder*, 5 Cow. 671; *Taylor v. Post*, 30 Hun, 446; *Hubbell v. Blakeslee*, 8 Hun, 603. See also *Hughes v. Johnson*, 38 Ark. 285.

32 *Dunham v. Dey*, 15 Johns. 555;

The Bank of Utica v. Finch, 3 Barb. Ch. 293; *Chapman v. Jenkins*, 31 Barb. 164; *Babcock v. Morse*, 19 Barb. 142. See also *Kieser v. Baldwin*, 62 Ala. 526; *Oliphant v. Esterly*, 36 Ark. 69; *Bolles v. Chauncey*, 8 Conn. 389; *Mayer v. Grottendick*, 68 Ind. 1; *Dumell v. Ferstage*, 23 Ind. 397; *Sloan v. Rice*, 41 Iowa, 465; *Post v. Robbins*, 35 Iowa, 208; *Watkins v. Hill*, 25 Mass. (8 Pick.) 522; *Humphreys v. Danser*, 32 N. J. Eq. 220; *Dunshee v. Parmalee*, 19 Vt. 172.

33 *Darst v. Bates*, 95 Ill. 493.

34 *McGuire v. Van Pelt*, 55 Ala. 345.

§ 221. In order to constitute notes to be renewals which shall take the place of the notes secured by the mortgage, it is not necessary that they shall be issued for the same amounts, at the same periods, and that each successive note has been applied to take up its immediate predecessor, and it will be sufficient if the notes finally given represent the original debt which the mortgage was made to secure.³⁵

So, a mortgage lien to indemnify mortgagees against loss by reason of their having accepted drafts for the accommodation of the mortgagors, is not necessarily lost by a change of the evidences of liability, as where the first acceptances are taken up with the proceeds of like acceptances for that purpose.³⁶

§ 222. A change in the renewal obligation that will change the identity of the debt will be fatal to its connection with the mortgage. Thus, if a note payable in any legal tender and secured by mortgage is surrendered on the receipt of a new contract, payable in gold, the new debt cannot be collected under the original lien.³⁷ So, where a party having a note secured by mortgage, after institution of proceedings in bankruptcy by him against the maker, entered into an agreement with the other creditors of the maker to dismiss the proceedings in bankruptcy against the maker, and to take a new note, payable in two years from date with interest, in the absence of proof of a contrary intention of the parties, it was held that the mortgage was released.³⁸ And where A gave a mortgage to B, to indemnify him in case he should have to pay the debt of A, conditioned that A should pay and satisfy the note by renewal or otherwise, and A renewed his note with different sureties, whereupon B assigned the mortgage to the new sureties; it was held that the rights of B ceased upon the renewal and that the mortgage could not be assigned so as to cut off the intervening rights of other mortgagees.³⁹

§ 223. Examples of extensions by renewals of notes.—In *Brinckerhoff v. Lansing* (4 Johns. Ch. 65), a mortgage was given as security for \$1,050, represented by a note given to a bank, which note was renewed from time to time, it being reduced to \$400, and afterward increased to \$720; it was held that the mortgage

³⁵ Gault v. McGrath, 32 Penn. St. 392.

³⁶ Choteau v. Thompson, 3 Ohio St. 424.

³⁷ Pratt v. Stearns, 31 Cal. 78.

³⁸ Jarnagan v. Gaines, 84 Ill. 203.

³⁹ Bonham v. Gallaway, 13 Ill. 68.

stood as security for the last note. It was thought that the increase of the debt on the periodical renewal, provided that the debt was kept within its original limits, did not affect the security, and that the last note and all intermediate renewals represented the same debt for which the mortgage was given, subject only to those fluctuations in amount which are customary in such bank operations.

In *Chapman v. Jenkins* (31 Barb. 164), a maker of a note executed a chattel mortgage to his sureties and indorsers, to secure them for their liability as such, and they were duly charged by notice of non-payment. The note was paid by the proceeds of a new note made by the mortgagor and indorsed by the mortgagees, for the express purpose of raising money to pay the first note. It was held that the mortgage continued as security for the amount of the second note, and that parol evidence was competent to show the relations of the parties, and that it was not intended that the payment of the first note with the proceeds of the second should extinguish the mortgage.

In *Rogers v. The Traders' Ins. Co.* (6 Paige, 583), the mortgagee of a steamboat, who had taken the mortgage as security for the payment of a note indorsed by him, was compelled to pay the note when it became due, and to save the credit of the drawers, he gave them his new note to take up the old one, instead of suffering it to be protested. It was held that the debt for which the mortgage was given was not extinguished, and that the mortgage still remained a valid lien upon the boat for the security of the amount due the mortgagee.

In *Pond v. Clark* (14 Conn. 334), a mortgage was given to secure the mortgagee for his indorsement of certain specified notes. Such notes as they became due were renewed by the substitution of other notes or drafts having different names upon them, but the obligation of the original indorsement by the mortgagee was preserved through all the renewals, and the substituted paper was ultimately discharged by him. It was held that the mortgage remained in full force for the substituted indorsements.

§ 224. Extension does not, in general, impair lien.—It is extremely well settled in this State that the taking of a debtor's note does not merge or extinguish the demand for which it is taken,⁴⁰

⁴⁰ *Gregory v. Thomas*, 20 Wend. 17; *Waydell v. Luer*, 5 Hill, 448; *Cole v. Sackett*, 1 Hill, 516.

although it be expressly agreed to take the note in satisfaction.⁴¹ It is true that a mortgage is but an incident of the debt, so that when the debt is gone, that is gone also; but it is an error to consider a mortgage as incidental to the note instead of the demand. Accurately speaking, a note is not a debt at all, any more than any other mere promise. Unless founded on a consideration, it is good for nothing between the original parties. A note is really the evidence of a debt, and a mortgage to secure a note is simply a security for the debt evidenced by the note. The conclusion is inevitable that the security stands until it is in some way separately cancelled, or until the debt itself is discharged. Taking a substituted note does not affect the debt, and consequently cannot affect the security.⁴²

Taking a note of the debtor as collateral security merely to a bond indebtedness without any agreement, either express or implied, for an extension, has been held not to operate as a binding extension so as to release the lands of a surety.⁴³ But an extension of the time of payment of a note secured by mortgage without the consent of the surety, if this extension is made by accepting a renewal note, has been held to operate as a discharge.⁴⁴

The validity of the lien is not impaired though the time for the payment of the debt be extended by stipulation between the original parties after the land upon which it is a charge has been transferred to a purchaser.⁴⁵ Though this will be different where the land stands as a surety for the debt of a person other than its owner.⁴⁶ So, an extension of time does not impair the security so as to give any new rights to the holders of junior liens.⁴⁷

⁴¹ *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luer*, 5 Hill, 448; *Hawley v. Foote*, 19 Wend. 516; *Frisbie v. Larned*, 21 Wend. 450, 452.

⁴² *Hill v. Beebe*, 13 N. Y. (3 Kern.) 556, 562; *Butler v. Miller*, 1 N. Y. (1 Comst.) 496, 500; *Westcott v. Gunn*, 4 Duer, 107; *Gahn v. Niemcewicz*, 11 Wend. 312, aff'g 3 Paige, 614.

⁴³ *Scott v. Stockwell*, 65 How. Pr. 249, aff'd 28 Hun, 641.

⁴⁴ *Ayres v. Wattson*, 57 Penn. St. 360; *Hubbard v. Gurney*, 64 N. Y. 457.

⁴⁵ *Kuhrs v. McGeah*, 38 Ohio St. 468.

⁴⁶ *The Bank of Albion v. Burns*, 40 N. Y. 170, aff'g 2 Lans. 52; *Smith v. Townsend*, 25 N. Y. 479.

⁴⁷ *Bank of Utica v. Finch*, 3 Barb. Ch. 293. See also *Naltner v. Tappety*, 55 Ind. 107; *Whittacre v. Fuller*, 5 Minn. 508.

EFFECT OF EXTENSION ON RIGHTS OF SURETIES.

§ 225. When an extension of time will discharge a surety.—If the payment of the mortgage debt is secured by the collateral obligation of some other person who occupies the position of a surety with relation to it, such surety will be discharged by any valid and binding agreement made by the mortgagee with the principal debtor, without the consent of the surety, by which the time for the payment of the mortgage debt is extended or postponed; and this, not only whether any loss has thereby happened to the surety or not, but even if it has been an actual benefit.⁴⁸ One reason for this rule may be found in the fact that the extension of time makes a material change in the contract; the original agreement is thereby annulled, and the surety is under no obligation under the agreement which is substituted for it.⁴⁹ Another reason, and this is the one which has received the most favor in courts of equity, is that by the extension the surety may be delayed for a time in the assertion of his equitable claim to make payment and be subrogated to the rights of the creditor.⁵⁰ The surety is by

48 *Antisdell v. Williamson*, 165 N. Y. 372; 59 N. E. 207, aff'g 37 App. Div. 167; 55 N. Y. Supp. 1028; *Kane v. Cortesy*, 100 N. Y. 132; 2 N. E. 874; *Spencer v. Spencer*, 95 N. Y. 353; *Murray v. Marshall*, 94 N. Y. 611; *Cohen v. Spitzer*, 145 App. Div. 104; 129 N. Y. Supp. 104; *Schwartz v. Smith*, 143 App. Div. 297; 128 N. Y. Supp. 1; *Olmstead v. Latimer*, 99 App. Div. 163; 41 N. Y. Supp. 44; 75 St. R. 500; *Del., L. & W. R. R. Co. v. Burkhard*, 36 Hun. 57; *Fox v. Parker*, 44 Barb. 541; *Gahn v. Niemcewicz*, 11 Wend. 312; *Huffman v. Hulbert*, 13 Wend. 375; *Miller v. McCan*, 7 Paige, 451; *Bangs v. Strong*, 7 Hill, 250. See also *Myers v. First Nat. Bank*, 75 Ill. 257; *Lim. Bank v. Mallett*, 34 Me. 547; *Gifford v. Allen*, 3 Metc. 258; *Wright v. Bartell*, 43 N. H. 548; *Haskell v. Burdette*, 35 N. J. Eq. 31; *People's Bank v. Pearson*, 30 Vt. 711.

The extension of the time of payment of one or more instalments of the principal of a mortgage does not

discharge the surety as to unmatured payments not included in the extension agreement. *Cohen v. Spitzer*, 145 App. Div. 104; 129 N. Y. Supp. 104.

Taking a new security from the debtor without agreeing to give him time does not discharge. *Fallkill Nat. Bank v. Sleight*, 1 App. Div. 190; 37 N. Y. Supp. 155; 72 St. R. 557.

Where a person guarantees the payment within a specified time of a mortgage given to secure the payment of a note, an extension of the note to a date within the period stated is held not to discharge the guarantor. The burden of proof is on the guarantor to show some damage. *Alger v. Alger*, 83 App. Div. 168.

49 *Rathbone v. Warren*, 10 Johns. 587.

50 *Bangs v. Strong*, 10 Paige, 11; *King v. Baldwin*, 2 Johns. Ch. 554, 560.

such extension also delayed in the right which he would otherwise enjoy, of coming into equity by a bill against the debtor and the creditor, to compel the debtor to make payment, and to have the estate upon which the debt is a charge sold for its satisfaction.⁵¹

§ 226. If the principal debtor gives to his creditor his note, payable "in one day after date," the surety is discharged.⁵² The acceptance of a promissory note made for a definite time, as a conditional payment, operates as an extension; ⁵³ though it has been held that this is not the case if the note is received as collateral security merely.⁵⁴

In *Newsam v. Finch* (25 Barb. 175), a promissory note for \$25 was signed by the defendant as surety. Before it became due the maker of the note paid \$10 on account, and, in consideration of this payment, it was agreed that the maker of the note "might have his own time to pay the balance," and it was held that this extended the time after the note became due by its terms for such a period as, under all the circumstances of the case, should be reasonable, and that the surety was discharged.

A defense of a surety to a promissory note alleging that the payee, without the knowledge or consent of the surety, released a mortgage on real estate executed by the principal maker to the payee to secure the note, and extended the time for a definite period after maturity, in consideration of a new mortgage, is good.⁵⁵

§ 227. Land of one person mortgaged for debt of another.—It is not necessary that the whole estate of one person should be bound as collateral to the debt of another in order to give him the rights of a surety. It is sufficient if any part of his property is pledged in such a way that it may become answerable for an obligation which it is the duty of some other person or estate, in the first instance, to pay and discharge. If, therefore, the real estate of a wife is mortgaged by her to secure the payment of her husband's debt, her lands stand as surety for the obligation, and any valid

⁵¹ *King v. Baldwin*, 2 Johns. Ch. 554, 560; s. c. 17 Johns. 384; *Hayes v. Ward*, 4 Johns. Ch. 123, 132; *Story's Eq. Jur.* § 639.

⁵² *Fellows v. Prentiss*, 3 Den. 512.

⁵³ *Hubbard v. Gurney*, 64 N. Y.

457. See also *Ayres v. Wattson*, 57 Penn. St. 360.

⁵⁴ *Scott v. Stockwell*, 65 How. 249, aff'd 28 Hun, 641.

⁵⁵ *Holland v. Johnson*, 51 Ind. 346.

and binding extension of the time of payment, made without her consent, will discharge the lien.⁵⁶

But where a husband and wife executed a note and mortgage on the wife's land to indemnify an indorser on the husband's note, it was held that the extension of the time of payment of the husband's indorsed note did not release the mortgagor, the mortgage note never having been extended.⁵⁷

Payment by a debtor of a part of the debt after the maturity of the whole is not a consideration sufficient to make an agreement of extension binding, and a surety will not be discharged thereby.⁵⁸

An extension of the mortgage debt will not discharge sureties on an undertaking to pay an occupation rent, pending an action to foreclose.⁵⁹

§ 228. Release of mortgagor by extension of time to his grantee.

—In the cases cited in which sureties have been discharged by the conduct of creditors in extending the time of payment, or in refusing to enforce payment when they might have done so, the relationship of principal and surety has, in general at least, been established by contracts to which in each case the creditors, the debtors, and the sureties, all were parties. The relationship of principal and surety was, in every case, one which was created by the contract of the parties. But when reference is had to rights under mortgages of land, there are many cases where the law designates one person or fund as being the proper one for satisfaction of the mortgage debt, and other persons or funds as sureties, and where these rights do not arise from the original form of the contract under which the mortgagee claims, but from equitable considerations depending on contracts or transactions to which the mortgagee was a stranger.

As an example of such a question, the case may be put of a mortgagor who conveys the mortgaged estate to a person who assumes the payment of the mortgage debt. The mortgagor, after

⁵⁶ *The Bank of Albion v. Burns*, 46 N. Y. 170; 2 Lans. 52; *Smith v. Townsend*, 25 N. Y. 479; *Gahn v. Niemcewicz*, 11 Wend. 312; *Niemcewicz v. Gahn*, 3 Paige, 614. See also *Christner v. Brown*, 16 Iowa, 130; *Hubbard v. Ogden*, 22 Kans. 363; *Metz v. Todd*, 36 Mich. 473; *Haskell v. Burdette*, 35 N. J. Eq. 31; *Insur-*

ance Co. v. O'Donnell, 41 Ohio St. 650; *Eisenberg v. Albert*, 40 Ohio St. 631.

⁵⁷ *Wise v. Willard*, 41 Ohio St. 679.

⁵⁸ *Ritch v. Smith*, 60 How. Pr. 13; 60 How. Pr. 157.

⁵⁹ *Cassidy v. Schedel*, 9 Hun, 340, *aff'd* 71 N. Y. 603.

this transaction, is, as between himself and his grantee, only obligated to pay the debt if his grantee does not, and in the language of the decisions he is spoken of as being a surety.⁶⁰ If the grantee does not personally obligate himself to pay the debt, still, if the conveyance be made subject to the mortgage, the land is the primary fund out of which the debt should be collected, and the mortgagor stands as its surety.⁶¹

The acceptance after maturity of the mortgage by such grantee of an installment of interest a day prior to the day it would become due is *prima facie* evidence of an agreement to extend the mortgage for the period for which the interest was received and unless rebutted, releases the mortgagor from liability on the bond.⁶²

Where the grantee has assumed the payment of the mortgage debt, making himself personally liable for its payment, a binding extension of time to the grantee has been adjudged to release the mortgagor on the principles applicable to all sureties.⁶³

Where the grantee has not personally covenanted to pay the mortgage, the conveyance being made merely subject to it, the mortgagor has also been held to be discharged by such an extension on the ground that, although no technical relation of principal and surety exists between the mortgagor and his grantee, still, as the land is the primary fund for the payment of the debt, in respect thereto and to the extent of its value the grantee stands in the relation of a principal debtor, and the grantor has an equity similar to that of a surety.⁶⁴

⁶⁰ *Rubens v. Prindle*, 44 Barb. 336; *Cornell v. Prescott*, 2 Barb. 16; *Tripp v. Vincent*, 3 Barb. Ch. 613; *Jumel v. Jumel*, 7 Paige, 591; *Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 Paige, 595; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Ferris v. Crawford*, 2 Den. 595; *Mills v. Watson*, 1 Sweeney, 374.

⁶¹ *Johnson v. Zink*, 52 Barb. 396.

⁶² *Germania Life Ins. Co. v. Casey*, 98 App. Div. 88; 90 N. Y. Supp. 418, *aff'd* 185 N. Y. 554; 76 N. E. 1095.

⁶³ *Calvo v. Davies*, 73 N. Y. 211; 29 Am. R. 130; *Matter of Piza*, 5 App. Div. 181; 38 N. Y. Supp. 540;

George v. Andrews, 60 Md. 26; 45 Am. R. 706; *Paine v. Jones*, 76 N. Y. 274; *Fish v. Hayward*, 28 Hun, 456; *contra*, *Perkins v. Squeer*, 1 T. & C. 620; *Meyer v. Lathrop*, 10 Hun, 66, *aff'd* 73 N. Y. 315; *Jester v. Sterling*, 25 Hun, 344. In Ohio the mortgagor is only released in the extent of loss suffered by him. *Feeters v. Lamborn*, 43 Ohio St. 144.

⁶⁴ *Spencer v. Spencer*, 95 N. Y. 353; *Murray v. Marshall*, 94 N. Y. 611, overruling *Penfield v. Goodrich*, 10 Hun, 41; *Matter of Piza*, 5 App. Div. 181; 38 N. Y. Supp. 540; *Olmstead v. Latimer*, 99 App. Div. 163; 41 N. Y. Supp. 44; 75 St. R. 500.

A more unusual case would arise if A, an owner mortgaged to B, and subsequently conveyed to C, who paid full value, A covenantee in the deed to pay the mortgage debt. In the hypothetical case C does not record the deed but goes into possession, and is in possession when the time for the payment of the mortgage debt is extended by a valid agreement between A and B. Upon foreclosure C sets up his unrecorded conveyance, asserting that under the terms of his deed from A, the land became the surety for the payment of the debt, while A was primarily liable, and that the unauthorized extension released the surety. It is difficult to see how such a claim could logically be denied.

§ 229. Extension reserving rights of surety.—When, in an agreement between a creditor and the principal debtor extending the time of payment, the remedies against the surety are reserved, the agreement does not operate as an absolute, but only as a qualified and conditional, suspension of the right of action. The stipulation in that case is treated in effect as if it was made in express terms subject to the consent of the surety, and the surety is not thereby discharged.⁶⁵

§ 230. Extension to discharge surety must be for good consideration.—But there is no positive duty incumbent on the creditor to prosecute measures of active diligence; and therefore mere delay on his part, at least if some other equity does not interfere, unaccompanied by any valid contract for such delay, will not discharge the surety.⁶⁶ The extension must be part of an agreement for that purpose, of such a nature that it can be enforced by the debtor. It must be upon a good consideration.⁶⁷ Payment of part of the amount due is not sufficient.⁶⁸ It must also have been

See *Union Bank of Brooklyn v. Rubenstein*, 78 Misc. R. 465; *contra*, *Maher v. Lanfrom*, 86 Ill. 513.

65 Per *ANDREWS, J.*, in *Calvo v. Davies*, 73 N. Y. 211, 217; 29 Am. R. 130; *Bangs v. Strong*, 10 Paige, 18; *Morgan v. Smith*, 70 N. Y. 537. See also *Kearsley v. Cole*, 16 M. & W. 128; *Oriental Financial Corporation v. Overend, Gurney & Co.*, 7 H. of L. Cas. 348.

66 *Schwartz v. Smith*, 143 App. Div. 297; 128 N. Y. Supp. 297; *Goldsmith v. Brown*, 35 Barb. 484; *Merchants' Ins. Co. v. Hinman*, 34

Barb. 410; 13 Abb. 110; *Merritt v. Lincoln*, 21 Barb. 249; *Schroepel v. Shaw*, 3 N. Y. (3 Comst.) 446; *King v. Baldwin*, 2 Johns. Ch. 554; *Story's Eq. Jur.* § 326.

67 *New York Life Ins. Co. v. Casey*, 178 N. Y. 381; 70 N. E. 916; *rev'g* 82 App. Div. 92; *Title Guarantee & Trust Co. v. Wenner*, 30 Misc. R. 250; 63 N. Y. Supp. 224; *Draper v. Romeyn*, 18 Barb. 166. See also *Zane v. Kennedy*, 73 Pa. St. 182.

68 *Schwartz v. Smith*, 143 App. Div. 297; 128 N. Y. Supp. 1.

made without the consent of the surety, for it would be unjust to allow a man to evade his obligations because of conduct of his creditor which he himself had encouraged or sanctioned.⁶⁹

In a case where a wife mortgaged her land to secure a debt of her husband, upon which she was liable only as surety, and the mortgagee voluntarily granted indulgence to the husband, it was held that this did not operate to release the wife in the absence of any showing that the mortgagee had in any way agreed or bound himself to give further time.⁷⁰

§ 231. Usurious consideration for extension.—An agreement to extend the time for the payment of a debt granted upon a usurious consideration is void if the borrower so elects, but it will be binding upon the lender accepting the usury.⁷¹ If the agreement by which the mortgage was extended shall have been made upon a usurious consideration, it will nevertheless operate to extinguish the claims against the surety unless he consented to such extension.⁷² If the person submitting to the usury prefers to do so in order to obtain the additional time, it will not be competent for the creditor to make his own violation of law a reason for refusing to perform his bargain, but the borrower cannot insist upon a credit for the amount paid, and at the same time claim the benefit of the extension.⁷³ The defense of usury is personal to the borrower, and it is not competent for the usurer to claim any advantage because the contract which he has assumed to make is such that the law, at the instance of the other party to it, will declare it to be void.⁷⁴

§ 232. Creditor must know.—In order that the contract for forbearance shall operate to release the surety, it is necessary that the

⁶⁹ Wright v. Storrs, 32 N. Y. 691, aff'g 6 Bosw. 600; La Farge v. Herter, 11 Barb. 159; Bangs v. Mosher, 23 Barb. 478. See also Shook v. State, 6 Ind. 113; Dubuisson v. Folkes, 30 Miss. 432; Smith v. Winter, 4 M. & W. 519; Tyson v. Cox, Turn. & R. 395.

⁷⁰ Frickee v. Donner, 35 Mich. 151.

⁷¹ Billington v. Wagoner, 33 N. Y. 31; Draper v. Trescott, 29 Barb. 401; *contra*, Jones v. Truesdell, 23 N. J. Eq. 555; Id. 121.

⁷² Loos v. McCormack, 46 Misc. R. 144; 93 N. Y. Supp. 1088, aff'd 107 App. Div. 8; 95 N. Y. Supp. 1141.

⁷³ Church v. Maloy, 70 N. Y. 63, aff'g 9 Hun, 148.

⁷⁴ Billington v. Wagoner, 33 N. Y. 31; Draper v. Trescott, 29 Barb. 401; Miller v. McCan, 7 Paige, 451; Vilas v. Jones, 10 Paige, 76. *Contra*, Vilas v. Jones, 1 N. Y. (1 Comst.) 274; Schroeppel v. Shaw, 5 Barb. 580.

mortgagee shall, at the time of making it, know that the relation of principal and surety exists.⁷⁵ But if the relation of the parties appears by matter of public record, existing at the time when the mortgage is executed, or if the mortgagee subsequently receives notice of facts sufficient to put him upon inquiry, he is bound by all of the facts which a proper examination of the public records or proper inquiry elsewhere would disclose.⁷⁶ He cannot close his eyes and then plead his blindness as an excuse for trespassing upon the equitable rights of a surety.

WHEN A REFUSAL BY A CREDITOR TO COLLECT A DEBT DISCHARGES THE SURETY.

§ 233. **Creditor should collect debt on request of surety.**—While, as has already been said, mere neglect of the creditor to enforce payment of a debt when due will not discharge the surety where there has been no valid agreement for an extension, and where the creditor is not requested by the surety to take proceedings for the satisfaction of his demands,⁷⁷ the creditor cannot refuse to collect when called upon by the surety to do so, without taking upon himself the risk of the subsequent insolvency of the principal debtor or depreciation in value of the primary fund. Whatever may have been the current of decision elsewhere, the principle was settled in this State many years ago, and has since been steadily maintained, that if a surety request a creditor to collect the debt from the principal, and the creditor refuse or neglect to do so at a time when it is collectible, and from a subsequent change of circumstances it becomes uncollectible, the surety is by such conduct of the creditor exonerated from his liability.⁷⁸

§ 234. **Reason of the rule.**—It is manifest that if the creditor, actually collude with the principal to cast the debt upon the surety,

⁷⁵ *Elwood v. Deifendorf*, 5 Barb. 398.

⁷⁶ *Bank of Albion v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479; *Guion v. Knapp*, 6 Paige, 41, 42; *Howard Ins. Co. v. Halsey*, 4 Sandf. 565; *aff'd* 8 N. Y. (4 Seld.) 271.

⁷⁷ *Goldsmith v. Brown*, 35 Barb. 484; *Merchants' Ins. Co. v. Hinman*, 34 Barb. 410; 13 Abb. 110; *Merritt v. Lincoln*, 21 Barb. 249; *Schroepel v.*

Shaw, 3 N. Y. (3 Comst.) 446; *King v. Baldwin*, 2 Johns. Ch. 554.

⁷⁸ *Per* WRIGHT, J., in *Remsen v. Beekman*, 25 N. Y. 552, 555; *King v. Baldwin*, 17 Johns. 384; *Pain v. Packard*, 13 Johns. 174; *Osborne v. Heyward*, 40 App. Div. 78; 57 N. Y. Supp. 542; 29 Civ. Proc. R. 215; *Warfield v. Trickey*, 23 W. Dig. 92. *Contra*, *Smith v. Freyler* (Montana), 29 Alb. L. J. 448.

the latter should be exonerated;⁷⁹ so also if, by omitting to do an act on the requirement of the surety, which equity and his duty to the surety enjoin on him to do, the surety is injured by the omission, the latter ought not to be held. It is inequitable and unjust that the surety's liability should continue from improper motives, at the option and for the convenience of the creditor and against the surety's will and express wish, until the principal becomes irresponsible. Duty enjoins the creditor to enforce payment from the party primarily liable; and if requested by the surety to collect the debt when it is collectible from such party by measures of active diligence, and the creditor refuses or neglects to do it until it becomes uncollectible from the principal, such conduct ought to be a defense in equity to any suit brought against the surety to charge him with the payment of the debt.⁸⁰

§ 235. Request to collect must be explicit.—In order to discharge the surety by reason of a neglect on the part of the creditor, it must be shown that the creditor was requested to enforce the collection of the debt by due process of law. Nothing short of an explicit expression of the desire of the surety that the creditor shall resort to his legal remedies, will be sufficient.⁸¹

§ 236. Surety only relieved to extent of actual injury.—But failure on the part of the creditor to comply with the request of the surety to enforce payment of the debt, will not operate to exonerate the surety, unless it results in actual injury to him, and then only to the extent of such injury. The solvency of the debtor, or the sufficiency of the fund at the time when the request to collect was made, and subsequent insolvency or insufficiency, are essential parts of the defense of the surety, and must be alleged and proven by him.⁸² A mere possibility or probability that compliance with the request of the surety would have resulted in the satisfaction of

⁷⁹ *Sailly v. Elmore*, 2 Paige, 497.

⁸⁰ Per *WRIGHT, J.*, in *Remsen v. Beekman*, 25 N. Y. 552, 557; *Russell v. Weinberg*, 4 Abb. N. C. 139, aff'g 2 Abb. N. C. 422; 16 Alb. L. J. 164; *Loomis v. Balheimer*, 5 Abb. N. C. 263.

⁸¹ *Hunt v. Purdy*, 82 N. Y. 486; *Toles v. Adees*, 84 N. Y. 222; *Singer v. Troutman*, 49 Barb. 182; *Goodwin v. Simonson*, 74 N. Y. 133; *Mutual*

Life Ins. Co. v. Davies, 44 N. Y. Super. (12 J. & S.) 172; 56 How. Pr. 440; *Fulton v. Matthews*, 15 Johns. 433; *Denick v. Hubbard*, 27 Hun, 347.

⁸² *People v. Berner*, 13 Johns. 383; *Huffman v. Hulbert*, 13 Wend. 377; *Merritt v. Lincoln*, 21 Barb. 249; *Wheeler v. Benedict*, 36 Hun, 478.

the debt, will not exonerate him, unless it be shown that the debt could have been collected out of the property primarily liable by legal process.⁸³

§ 237. **No one not really a surety will be relieved.**—The doctrine that a surety is entitled by notice to call upon the creditor to proceed to collect the debt by legal proceedings against the principal on the debt becoming due, although no such obligation is imposed by the contract, and that the creditor failing to comply is discharged to the extent of the loss sustained by the delay, has not always been regarded with approval by the courts, and the tendency is not to enlarge or extend it. This doctrine, though frequently criticised, has not been overruled, but the courts have not been disposed to apply it except in cases where the surety became such at the inception of the contract, or that relation was created by dealings between the parties originally bound by the contract subsequent thereto of which the creditor has notice.⁸⁴ Thus, the court refused to apply the rule to the case of an indorser for value on the ground that the indorser, though in the nature of a surety, is answerable upon an independent contract, and it was his duty to take up the bill when dishonored.⁸⁵ And in a case where there was a guaranty of payment made by a vendor on the sale to the plaintiff of a bond and mortgage, the former receiving the amount of the security as the consideration of the transfer, the court held the assignor's engagement, though collateral in form, was in substance an original undertaking, and that it was his duty to pay the mortgage debt when it became due, and that he could not by any notice impose upon his assignee the duty of proceeding against the land.⁸⁶

§ 238. **Surety discharged by collusion between debtor and creditor.**—The surety will also be discharged without any request being made by him for the collection of the debt, if the principal debtor wrongfully colludes with the creditor to retain his liability; as if the money be offered by the debtor to the creditor on the day it falls due, or afterward, and he, without the consent of the surety, requests the debtor to retain it longer, for this operates as

⁸³ *Herrick v. Borst*, 4 Hill, 650.

⁸⁵ *Trimble v. Thorne*, 16 Johns.

⁸⁴ Per *ANDREWS*, Ch. J., in *Newcomb v. Hale*, 90 N. Y. 326, 329.

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⁸⁶ *Newcomb v. Hale*, 90 N. Y. 326.

a fraud upon the surety.⁸⁷ But to accomplish this result there should be a formal tender.⁸⁸

It has been held that where a mortgagee, out of kindness for the heirs of the mortgagor, and in the belief that the real estate would rise in value, delayed foreclosure until the property had so depreciated as to be an inadequate security, he would not be allowed to proceed against the administrators for the collection of the deficiency, they having paid out the whole personal property for the payment of other debts, knowing that the real estate was, at the time of the death of the mortgagor, sufficient to pay the debts charged upon it.⁸⁹

§ 239. **Guarantor of collection released by neglect to sue.**—Where a mortgage is assigned with a guaranty of collection, it is a condition precedent that the creditor shall diligently endeavor to collect the amount from the principal debtor by exhausting the ordinary legal remedies for that purpose, and if he fails to do this, the guarantor is discharged. So, the allowance of the lapse of one term after the debt becomes due, without suit against the principal, has been held to effect such discharge;⁹⁰ and a delay of six months in foreclosing a mortgage has been determined to release the guarantor.⁹¹ A delay of two years and nine months after the mortgagee had been expressly requested by such a surety to proceed and enforce the collection of the demand while the security was probably good, has been adjudged sufficient to require the release of the surety.⁹² This rule does not extend to the case of a guarantor of payment whose duty it is to make payment in the first instance.⁹³

In the absence of a provision in the mortgage making the whole principal due upon default in the payment of interest, such a de-

⁸⁷ Saily v. Elmore, 2 Paige, 497.

⁸⁸ Clerk v. Sickler, 64 N. Y. 231.

⁸⁹ Johnson v. Corbett, 11 Paige, 265, 272.

⁹⁰ Kies v. Tift, 1 Cow. 98.

⁹¹ Craig v. Parkis, 40 N. Y. 181. See also Moakley v. Riggs, 19 Johns. 69; Loveland v. Shepard, 2 Hill, 139; Merritt v. Bartholick, 36 N. Y. 44.

⁹² Northern Ins. Co. of N. Y. v. Wright, 13 Hun, 166, aff'd 76 N. Y. 445.

⁹³ Newcomb v. Hale, 90 N. Y. 326.

See also Noonan v. Lee, 2 Black. 500; Redman v. Purrington, 65 Cal. 271; 3 Pac. 883; Elwood v. Wolcott, 32 Kan. 526; 4 Pac. 1056; Sharp v. Barker, 11 Kans. 381; Stanclifts v. Norton, 11 Kan. 218; Detweiler v. Breckenkamp, 83 Mo. 45; Lowenstein v. Phelan, 17 Nev. 429; 22 N. W. 561; Moore v. Cameron, 93 N. C. 51; Gulden v. O'Byrne, 7 Phila. 93.

fault will not have that result.⁹⁴ Nor can there be default until the amount due has become liquidated.⁹⁵

SHORTENING THE TIME OF PAYMENT UNDER THE "DEFAULT CLAUSE."

§ 240. Nature of the "default clause."—It is a common thing to insert in bonds secured by mortgages, a clause known as a "default clause," which is to the effect that, if any instalment of interest or principal, or any tax on the mortgaged property shall remain unpaid for a certain number of days after it becomes due, the principal sum shall, at the option of the mortgagee, become due and payable. Such a stipulation is entirely valid and will be enforced by the courts; it does not impose any forfeiture or penalty upon the mortgagor, and he must abide by the contract which he makes. The time of payment is the only thing which is contingent, and the parties have a perfect right to make the prompt payment of interest, or any other condition or event, the criterion which shall determine when the principal shall become due.⁹⁶

§ 241. Default clause is for benefit of mortgagee only.—If the stipulation is drawn so as to provide that the entire amount of the debt shall become due on a default in payment of an instalment of interest or the like, it is still for the benefit of the mortgagee only, and it cannot be taken advantage of by the mortgagor so as to permit him to pay the debt, though the time originally stipulated for has not expired.⁹⁷

⁹⁴ Burt v. Saxton, 4 Thomp. & C. 108; 1 Hun, 551.

⁹⁵ Price v. Wood, 76 Hun, 318; 27 N. Y. Supp. 691.

⁹⁶ House v. Eisenlord, 102 N. Y. 713; 7 N. E. 428, aff'g 17 W. D. 203; Cole v. Hinck, 120 App. Div. 355; 105 N. Y. Supp. 407; Dougan v. Evansville & T. H. R. R. Co., 15 App. Div. 483; 44 N. Y. Supp. 503; 78 N. Y. St. R. 503; Smith v. Lamb, 59 Misc. R. 568; 111 N. Y. Supp. 455; Dunn v. Sharpe, 9 Misc. R. 636; 30 N. Y. Supp. 353; Martin v. Clover, 17 N. Y. Supp. 638; Crane v. Ward, Clarke, 393; Noyes v. Clark, 7 Paige, 179; Valentine v. Van Wagner, 37 Barb. 60; 23 How.

Pr. 400; Ferris v. Ferris, 16 How. Pr. 102; 28 Barb. 29; Rubens v. Prindle, 44 Barb. 336; Dwight v. Webster, 32 Barb. 47; 19 How. Pr. 349; 10 Abb. 128; Hunt v. Keech, 3 Abb. 204; compare Noyes v. Anderson, 124 N. Y. 175; 26 N. E. 316, aff'g 1 N. Y. Supp. 5; 16 St. R. 603, where distinction is made between default clause and agreement not to enforce for a stipulated time.

Where mortgage is for future advances and indebtedness. See Dunn v. Sharpe, 9 Misc. R. 636; 30 N. Y. Supp. 353.

⁹⁷ Cohen v. Spitzer, 145 App. Div. 104; 129 N. Y. Supp. 104; Quackenbush v. Mapes, 54 Misc. R. 124; 105

A clause of this kind does not operate against the mortgagee so as to set the statute of limitations running against him as to the instalments of the debt not due.⁹⁸ And a foreclosure on default of a first note, and payment thereof out of proceeds of sale, will not be a bar to an action to charge an indorser on one of the notes falling due subsequently.¹

§ 242. **Construction of provision as to default.**—The clause making the whole amount due on failure to pay an instalment of interest or of principal, need not be recited in the mortgage if it contains a reference to the bond containing such clause, as by saying that payment is to be made “according to the condition of a certain bond bearing even date with the mortgage.” The object of the mortgage is to reinforce that obligation; and a reference in the mortgage to the paper containing such obligation, makes the bond a part of the obligation for all essential purposes.²

But the converse of this proposition is not true, and if the default clause be inserted in the mortgage and be not included in the bond, the debt may become due for the purpose of enforcing the lien, when only an instalment of it would be due for the purpose of an action at law to recover the debt. This was held in a case where a mortgage of a railroad gave to the trustees the right to enforce the entire mortgage on any default, but the separate bonds which were secured by the mortgage contained no such provision.³

The court will not imply any agreement of this kind, and when a mortgage authorized a sale of the mortgaged premises for the payment of the whole debt, it was held that this merely authorized a statutory proceeding by advertisement, and that an action to foreclose could be stayed by payment of the instalment due.⁴

N. Y. Supp. 654, modified 123 App. Div. 250; 107 N. Y. Supp. 1053; Mallory v. West Shore R. R., 35 N. Y. Supr. Ct. (3 J. & S.) 174; S. & M. R. R. Co. v. Lancaster, 62 Ala. 555; Morgan v. Martin, 32 Mo. 438; Lowenstein v. Phelan, 17 Neb. 429; 22 N. W. 561; McClelland v. Bishop, 42 Ohio St. 113; *contra*, National Bank v. Peck, 8 Kans. 8.

⁹⁸ Capehart v. Detrick, 91 N. C. 344; Howell v. Western R. R. Co., 94 U. S. 463.

¹ McClelland v. Bishop, 42 Ohio St. 113.

² Dimon v. Dunn, 15 N. Y. 498, *rev'g s. c. sub nom. Dimon v. Bridges*, 8 How. Pr. 16; Martland v. Godwin, 19 N. Y. Supp. 275; 46 N. Y. St. R. 959.

³ Mallory v. The West Shore Hudson River R. R. Co., 34 N. Y. Sup. (3 J. & S.) 174.

⁴ Holden v. Gilbert, 7 Paige, 208.

§ 243. Provision as to default construed as limitation on right to sue.—A provision in a mortgage that in case of a default in making any of the payments provided for therein within a certain time after such payment shall be due, the entire principal shall become due and payable, operates as a limitation upon the right of the mortgagee to proceed against the mortgagor prior to the expiration of the period specified. So where a mortgage given to an association by one of its members provided that if default should be made “in the said monthly payments for the space of six months after they, or any of them, should become due” it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to the statute, it was held that such provision was not to be limited to an exercise of the power of sale by advertising, according to statute, but by its reasonable interpretation, operated as an extension of the term of credit, so far as to preclude the association from commencing any action upon the mortgage until the expiration of six months from the time when the monthly payment remaining unpaid had become due.⁵

§ 244. Statute providing short form of mortgage and construction of default clause.—Where a statute provides a form for a mortgage and the construction which is to be given to certain provisions therein, such rule of construction will not be applied where a mortgage, though it contains one or more of the provisions recited in the statutory form, does not show that it was made in contemplation of such act. So where there was nothing in the record of an action to foreclose a mortgage to show that a clause in the mortgage as to default in the making of payments was drawn with respect to the provisions of the act entitled “An Act to provide for Short Forms of Deeds or Mortgages.” (Laws of 1890, Chap. 475), it was decided that such clause would not be construed with reference to such provisions, as to the right to foreclose for the whole principal sum.⁶

The mere production of the bond and mortgage, from which it appears that more than the stipulated time has expired since the

⁵ Second American Building Association v. Platt, 5 Duer (12 N. Y. Super.) 675, dismissing a complaint which did not show a default for the prescribed period.

⁶ Mutual Benefit Loan and Building Co. v. Jaeger, 34 App. Div. 90; 54 N. Y. Supp. 99.

instalment of interest became due and default was made thereon, is sufficient *prima facie* to entitle the mortgagee to judgment for the whole amount of principal and interest.⁷

§ 245. Election.—There is no obligation upon the holder of a mortgage to elect that the principal sum is due upon a failure to pay interest.⁸ Election must be evidenced by an affirmative act, seasonably made.⁹ Until it is made nothing is due but the interest and therefore a tender, before election, of the interest due will be a bar to a subsequent action to foreclose the mortgage. And in such a case the tender to be available as a defense to such an action does not have to be kept good by payment into court.¹⁰

Unless so required by the terms of the bond and mortgage, it is not necessary to give the mortgagor notice of an intention to exercise an option to make the whole indebtedness due on failure to pay interest;¹¹ the commencement of an action is sufficient indication of such intention.¹² Appearance, however, by an assignee of the mortgage who holds it as security for a loan as a defendant in an action of foreclosure brought by the assignor, followed by the former's consent to a judgment is held not to constitute an election.¹³

In case a mortgage has been assigned as security for a loan, the mortgagee and his assignee are to be regarded in equity as joint owners; an election by the assignor alone to treat the principal as due for a default in the payment of interest is not sufficient. It is necessary that both should join,¹⁴ but where the assignment

⁷ Sowarby v. Russell, 6 Rob. 322; 4 Abb. N. S. 238.

⁸ Quackenbush v. Mapes, No. 1, 123 App. Div. 242; 107 N. Y. Supp. 1047.

⁹ Cresco Realty Co. v. Clark, 128 App. Div. 144; 112 N. Y. Supp. 550.

¹⁰ Cresco Realty Co. v. Clark, 128 App. Div. 144; 112 N. Y. Supp. 550.

¹¹ Hothorn v. Louis, 52 App. Div. 218; 65 N. Y. Supp. 155, *aff'd* 170 N. Y. 576; 62 N. E. 1096; Howard v. Farley, 3 Robt. 599; Hunt v. Keech, 3 Abb. Pr. 204; Hoodless v. Reid, 112 Ill. 105; Marston v. Brittenham, 76 Ill. 611; Loan & Trust Co. v. Munson, 60 Ill. 371; Buchanan v. Life Ins. Co., 96 Ind. 510; Young

v. McLean, 63 N. C. 576; *contra*; Dean v. Applegarth, 65 Cal. 391; 4 Pac. 375.

¹² Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163; 75 N. E. 1124; Northampton Nat'l Bank v. Kidder, 106 N. Y. 221; 12 N. E. 577; 8 St. R. 621; 27 W. D. 165; New York Security & T. Co. v. Saratoga Gas & E. L. Co., 88 Hun, 569; 890 N. Y. Supp. 890; Borgeol v. Eiga-broadt, 35 Misc. R. 606; 72 N. Y. Supp. 133; Hunt v. Keech, 3 Abb. Prac. 204.

¹³ Cresco Realty Co. v. Clark, 128 App. Div. 144; 112 N. Y. Supp. 550.

¹⁴ Cresco Realty Co. v. Clark, 128 App. Div. 144; 112 N. Y. Supp. 550;

of a mortgage is absolute, the election to treat the principal as due in such a case would have to be made by the assignee.¹⁵ Where a portion only of a series of promissory notes payable at intervals of one month are transferred, the transferee cannot, on the failure of the maker to pay notes not transferred to him, take advantage of such a provision, unless the other holders concur. Moreover, even if the transferee acquired the right as against the maker to declare the whole debt due so as to resort to the security, the exercise of that right would not make the notes become due before maturity as against his immediate transferor.¹⁶ The holders of a large majority of an issue of corporate bonds secured by a mortgage with such a clause may make the election,¹⁷ but an individual holding less than a majority, may not.¹⁸ The holder of a mortgage should allege in his complaint that he has elected to consider the whole amount due if he seeks to recover the whole principal and interest for a default in payment.¹⁹

§ 246. Election concludes both mortgagor and mortgagee.—After the mortgagee has made his election and has instituted foreclosure, neither the mortgagor nor his grantee can defeat the action by a subsequent tender of the amount of interest due, with costs.²⁰ On the other hand the mortgagee is similarly bound by his election, once made, after the mortgagor as a direct result of such election has changed his position and assumed legal obligations.²¹ So where a mortgage contained such a clause and also gave the mortgagor the privilege at any time after a date specified, by paying the principal before maturity upon the payment of a thousand dollars

Shaw v. Wellman, 59 Hun, 447; 13 N. Y. Supp. 527.

¹⁵ Cresco Realty Co. v. Clark, 128 App. Div. 144; 112 N. Y. Supp. 550.

¹⁶ Getty, Inc. v. Cauchois, 141 App. Div. 443; 126 N. Y. Supp. 202.

¹⁷ Atlantic Trust Co. v. Crystal Water Co., 72 App. Div. 539; 76 N. Y. Supp. 647.

¹⁸ Batchelder v. Council Grove Water Co., 131 N. Y. 42; 42 St. R. 614; 29 N. E. 801.

¹⁹ Howard v. Farley, 3 Robertson, 599.

²⁰ Pizer v. Herzig, 120 App. Div. 102; 105 N. Y. Supp. 38; Rosche v. Kosmowski, 61 App. Div. 23; 70

N. Y. Supp. 216; Osborne v. Ketcham, 76 Hun, 325; 27 N. Y. Supp. 694.

A tender by a railroad company to a bondholder who has commenced an action to foreclose for default in payment of interest due upon his bonds, is not sufficient to arrest the action unless it is a tender of all the interest due on all the bonds whose holders have not agreed to postpone their claim to interest. Van Benthuyzen v. Central N. E. & W. R. Co., 17 N. Y. Supp. 709.

²¹ Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163; 75 N. E. 1124, reversing 95 App. Div. 287; 88 N. Y. Supp. 628.

additional as a bonus, he was held to have made a final election by the institution of foreclosure proceedings. And where the mortgagor made financial arrangements in view of such elections, notified the mortgagee that he would pay the mortgage and interest and the latter stated that its foreclosure suit had been discontinued, insisted upon the payment of the bonus before it would satisfy the mortgage and threatened to sue for the interest, and, in order to procure the discharge of the mortgage, the mortgagor paid the bonus, it was decided that such payment must be regarded as involuntary and could be recovered back in an appropriate action for the purpose.²² Assuming a demand to be necessary, it has to be made at the place where the interest is payable under the terms of the mortgage, but if the designated place be an office, closed and abandoned, there is no obligation to search elsewhere, and foreclosure may be instituted without previous demand.²³

§ 247. Place where interest must be paid.—Payment of interest must be made to the creditor himself, or to some person authorized by him to receive it, and the creditor may require it to be paid to him at any place within the State.²⁴

In the absence of any fraud or trick on the part of the mortgagee, it is no excuse for the mortgagor that he could not find the mortgagee in season to make payment.²⁵

In general a debtor is bound, if no place of payment is specified in the contract, to seek the creditor and make payment to him personally. But this rule is subject to the exception that if the creditor is out of the State when payment is to be made, the debtor is not obliged to follow him, but readiness to pay within the State in that case will be as effectual as actual payment to save a forfeiture. It may perhaps be that, although a creditor is absent from the State when a payment is due, if he has a house therein where he resides, it is the duty of the debtor to tender the money there, or otherwise his obligation is not discharged. However this

²² Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163; 75 N. E. 1124, reversing 95 App. Div. 287; 88 N. Y. Supp. 528.

²³ Long Island Loan & Trust Co. v. Long Island City & Newtown R. Co., 85 App. Div. 36; 82 N. Y. Supp. 644; aff'd on opinion below 178 N. Y. 588; 70 N. E. 1102.

²⁴ Grussy v. Schneider, 50 How. Pr. 134, aff'd 55 How. Pr. 188.

²⁵ Bennett v. Stevenson, 53 N. Y. 508; Asendorf v. Meyer, 8 Daly, 278; Dwight v. Webster, 32 Barb. 47; 19 How. 349; 10 Abb. 128. See Schieck v. Donohue, 92 App. Div. 330; 87 N. Y. Supp. 204, where mortgagee changed his residence.

may be as a general rule, no such duty rests upon a mortgagor, and he is not obliged to part with his money to a third person without satisfactory evidence of his authority. If the mortgagee desires that the interest should be paid to any agent of his within the State, he should notify the mortgagor that such agent is entitled to receive it, and if he leaves the State without doing so, the mortgagor is not obliged to tender the money at his residence, and failure to do so will not operate to make a mortgage due, under a default clause.²⁶ In *Weygand v. Park Terrace Co.*,²⁷ Judge Chase of the Court of Appeals writing the opinion, which was concurred in by the full bench, lays down the following rules;—

1. It is a general rule that a debtor must seek his creditor to make payment of his indebtedness.

2. The parties to a contract may provide therein where payments thereon shall be made.

3. Where a contract is made outside of the State in which the promisor resides, and it does not, either by express terms or by fair inference, provide where the same is to be performed it will be presumed that the parties intend that it shall be performed at the place where it is made, and the promisor must provide at such place to make the payments thereon.

4. Where a contract is made in this State either with a person then residing in this State, who afterwards removes therefrom, or with a non-resident of this State, it is the duty of the promisee to provide a place in this State where payments can be made, and it is not necessary for the debtor to go beyond the bounds of this State to make payments thereon.

Where an attorney, authorized to receive payment, wrote to the debtor requiring payment to be made to him at his office at a time named, and then absented himself therefrom, leaving a boy in charge, a tender to the boy was held sufficient to save costs.²⁸

§ 248. **Excusing default**, the court will not, as a rule, excuse the mortgagor's default, when the mortgagee has done nothing to render it unconscionable for him to take advantage of it.²⁹ The

²⁶ *Hale v. Patton*, 60 N. Y. 233; *Houbie v. Volkening*, 49 How Pr. 169; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359. See *Weyand v. Randall*, 131 App. Div. 167; 115 N. Y. Supp. 279.

²⁷ 202 N. Y. 231; 95 N. E. 723,

rev'g 135 App. Div. 821; 120 N. Y. Supp. 192.

²⁸ *Kirton v. Braithwaith*, 1 M. & W. 310; *Grussy v. Schneider*, 50 How. Pr. 134, 137.

²⁹ *Cole v. Hinch*, 120 App. Div. 355; 105 N. Y. Supp. 407; *Ferris v.*

foreclosure of a mortgage is equitable in its nature, although based on legal rights, and it is the province of a court of equity to see to it that a party invoking its relief shall have dealt fairly before relief is given.³⁰ In one of the more recent decisions it is said that cases where foreclosure may be denied in spite of the default of the mortgagor fall within two classes: First, where the default is in the payment of taxes or assessments, or sums for which the time of payment is not fixed by the instrument and can be known to the mortgagor only by investigation or information *dehors* the mortgage; second, where by course of dealing between the parties, the mortgagor has been induced by the mortgagee to suffer the default.³¹ If the mortgagee has been guilty of any fraud or oppressive conduct, the court will not allow him to profit by his own wrong.³² So where the plaintiff, an assignee of the mortgage, colluded with his assignor to prevent the mortgagor from ascertaining who was then the owner of the mortgage, and thus prevented him from making payment to the right person within the time fixed by the condition, a stay of proceedings was ordered by the court on the ground that, under such circumstances, it was inequitable to permit the assignee to take advantage of the breach of the condition.³³

Mere negligence of the mortgagor, or forgetfulness as to the place or person to whom payment is to be made, will not excuse non-payment or prevent the whole amount of the debt from becoming due pursuant to the terms of the mortgage because of such default.³⁴

The fact that the mortgaged estate belongs to a mere surety, as to a wife, while the debt was the husband's, can make no difference,

Ferris, 16 How. Pr. 102; Hale v. Gouverneur, 4 Edw. Ch. 207.

30 Germania Life Ins. Co. v. Potter, 124 App. Div. 814; 109 N. Y. Supp. 435, rev'g 57 Misc. R. 204; 107 N. Y. Supp. 912.

31 Pizer v. Herzig, 120 App. Div. 102; 105 N. Y. Supp. 38

32 Bennett v. Stevenson, 53 N. Y. 508; Schieck v. Donohue, 77 App. Div. 321; 179 N. Y. Supp. 233, appeal dismissed, 173 N. Y. 638; 66 N. E. 1116; French v. Row, 77 Hun, 380; 28 N. Y. Supp. 849; Bieber v.

Goldberg, 133 App. Div. 207; 117 N. Y. Supp. 211; Teachers Bld'g Ass'n v. Severance, 41 App. Div. 311; 58 N. Y. Supp. 464; Foster v. Hughes, 51 How. Prac. 20; Western Bank v. Sherwood, 29 Barb. 383; Broderick v. Smith, 15 How. Pr. 434; 26 Barb. 539; Noyes v. Clark, 7 Paige Ch. 179.

33 Noyes v. Clark, 7 Paige, 179.
34 Ferris v. Ferris, 28 Barb. 29; 16 How. Pr. 102; Noyes v. Clark, 7 Paige Ch. 179; Spring v. Fisk, 21 N. J. Eq. 175. Compare Lynch v. Cunningham, 6 Abb. Prac. 94.

for when the whole debt becomes due the court has no power to stay proceedings on payment of mere interest and costs.³⁵ If the mortgagor fails to pay the interest within the time specified after it becomes due he must, in order to relieve himself from a forfeiture show a sufficient reason in his papers which will excuse his laches.³⁶ A further exception to the general rule was made where a temporary receiver had been appointed for the owner of the land, a state bank. In this case there was no question of permanent insolvency and it was held that the default had not been caused by any negligence on the part of the owner nor was it chargeable with any of the circumstances producing the result. It was an act of the state, quasi governmental in its character.³⁷

§ 249. **Practice when default is excusable.**—It seems that the question whether or not such a default is excusable may properly be litigated only at the trial of the action, and that the court is without jurisdiction to decide the question on affidavits or to stay the action on a motion so founded.³⁸ A different practice formerly prevailed.³⁹ Perpetual stays of proceedings have been granted and, where there was obvious fraud and oppression, have been sustained.⁴⁰ Such a stay if granted, is conclusive and prevents a final judgment from which an appeal may be taken. It is therefore itself appealable to the court of appeals.⁴¹ But the doctrine of *Cole v. Hinck* would seem to be the equitable and logical one. As Mr. Justice Lambert very reasonably says in that case “If the defendants in the action have a substantial defense in equity, to be available, it must be presented as an issue by answer and litigated in the ordinary way. When the mortgagor has a valid excuse for not paying interest in time, he cannot pay the money into court on an *ex parte* order. The proper practice is to offer to pay the amount to the plaintiff, and, on his refusing to receive it, to apply to the court, upon papers excusing the default,

³⁵ *Hale v. Gouverneur*, 4 Edw. 207; *Claffin v. Reese*, 54 Iowa, 544; 6 N. W. 729.

³⁶ *Hunt v. Keech*, 3 Abb. Pr. 204.

³⁷ *Smith v. Lamb*, 59 Misc. R. 568; 111 N. Y. Supp. 455.

³⁸ *Cole v. Hineck*, 120 App. Div. 355; 105 N. Y. Supp. 407.

³⁹ *Thurston v. Marsh*, 5 Abb.

Pr. 389; 14 How. Pr. 572; *Lynch v. Cunningham*, 6 Abb. Pr. 94; *Asendorf v. Meyer*, 8 Daly, 278.

⁴⁰ *Noyes v. Clark*, 7 Paige, 179; *Foster v. Hughes*, 51 How. Pr. 20. See *Trenor v. Le Count*, 84 Hun, 426; 32 N. Y. Supp. 412.

⁴¹ *Bennett v. Stevenson*, 58 N. Y. 508.

for an order staying proceedings in the action.”⁴² In a proper case, and upon imposing suitable terms, an application of this kind will be entertained, though the motion be not made until the action to foreclose is at issue.⁴³

§ 250. When default in payment of interest is waived.—A mortgagee may by his acts or conduct be considered as having waived his right to foreclose by reason of a default in payments called for by the mortgage. He will not be permitted to take an unfair advantage of a mortgagor and at the same time insist upon a strict interpretation of the clause conferring the right to foreclose.⁴⁴ So if the mortgage shall have become due by operation of the agreement relative to prompt payment of interest, an unconditional payment of interest will waive the default and revive the term of credit,⁴⁵ even if made after a summons, complaint, and notice of *lis pendens* have been filed but no summons served.⁴⁶ An extension of the time of payment by the holder of a majority in value of corporate bonds will also constitute a waiver.⁴⁷ But if the mortgagee shall accept payment of an instalment of principal or interest larger than the interest in default, he will not thereby waive his right to insist upon the payment of the balance.⁴⁸

Where, after a default had occurred in payment of interest, the mortgagor and mortgagee entered into an agreement to forgive the default on the performance by the mortgagor of certain conditions, it was held that, in the absence of full performance of such conditions, the mortgagee's right to insist upon the default still remained, even though payment of interest, which was one of the conditions, had been made and accepted.⁴⁹

The right to insist that the principal has become due is not waived by the commencement of an action to foreclose for non-payment of interest, and upon the expiration of the time stipulated

⁴² *Thurston v. Marsh*, 5 Abb. 389; 14 How. Pr. 572.

⁴³ *Lynch v. Cunningham*, 6 Abb. Pr. 94; *Asendorf v. Meyer*, 8 Daly, 278.

⁴⁴ *Schieck v. Donohue*, 92 App. Div. 330; 87 N. Y. Supp. 206. Waiver may be by letter, *Ver Planck v. Godfrey*, 42 App. Div. 16; 58 N. Y. Supp. 784.

⁴⁵ *Malcolm v. Allen*, 49 N. Y. 448;

Jackson v. Allen, 3 Cow. 220; *Jackson v. Sheldon*, 5 Cow. 448; *Lawson v. Barron*, 18 Hun, 414.

⁴⁶ *Lawson v. Barron*, 14 Hun, 414.

⁴⁷ *Arnot v. Union Salt Co.*, 186 N. Y. 501; 79 N. E. 719, rev'g 109 App. Div. 433; 96 N. Y. Supp. 80.

⁴⁸ *Malcolm v. Allen*, 49 N. Y. 448; *Rubens v. Prindle*, 44 Barb. 336.

⁴⁹ *Odell v. Hoyt*, 73 N. Y. 343.

in the interest clause, a supplemental complaint may be filed for the collection of the principal.⁵⁰

§ 251. **Default in payment of taxes.**—A condition in a mortgage providing that in a case of a failure to pay taxes upon the mortgaged property the whole principal sum shall become due and payable is similarly construed. Mr. Justice Van Brunt has said "I am unable to discover any difference between a condition relating to principal and interest and one relating to taxes. If it is expressly stated that the whole principal sum shall become due because of the non-payment of taxes, and taxes are unpaid, and the mortgagee commences his foreclosure on that account, I do not see how the court can relieve the defendant any more than they could for the non-payment of interest."⁵¹ Where a mortgagee has no knowledge that any taxes are in arrears, a mere extension by him of the time of payment of a mortgage is held not to be a waiver of his right to exercise the option given by the mortgage to consider the entire principal sum due on account of a default in the payment of taxes which occurred before the extension was given, unless such extension was associated with acts indicating an intelligent purpose to renounce such a privilege or which makes it inequitable for him to enforce it.⁵² A provision in a mortgage that the mortgagor shall pay the taxes or assessments upon the mortgaged premises and in default of his so doing, that the mortgagee may discharge the same and collect them as a part of the mortgage, does not confer upon the latter the right to foreclose and collect the whole amount of the mortgage in case of a failure of the mortgagor to pay merely the taxes.⁵³ Where the time of payment of a mortgage was extended, but a clause making the principal due upon a default in the payment of taxes was not in terms rescinded, it was held that the extension agreement did not prevent the mortgagee exercising his option.⁵⁴ A court of equity will not permit a mortgagee to avail himself of the

⁵⁰ *Malcolm v. Allen*, 49 N. Y. 448.

⁵¹ *O'Connor v. Shipman*, 48 How. Pr. 126, 128; *Martin v. Clover*, 17 N. Y. Supp. 638; *Standliff v. Norton*, 11 Kans. 218; *Sharp v. Baker*, 11 Kans. 381. Does not constitute a forfeiture, *Webber v. Huerstel*, 11 Misc. R. 214; 32 N. Y. Supp. 1109.

⁵² *Weber v. Huerstel*, 11 Misc. R. 214; 32 N. Y. Supp. 1109.

⁵³ *Williams v. Townsend*, 31 N. Y. 411.

⁵⁴ *Leopold v. Hallheimer*, 1 App. Div. 202; 37 N. Y. Supp. 154; 72 St. R. 555.

right to elect that the whole principal sum shall become due for the purpose of injustice and oppression.⁵⁵ Thus where he did so elect on the very day taxes became due it was held unconscionable⁵⁶ and where, after election, he had declared his intention of waiting a reasonable time before taking any steps to enforce his security, a payment within three days thereafter defeated his action.⁵⁷ Moreover a court of equity will not entertain an action to foreclose a mortgage because of a technical default in the payment of taxes where it appears that the taxes were promptly paid upon the mortgagor's attention being called to the default and before the action was commenced, and that the mortgagee was not injured by the default.⁵⁸

§ 252. **Insurance Clause.**—The failure of a mortgagor to comply with a covenant in the mortgage to keep the buildings on the mortgaged premises insured against loss by fire is construed by statute⁵⁹ to be a condition similar to the customary default in interest clause, and confers upon the mortgagee the right to advance the necessary money for premiums for insurance, to demand reimbursement from the mortgagor and, upon failure to receive it, to elect to consider the whole principal sum due and to foreclose. But the failure to comply strictly with the form prescribed by the statute will defeat such an action.⁶⁰ This section is not nullified by the provision in the same act⁶¹ relating to mortgages upon leaseholds. The two provisions are to be construed together and while the latter section confers no right upon the mortgagee to elect to demand payment of the entire principal sum for failure of the mortgagor to pay the insurance premium or to assign the policy yet the former may acquire such right if he brings himself within the provisions of the prior section.⁶² A complaint in an action by a mortgagee who seeks to maintain foreclosure under the provision of the Real Property Law that upon default of the mortgagor to pay, upon demand, premiums for

⁵⁵ *Noyes v. Anderson*, 124 N. Y. 175; 26 N. E. 316; 35 St. R. 94.

⁵⁶ *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814; 109 N. Y. Supp. 435, reversing 57 Misc. R. 204; 109 N. Y. Supp. 912.

⁵⁷ *Ver Planck v. Godfrey*, 42 App. Div. 16; 58 N. Y. Supp. 784.

⁵⁸ *Ver Planck v. Godfrey*, 42 App. Div. 16; 58 N. Y. Supp. 784.

⁵⁹ Real Prop. Law, § 254.

⁶⁰ See *Mutual Benefit Loan & Building Co. v. Jaeger*, 34 App. Div. 99; 54 N. Y. Supp. 99.

⁶¹ Real Prop. Law, § 271.

⁶² *Bieber v. Goldberg*, 133 App. Div. 207; 117 N. Y. Supp. 211.

insurance paid by the mortgagee the latter may elect to treat the whole principal sum and interest payable, is insufficient and will be dismissed where there are no allegations that the mortgagee procured the insurance to be made upon default of the mortgagor to conform to his agreement, or that any demand was ever made upon the latter for any premium paid by the mortgagee for such insurance.⁶³

63 *Bumpus v. Willett*, 55 Misc. R. 94; 106 N. Y. Supp. 366, decided under subdivision 3 of Sec. 219 of Real Property Law (L. 1896 ch. 547).

CHAPTER VIII

RIGHTS OF MORTGAGEE IN POSSESSION AND ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE

RIGHTS OF MORTGAGEE IN POSSESSION.

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RIGHTS OF MORTGAGEE IN POSSESSION.¹

§ 253. **Right to retain possession.**—Formerly the mortgagee could maintain ejectment after a default, but this remedy was taken away by the Revised Statutes.² A mortgagee is now regarded as a mere lienor, having no legal estate in the land covered

¹ For rights of mortgagee as to possession see § 24 ante.

² 2 R. S. 312, § 57; Code, § 1498;

Barson v. Mulligan, 191 N. Y. 306; 84 N. E. 75.

by his mortgage and he cannot, prior to foreclosure, obtain possession so as to constitute himself a mortgagee in possession except by consent of the mortgagor.³ If, however, the mortgagee obtains possession without force, by consent⁴ of the mortgagor or by legal proceedings, or in any other legal mode, he is entitled, as well since as before the statute, to hold it against the mortgagor until his debt is paid out of the rents and profits or otherwise.⁵ The question as to whether a mortgage debt has been paid by a receipt of rents and profits, cannot be passed upon in an action of ejectment, for the reason that the application of such rents and profits is not made by the law, but upon equitable principles and in equitable actions only.⁶

§ 254. **Nature of mortgagee's right of possession.**—The fact that, since the Revised Statutes, a mortgagee cannot maintain ejectment against the mortgagor, and that even since those statutes the mortgagee, being in possession, may retain it until the debt is paid, presents no anomaly or inconsistency in the law. The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or retain possession of the pledge for the purpose of paying

3 Barson v. Mulligan, 191 N. Y. 306; 84 N. E. 75, rev'g 120 App. Div. 878; 106 N. Y. Supp. 865; Hoyer v. Bridgewater, 134 App. Div. 255; 118 N. Y. Supp. 951.

4 Roberts v. Sutherlin, 4 Oreg. 219.

An insane mortgagor may elect through his committee to regard a mortgagee who has entered as lawfully in possession. Hoyer v. Bridgewater, 134 App. Div. 255; 118 N. Y. Supp. 951.

5 Becker v. McCrea, 193 N. Y. 423; 86 N. E. 463, rev'g 119 App. Div. 56; 103 N. Y. Supp. 963; Townsend v. Thomson, 139 N. Y. 152; 34 N. E. 891; Becker v. McCrea, 149 App. Div. 211; Van Dyne v. Thayer, 14 Wend. 233; Phyfe v. Riley, 15 Wend. 248; Watson v. Spence, 20 Wend. 260; Fox v. Lipe, 24 Wend. 164; Casey v. Buttolph, 12 Barb. 637; St. John v. Bumpstead, 17 Barb. 100; Munro v. Merchant, 26

Barb. 383; Winslow v. McCall, 32 Barb. 241; Bolton v. Brewster, 32 Barb. 389; Sahler v. Signer, 44 Barb. 606; Randall v. Raab, 2 Abb. 307; Fogal v. Pirro, 17 Abb. 113; 10 Bosw. 100; Pell v. Ulmar, 18 N. Y. (4 Smith) 139; Chase v. Peck, 21 N. Y. (7 Smith) 586; Hubbell v. Moulson, 53 N. Y. 225; Madison Avenue Baptist Church v. Oliver Street Baptist Church, 73 N. Y. 82. See also Russell v. Ely, 2 Black, 575; Wells v. Rice, 34 Ark. 346; Frink v. Le Roy, 49 Cal. 317; Johnson v. Sandhoff, 30 Minn. 197; 14 N. W. 889; Den v. Wright, 2 Hals. (7 N. J. L.) 175; 11 Am. Dec. 546; Calhoun v. Lumpkin, 60 Tex. 185; Hennessy v. Farrell, 20 Wis. 62, 42a.

6 Ferris v. Houston, 74 Ala. 163; Slaughter v. Swift, 67 Ala. 494; Toomer v. Randolph, 60 Ala. 358; Dailey v. Abbott, 40 Ark. 275; Seaver v. Durant, 39 Vt. 103.

the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession; and such was deemed to be the nature and construction of a mortgage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary right; and it was only by the use of fictions that the title was at length allowed to be brought into controversy. When the legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet there is nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledgee, but when its object is accomplished, it is neither just nor lawful for an instant longer.⁷

§ 255. Appointment of a receiver against mortgagee in possession.

—It is, as a general rule, the settled doctrine of the courts of equity, that when anything is due to a mortgagee in possession, he will not be deprived of such possession by the appointment of a receiver, and the question of indebtedness will not be tried upon affidavits. If the mortgagee will swear that a balance remains unpaid, a receiver will not be appointed. This is particularly so when the mortgagee is responsible, and is able to account for and pay any excess of rents and profits after the payment of his debt, or will give security to do so. If it appears that the mortgagee is irresponsible, or that the rents and profits will be in danger of

⁷ Per COMSTOCK, Ch. J., in *Kortright v. Cady*, 21 N. Y. 343, 364. See also *Brinkman v. Jones*, 44 Wis. 498.

loss, or that the mortgagee is committing waste upon or materially injuring the premises, a different rule will prevail, and a receiver will be appointed. The question is always one addressed to the sound discretion of the court in view of the particular facts and circumstances of the case presented.⁸

§ 256. How a mortgagee may obtain possession.—The legal remedy of a mortgagee to obtain possession of the property by ejectment being abolished, and the right of the mortgagee, whose mortgage is due, to retain possession lawfully acquired having been repeatedly adjudged to still continue, it remains to be considered under what circumstances the possession of a mortgagee will be lawful, so as to entitle him to the benefits of this rule.

Where a mortgage has been defectively foreclosed, by reason of some irregularity that leaves the rights of lienors junior to the mortgage in full force, but the proceeding is regular so far as to bind the mortgagor who has the right of possession, the purchaser under the mortgage sale may lawfully obtain possession. Having obtained such possession, he will become the owner of the property as to all persons bound by the proceedings,⁹ and as to all rights not so bound he will stand as an assignee of the mortgage in lawful possession under it.¹⁰ It is with reference to persons so circumstanced that questions as to the rights of mortgagees in possession now most frequently arise; and it is obvious that in such cases, the right to possession having been determined by the proceedings to foreclose, it cannot again be litigated by proceedings on behalf of the owner of the equity whose rights have become finally barred.

A mortgagee who takes possession without foreclosure and against the consent of the mortgagor, is a trespasser, and the

⁸ *Bolles v. Duff*, 35 How. Pr. 481; *Quinn v. Brittain*, 3 Edw. 314; *Patten v. The Accessory Transit Co.*, 4 Abb. 237; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565. See *Union Bank of Brooklyn v. Rubenstein*, 78 Misc. R. 465.

⁹ *Vanderkemp v. Shelton*, 11 Paige, 28; *Groff v. Morehouse*, 51 N. Y. 503; *Wetmore v. Roberts*, 10 How. Pr. 51.

¹⁰ *Wing v. Field*, 35 Hun, 617; *Hart v. Wandle*, 50 N. Y. 381; *Robinson v. Ryan*, 25 N. Y. 320; *Walsh v.*

Rutgers Fire Ins. Co., 13 Abb. 33; *Benedict v. Gilman*, 4 Paige, 58; *Smith v. Gardner*, 42 Barb. 356; *Jackson v. Bowen*, 7 Cow. 13; *Vroom v. Ditmas*, 4 Paige, 526; *Bigler v. Waller*, 14 Wall. 297; *Sloan v. Frothingham*, 72 Ala. 589; *Holton v. Bowman*, 32 Minn. 191; 19 N. W. 734; *Johnson v. Sandhoff*, 30 Minn. 197; 14 N. W. 889; *Martin v. Fridley*, 23 Minn. 13; *Childs v. Childs*, 10 Ohio St. 339.

remedy of the mortgagor is at law and not in equity, and the fact that he was a lunatic when possession was taken, does not give him a standing in a court of equity after the restoration of his reason.¹¹

§ 257. What is possession as mortgagee.—Whether a mortgagee who enters the mortgaged premises with the consent of the mortgagor is to be regarded as a mortgagee in possession must be decided in the light of the particular facts of each case. Judge Werner, writing for the court of appeals has said:¹² “Whenever it appears that the mortgagor has consented, either expressly or impliedly, by contract or conduct, to the entry of the mortgagee, for purposes, or under circumstances, not inconsistent with their relative legal rights under the mortgage, the possession of the mortgagee may properly be regarded as lawful. So, on the other hand, when the entry of the mortgagee is effected by the consent of the mortgagor under a relation that is hostile to, or inconsistent with, the legal rights of the parties under the mortgage, then the mortgagee’s possession must stand or fall without reference to his mortgage.”

One who is lawfully in possession of the mortgaged premises for another purpose, as, for instance, under a contract to purchase them, will, by the purchase of overdue and unpaid mortgages upon the premises, become substituted in the place of the mortgagees, and will be entitled by subrogation to the rights which the mortgagees would have had if they had entered into possession;¹³ but one in wrongful possession of mortgaged premises cannot, by purchasing a mortgage upon which no default has occurred, acquire a right to hold the land as mortgagee in possession.¹⁴ Nor can one in possession as a lessee acquire such a right by the purchase of a past due mortgage upon the leased property without notice to or actual consent of the landlord.¹⁵

A purchaser upon, and in possession under, a foreclosure sale, void as against the owner of the equity of redemption, because he

¹¹ *Endel v. Wall*, 16 Fla. 786; *Pfetz v. Pfetz*, 14 Md. 376.

¹² *Barson v. Mulligan*, 191 N. Y. 306; 84 N. E. 75, rev’g 120 App. Div. 879. Followed in *Barson v. Mulligan* 198 N. Y. 23; 90 N. E. 1127, rev’g 133 App. Div. 44; 117 N. Y. Supp. 723.

¹³ *Madison Ave. Baptist Church*

v. Baptist Church in Oliver Street, 2 Robt. 642.

¹⁴ *Madison Ave. Baptist Church v. Baptist Church in Oliver Street*, 19 Abb. 105; s. c. rev’d on other grounds, 1 Abb. N. S. 214; 30 How. Pr. 455; 3 Robt. 570.

¹⁵ *Constant v. Barrett*, 13 Misc. R. 249; 34 N. Y. Supp. 163.

was not made a party to the foreclosure suit, does not stand in the position of mortgagee or assignee of the mortgagee in possession, but as a stranger.¹⁶ But if the owner of the equity of redemption consents that such possession be taken, the purchaser cannot thereafter be driven from possession without first receiving the amount due upon the mortgage.¹⁷

A mortgagee who enters as purchaser under a sale in foreclosure which is afterward set aside for an irregularity and fraud, has been held to be lawfully in possession as mortgagee.¹⁸ A mortgagee who is in possession under a lease, has no right to possession as a mortgagee after the expiration of his term as lessee, and it is his duty to surrender possession upon demand, and he is subject to removal if he refuses so to do.¹⁹ Where the mortgagor of a farm by an instrument authorized the mortgagee to take possession and to rent the farm and apply the net income upon the mortgage indebtedness, and the mortgage had not become due, it seemed that the possession thus given the mortgagee did not put him in the position of a mortgagee in possession in the technical sense, but merely gave him a qualified possession limited to the exercise of certain acts prescribed in the instrument.²⁰

§ 258. Examples of lawful possession.—In *Madison Ave. Baptist Church v. Oliver Street Baptist Church* (73 N. Y. 82, 94), EARL, J., uses the following language: “While under our present law a mortgagee cannot bring ejectment to obtain possession of the mortgaged premises, being lawfully in possession under a mortgage upon which some amount is due, he can retain such possession against the mortgagor until such amount is paid. It is ordinarily sufficient that the mortgagee is lawfully in possession after default upon the mortgage. The court will not then deprive him of the possession until the mortgage has been paid. The possession need not be given under the mortgage nor with a view thereto.” In this case the defendant acquired possession under a conveyance of the property, which was sought to be set aside and declared to be void. It was held that the order authorizing the conveyance was void, the court having no jurisdiction to grant it. The de-

16 *Shriver v. Shriver*, 86 N. Y. 575; *Watson v. Spence*, 20 Wend. 260.

17 *Wing v. Field*, 35 Hun, 617.

18 *Harper v. Ely*, 70 Ill. 581.

19 *Barson v. Mulligan*, 198 N. Y.

23; 90 N. E. 1127, rev'g 133 App. Div. 44; 117 N. Y. Supp. 723.

20 *Sexton v. Breese*, 135 N. Y. 387; 48 St. R. 525; 32 N. E. 133.

fendant had no title under the deed, which was determined to have no legal effect, but, inasmuch as it acquired possession by the consent of the plaintiff, it was declared to be entitled to remain in possession by virtue of a mortgage which it held until the amount due on that mortgage was satisfied.

In *Shields v. Lozear* (34 N. J. Law 496; s. c. 3 Am. R. 256), the vendor of land received a purchase-money mortgage and remained in possession under a lease by the terms of which he covenanted to yield and surrender such possession at its expiration. The lease expired, and the mortgage became due on the same day, and it was held in an action of ejectment brought by the landlord, that the mortgagee was entitled to continue to hold the premises under the mortgage, the mortgage money not being paid, without first surrendering the premises to his landlord, and that the tenant by an assertion of his rights as mortgagee did not violate the rule which estops him from disputing his landlord's title.

In *Niles v. Ransford* (1 Mich. 338; 51 Am. Dec. 95), a mortgage was foreclosed under a power of sale, but the proceeding was irregular and did not bind the mortgagor, whose tenant was in possession. The purchaser under the foreclosure conveyed his title to such tenant, who claimed ownership against his landlord, the mortgagor. In an action of ejectment brought by the mortgagor, it was held that while the deed did not convey the title, it operated to assign the mortgage, and that the tenant could lawfully purchase a valid mortgage and continue in possession under it against his landlord.

§ 259. Further examples.—In *Winslow v. McCall* (32 Barb. 241), a mortgage had been foreclosed by advertisement. The owner of the equity of redemption was in possession of the property by his tenant at the time of the sale in foreclosure, and although he was duly served with the requisite notice his tenant was not. After such sale he became the assignee of a mortgage which was past due, and the owner of which had not properly been served with notice of the foreclosure, and thereupon he claimed to be entitled to continue in possession as mortgagee. This claim was sustained by the court, PARKER, J., remarking: "Cornwall was then (when the mortgage became due) in possession—a possession legally acquired and of which he had never been divested. I think he is from that time to be deemed a mortgagee in possession. It is not necessary that he should have obtained possession as mort-

gagee either by consent of the mortgagor or by legal proceedings. It is sufficient if he obtained possession in some legal mode."

Bolton v. Brewster (32 Barb. 289) was an action of ejectment to recover possession of a farm in Queens County. The defendant claimed title under an executor's deed, and he also claimed a right to possession under a past due mortgage. The defendant's claim of title was not sustained, for the reason that the will had been proved before the surrogate of New York County, while the testator at the time of his death was an inhabitant of the city of Hudson, but the claim of the defendant to a right to retain possession under his mortgage was sustained by the court. It will be noticed that the possession was obtained from an executor, the will never having been proved, but the question as to whether the executor had any more right to give possession than he had to grant the title does not appear to have been considered.

In *Phyfe v. Riley* (15 Wend. 248), the defendant being a mortgagee entered into possession under a deed from the mortgagor, which was executed subsequent to the docketing of a judgment under which the plaintiff claimed title. The possession was held to have been lawfully acquired, and it was determined that the defendant could not be dispossessed in an action of ejectment until the mortgage had been paid.²¹

In *Fox v. Lipe* (24 Wend. 164), a mortgage which contained no valid power of sale was foreclosed by a sale under the statute, and the mortgagee entered into possession. It was held that ejectment would not lie until the mortgage was paid.

Van Duyne v. Thayre (14 Wend. 233) was an action of ejectment by a widow for dower, and the mortgagee was protected in his possession. It was alleged that the mortgagor, who was the husband of the plaintiff, "had either surrendered the possession of the premises to the heirs of the mortgagee in extinguishment of the mortgage or had abandoned the premises, and the heirs had entered under the mortgage."

§ 260. Further examples.—Notwithstanding the fact that a mortgagee is now precluded from maintaining ejectment against the mortgagor, a tenant of the mortgagor is still permitted to attorn to a mortgagee after the mortgage has become forfeited,²² and

²¹ See also *Chase v. Peck*, 21 N.Y. 581.

²² Real Prop. Law, § 224.

it has been held that, after such attornment, the tenant can resist an action brought against him by the mortgagor for rent.²³ It would therefore seem that one lawful way for a mortgagee to acquire possession of the property would be to persuade the tenant of the mortgagor to attorn to him.

Gross v. Welwood (90 N. Y. 638) was an action of ejectment. The defendants claimed, through one Bergen, first as mortgagee in possession under a mortgage executed by the plaintiff, and second under a tax lease executed to Bergen. The court held that it rested upon the defendant to show that he had a right to the possession. The tax lease was void, and the defendant, at the trial, abandoned all claim under it. The evidence as to the possession by Bergen was conflicting. The court says: "It was therefore an issue which the jury alone could determine. It was for them to say whether Bergen was in fact in possession, and if so, the character of that possession, and whether lawfully acquired or not;"²⁴ and as the verdict established that defendant's possession was not taken under the mortgage, plaintiffs were entitled to recover."

In *Howell v. Leavitt* (95 N. Y. 617; 29 Alb. L. J. 433), a mortgage had been foreclosed and a title perfected thereunder pursuant to which and by means of a writ of assistance possession was acquired by the purchaser. The summons had been attempted to be served by publication upon the owner of the equity of redemption, but this was unavailing, for the reason that the defendant was dead, though this fact was not known to the plaintiff. An action of ejectment was brought by the children of the owner of the equity and was resisted by the defendants, who were grantees of the purchaser at the foreclosure sale, who claimed the position of mortgagees in possession. The court said: "In most of the cases which have upheld the right of the mortgagee (to retain possession) his possession was obtained with the consent, express or implied, of the owner of the land, although in some of them the mode of acquiring possession did not distinctly appear, and in many the rule is stated quite broadly and with little of restriction or limitation. It is scarcely necessary to review the authorities and consider them in detail, for none of them have ever gone so

²³ *Jones v. Clark*, 20 Johns. 51.

nue Church v. Oliver Street Baptist

²⁴ Citing *Trimm v. Marsh*, 54 N.

Church, 73 N. Y. 94.

Y. 599; 13 Am. R. 623; *Madison Ave-*

far as to hold that a possession of the mortgage, acquired either by force or fraud, against the will and consent of the rightful owner, and without even color of lawful authority as it respects such owner and amounting only to a pure trespass, was sufficient to defend an action of ejectment. The possession requisite for such a defense must have about it at least some basis of right as against the owner evicted. Often his assent may be inferred from slight circumstances, but the right cannot be founded upon an absolute wrong. To hold that one who has merely a lien and but an equitable right can get a legal one by the commission of a trespass, would be neither logical nor just."²⁵

A purchaser under the foreclosure of a junior mortgage, in which the wife of the mortgagor did not join, may purchase a prior mortgage in which the wife did join, and defend his possession under it against the widow's claim for dower until such mortgage is paid.²⁶

§ 261. **Right to acquire an adverse title.**—The relation between the mortgagee and the mortgagor, or his grantee, is not one of trust or confidence, nor has the mortgagee any duty to perform which incapacitates him from purchasing an outstanding title thereto. Neither does any duty to protect the equity of redemption against a sale thereof, arise because the mortgagee is in possession; nor is any power, in fact, conferred upon the mortgagee for that purpose.²⁷

A mortgagee in possession may, therefore, cause the premises to be sold under an execution in his favor against the mortgagor, and become the purchaser at such sale, and after the purchase is consummated, he may set up the title thus acquired against the claim of the mortgagor to redeem.²⁸

In a very limited sense, a mortgagee may be said to be a trustee. There may be a duty resting upon a mortgagee in possession to

²⁵ See also *Dunning v. Leavitt*, 85 N. Y. 30, rev'g 20 Hun, 178. Article in 26 Alb. L. J. 526; 27 Id. 6.

²⁶ *McMahon v. Russell*, 17 Fla. 698.

²⁷ *Clark v. Bush*, 3 Cow. 151; *Kirkwood v. Thompson*, 2 De G. J. & S. 613. See also *Parkinson v. Hanbury*, 1 Drew & Sm. 143; s. c. 2 De

G. J. & S. 450; L. R. 2 H. L. Cases, 1. See *ante*, §§ 28, 29.

²⁸ *Trimm v. Marsh*, 54 N. Y. 599; *Ten Eyck v. Craig*, 2 Hun, 452; 5 N. Y. Sup. (T. 86) 65 aff'd 62 N. Y. 406. See also *Walthall, Ex'r v. Rhines*, 34 Ala. 92; *Hurmden v. Roberts*, 6 Fla. 711; *King v. State M. F. Ins. Co.*, 7 Cush. (Mass.) 7; *Wordler v. Busch*, 43 Mo. 231.

discharge a particular claim against the land. If in such a case he omits to do it, and allows the land to be sold on such a claim, and becomes the purchaser, he would hold the title in trust for the mortgagor. A mortgagee in possession is allowed, and it may be his duty to pay taxes on the land out of the rents and profits. If he suffers the land to be sold for taxes in violation of his duty, and purchases on the sale, he would, upon general principles, be deemed to hold the title as trustee. So, if a mortgagee is allowed to take possession, and undertakes to pay the interest on other liens out of the rents and profits, and fails to do so, he could not purchase the land for his own benefit in hostility to the mortgagor on foreclosure of an incumbrance for non-payment of interest which he was bound to pay.²⁹

§ 262. Foreclosure by mortgagee in possession.—There is nothing in the position or legal claims of a mortgagee in possession which will restrain him from bringing an action to foreclose his mortgage and extinguish the rights of the mortgagor by a sale of the property. And where an action of foreclosure was discontinued upon a stipulation being made by which the amount due upon the mortgage was reduced, and the mortgagee was given substantially the same rights which the law confers upon a mortgagee in possession, but no time was specified within which the mortgagee could insist upon the immediate payment of the amount secured by the mortgage, it was held that the mortgagee was not required to wait more than three years, it being shown that the revenue from the property did not suffice to reduce the amount of the lien.³⁰

ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

§ 263. Liability of a mortgagee to account for rents and profits.—A mortgagee in possession should endeavor to make the premises produce a fair rental. His duty is said to be that of a provident owner,³¹ and, while he is not in general liable for imaginary profits which he did not receive, but only for actual rent, he must answer for his fraud or wilful neglect. He may not turn out a sufficient tenant, or refuse a higher rent, without becoming thereby

²⁹ Per ANDREWS, J., in *Ten Eyck v. Craig*, 62 N. Y. 406, 422. See also *Schenck v. Kelley*, 88 Ind. 444.

³⁰ *Union Dime Savings Institution v. Quinn*, 63 How. Pr. 211.

³¹ *Shaeffer v. Chambers*, 2 Halst. Ch. (N. J.) 548; 47 Am. Dec. 211.

responsible for the rent lost.³² If by reason of the fraud or neglect of the mortgagee the premises are not rented out at a fair cash rent, the mortgagee may be charged such rent as might have been received with reasonable care and prudence.³³ A mortgagee in possession is to take the fair rents and profits, but he is not bound to engage in any speculations for the benefit of his mortgagor, and is only liable for wilful default.³⁴ He is liable to account to the mortgagor for all rents, issues, and profits received by him, and for all waste and destruction of the premises, and he must deduct the allowance for these matters from the amount due on the mortgage.³⁵

An agreement between the mortgagor and mortgagee, when the mortgage debt bears interest, that the latter shall use and occupy the mortgaged premises without being liable for rents and profits, unless supported by a consideration other than the forbearance to foreclose the mortgage, is not such a valid contract as will bar the right to an action for them,³⁶ and, unless the parties so agree, the receipt of rents and profits by a mortgagee in possession will not in itself and without a judgment of the court on an accounting, satisfy the mortgage debt and divest the mortgagee of his status.³⁷ An assignee of a mortgage as security for a debt or his transferee may be regarded as a mortgagee in possession and liable to account for the rents and profits received.³⁸ But a corporation which has taken a mortgage of a term, as security merely, but which has even taken possession of the premises, is not liable to the landlord for the rent and this rule is not changed by the fact that the keys of the premises had been sent to the corporation, not upon its solicitation, and that the landlord would not accept them from it when returned.³⁹

32 Coote on Morts. 557; Powell on Morts. 949; Wash. Real Prop. vol. 1, p. 578; Fisher on Morts. 492.

33 Van Buren v. Olmstead, 5 Paige, 8; Quinn v. Brittain, 3 Edw. 314.

34 Powell on Morts. 950; Fisher on Morts. 492; Wash. Real Prop. vol. 1, p. 578; Walsh v. Rutgers Fire Ins. Co., 13 Abb. 33; Booth v. Steam Packet Co., 63 Md. 39.

35 Hoye v. Bridgewater, 134 App.

Div. 255; 118 N. Y. Supp. 951; Daniel v. Coker, 70 Ala. 260; Greer v. Turner, 36 Ark. 17; Onderdonk v. Gray, 19 N. J. Eq. 65.

36 Anderson v. Lauterman, 27 Ohio, 104.

37 Hoye v. Bridgewater, 134 App. Div. 255; 118 N. Y. Supp. 951.

38 Dempsey v. Johnson, 142 App. Div. 226; 126 N. Y. Supp. 944.

39 Levy v. Long Island Brewery, 26 Misc. R. 410; 56 N. Y. Supp. 242.

§ 264. **Principles.**—The principles upon which a mortgagee who takes possession of the mortgaged premises without a regular foreclosure is to account, are substantially the same as those which the Revised Statutes have adopted in relation to the damages of a dowress in cases where her dower has been withheld from her after it was demanded: that is, the mortgagee is to be charged with the net profits which he has received, or which he might have received without any negligence on his part, after payment of taxes and ordinary repairs and other expenses of that character; but without charging him with the increased rents and profits arising from any permanent improvements made by him.⁴⁰

It is the duty of the mortgagor, if he have the opportunity, to give notice to the mortgagee that the estate can be made more productive, and to assist him in making it so. If he omits to do this, and lies by making no objection to the mortgagee's proceedings, this fact will weigh strongly against him if he afterward attempts to charge the mortgagee with mismanagement.⁴¹ A plaintiff suing to have conveyances absolute upon their fact declared to be mortgages and for a reconveyance upon the payment of the debt, with an incidental accounting, is not, prior to a determination of the main issue, entitled to an inspection of the defendant's books and papers in order to discover the sum due.⁴²

And the burden of proving the receipt of rents and profits rests upon the mortgagor. If he does not introduce such evidence, it does not lie with him afterward to complain of the decree.⁴³

§ 265. **In the absence of evidence of fraud or negligence** the mortgagee can only be charged with rents and profits actually received by him, and not with the supposed value of the property.⁴⁴ But if fraud or gross neglect is shown, he will be charged with what he might have received if he had been honest and diligent.⁴⁵ It has even been held that the burden rests upon the mortgagee to prove his diligence and good faith where the property has been un-

⁴⁰ Per Chancellor WALWORTH, in *Bell v. The Mayor, etc.*, of New York, 10 Paige, 73; citing *Moore v. Cable*, 1 Johns. Ch. 385; 1 R. S. 743, § 21.

⁴¹ Fisher on Morts. 491.

⁴² *Fogarty v. Fogarty* (No. 1), 128 App. Div. 272; 112 N. Y. Supp. 742.

⁴³ *Hards v. Burton*, 79 Ill. 504.

⁴⁴ *Hogan v. Stone*, 1 Ala. 496; 35 Am. Dec. 39; *Clark v. Finlan*, 90 Ill. 245; *Gerrish v. Black*, 104 Mass. 400.

⁴⁵ *Moshier v. Morton*, 100 Ill. 63.

productive, in order to relieve himself from a charge for rental value.⁴⁶

The mere fact that after the mortgagee's taking possession a tenement was left unoccupied, in the absence of proof that the mortgagee was negligent in the matter of procuring a tenant, will not charge the mortgagee with its rental value.⁴⁷

It has been said that a mortgagee in possession should be charged with rents, according to the equities of the case, upon the basis either of gross receipts, net receipts, or rental value.⁴⁸

§ 266. A person who occupies the legal position of a mortgagee, under circumstances which lead him to believe that he is the owner of the property, is only to be charged with what he actually receives, and not for what he might have received.⁴⁹

If instead of renting the property the mortgagee elects to occupy and enjoy it himself, he will be required to account on the basis of a fair rental; such as might have been received with reasonable care and prudence,⁵⁰ independent of the question of the amount of net profits actually received by him therefrom.⁵¹ But if the mortgagee has been unable to procure a tenant, and has caused the land to be tilled himself, he will be chargeable only with the net results, and it has been said to be his duty to make use of the property himself in such a case.⁵² He is under no obligation to work the land himself if he can rent it.⁵³ And he will not be charged anything if the use is worth nothing.⁵⁴

A mortgagee will not be charged interest on rents received by him; he receives no compensation for his services, and this will be set off against interest.⁵⁵

§ 267. The liability of the mortgagee to account commences when he first receives profits which ought to be applied in reduction of

⁴⁶ *Shaeffer v. Chambers*, 6 N. J. Eq. 548.

⁴⁷ *Donohue v. Chase*, 139 Mass. 407; 2 N. E. 84.

⁴⁸ *Worthington v. Wilmot*, 59 Miss. 608.

⁴⁹ *Morris v. Budlong*, 78 N. Y. 543, 556, rev'g 16 Hun, 570. See also *Barnard v. Jennison*, 27 Mich. 230; *Parkinson v. Hanbury*, 2 L. R. 1.

⁵⁰ *Van Buren v. Olmstead*, 5 Paige 8.

⁵¹ *Barnett v. Nelson*, 54 Iowa, 41; 6 N. W. 49; 37 Am. R. 183; *Sanders v. Wilson*, 34 Vt. 318.

⁵² *Shaeffer v. Chambers*, 2 Halst. (N. J.) Eq. 528; 47 Am. Dec. 211.

⁵³ *Hidden v. Jordan*, 28 Cal. 301.

⁵⁴ *Peugh v. Davis*, 2 Mackey (D. C.) 23.

⁵⁵ *Breckenridge v. Brooks*, 2 A. K. Marsh (Ky.) 335; 12 Am. Dec. 401.

his claims. So, on a bill to redeem brought by the widow of a mortgagor, the mortgagee was required to account from the date of his entry into possession, and not merely from the time the plaintiff became a widow.⁵⁶

§ 268. Where one religious corporation conveyed its church property to another under an order which was void for jurisdictional defects and the grantee held mortgages which were valid liens, and on an accounting with respect to the amount due on such mortgages, it appeared that the defendant had paid out more than it had received of pew rents for the costs and expenses of maintaining religious services which were for the benefit of both parties, it was held that the defendant should not be charged with the rents and profits, but should bear all expenses while the property was in its possession, and should lose the interest accruing during that period on the amount of its demands.⁵⁷

§ 269. A mortgagee in possession owes duties to junior lienors as well as to the mortgagor, and a subsequent mortgagee has a right to compel him to make proper deductions for rents and profits received by him.⁵⁸

And a senior mortgagee in possession, with knowledge of a junior mortgage, who permits the mortgagor to receive the profits of the property to the prejudice of the junior mortgagee, will be postponed to the junior mortgagee for that amount.⁵⁹

So, where a mortgagee having taken possession, rented the property to the widow and adult heirs of the mortgagor and then omitted to collect the rents, it was held on a bill to redeem in which the infant heirs were included as parties, that the mortgagee must, as to them, account for the rents as if he had collected them.⁶⁰

§ 270. Holding as mortgagee.—A mortgagee in possession after condition broken with the assent of the mortgagor, is presumed, until the contrary is shown, to occupy in his character of mortgagee; and as such is liable to account for rents and profits. Thus,

⁵⁶ *Dela v. Stanwood*, 62 Me. 574.

⁵⁷ *Madison Ave. Bap. Church v. Baptist Church in Oliver St.*, 73 N. Y. 82, modifying 41 N. Y. Super. (9 J. & S.) 369.

⁵⁸ *Moore v. Degraw*, 1 Halst. (N. J.) Ch. 346.

⁵⁹ *Hitchcock v. Fortier*, 65 Ill. 239; *Demarest v. Berry*, 16 N. J. Eq. 481.

⁶⁰ *Butts v. Broughton*, 72 Ala. 294; *Dozier v. Mitchell*, 65 Ala. 511; *Barron v. Paulling*, 38 Ala. 292.

where a tenant in possession purchased outstanding past due mortgages on the premises, and after the expiration of his term continued in possession and in receipt of rents and profits, such continued occupancy, until the contrary is shown, is presumed to be under the mortgage and not as a tenant holding over.⁶¹ And a mortgagee who also had a claim to a lien under a mechanic's lien statute, which was legally invalid, who was put into possession by the mortgagor under an agreement that the rents and profits should apply upon the latter lien, was held, as between himself and the creditors of the mortgagor holding junior liens, to be in possession as mortgagee, and the rents were deducted from the mortgage debt.⁶²

But a mortgagee who takes a conveyance from the mortgagor and enters thereunder, does so under his title, and not as the holder of a mere lien, and is not accountable as such to the holder of a junior incumbrance, as against whom his mortgage may be enforced for its full amount.⁶³

A mortgagee in possession may institute summary proceedings against a tenant of the premises for nonpayment of rent, as the conventional relation of landlord and tenant sufficiently exists between parties. Indeed his very situation carries with it not only the right but the duty to collect the rents and to use all lawful processes for that purpose, for he must in time account to the mortgagor and is responsible for his neglect.⁶⁴

A grantee under a deed absolute on its face, but made as security for a debt, is a mortgagee simply, and as such must account for rents and for proceeds of sales of the property with interest, and for waste.⁶⁵

§ 271. Right of a mortgagee in possession to make repairs.—The mortgagee is entitled to be credited for moneys expended by him to keep the premises in necessary repair,⁶⁶ but when he under-

⁶¹ *Anderson v. Louterman*, 27 Ohio, 104.

⁶² *Hilliard v. Allen*, 4 Cush. (Mass.) 532.

⁶³ *Rogers v. Herron*, 92 Ill. 583.

⁶⁴ *Goodnow v. Pope*, 31 Misc. 475; ⁶⁴ N. Y. Supp. 394.

⁶⁵ *Foley v. Foley*, 15 App. Div. 276; 44 N. Y. Supp. 588; *Turner v. Wilkinson*, 72 Ala. 361; *Morrow v.*

Turney, 35 Ala. 131; *Powell v. Williams*, 14 Ala. 476; *Cooke v. Culbertson*, 9 Nev. 199.

⁶⁶ See also *McCumber v. Gilman*, 15 Ill. 381; *Hasford v. Johnson*, 47 Ind. 479; *Booth v. Packet Co.*, 63 Md. 39; *Gillis v. Martin*, 2 Dev. Eq. 470; 25 Am. Dec. 729; *Adkins v. Lewis*, 5 Oreg. 292; *Dewey v. Brownell*, 54 Vt. 441; 41 Am. Rep. 852.

takes, without the consent of the mortgagor, to make improvements on the property, though they may be of a beneficial and permanent character, he does it at his peril, and has no right to look to the mortgagor for an allowance. It would be unjust that he should be at liberty to improve as he thought most beneficial to himself, and thereby perhaps deprive the mortgagor of the power of redeeming.⁶⁷

In *Moore v. Cable* (1 Johns. Ch. 385), it was held that the clearing of wild land did not constitute necessary repairs, and Chancellor KENT remarked that, "to make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make."

§ 272. The same rule was expressed by DENIO, J., as follows:⁶⁸ "Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements. He can at any time fall upon the debtor, by suit of foreclosure, to elect whether he will pay the debt or incur an absolute forfeiture; and if he is found making costly improvements, there is good reason to suspect a design to avail himself of the present inability of the debtor to discharge the incumbrance in order to confirm his title to the estate by embarrassing the right of redemption. The general rule is therefore understood to be that upon taking the account in a suit for redemption against a mortgagee in possession, he is to be charged with the rents and profits, and be allowed only for necessary reparations."⁶⁹

§ 273. Exceptions.—The rule refusing an allowance for permanent improvements to the mortgagee, is subject to some exceptions.

⁶⁷ *Quin v. Brittain*, Hoff. Ch. 354; *Trust Co. v. Fisher*, 106 Ill. 189; *McCumber v. Gilman*, 15 Ill. 381; *Cook v. Ottawa University*, 14 Kans. 548; *Clark v. Smith*, Saxton (N. J.) 123.

⁶⁸ *Mickles v. Dillaye*, 17 N. Y. (3 Smith) 80.

⁶⁹ See also *Story's Eq. Jur.* § 1016 b; 4 *Kent's Com.* 167.

Where valuable and permanent improvements have been made in good faith by a person standing upon the legal footing of a mortgagee, but who supposed himself to have acquired the absolute title, as by a purchase under a foreclosure which was defective and failed to cut off a right of redemption, if the person entitled to redeem neglect to apprise the mortgagee of his error, and allow him to go on in expending money upon the property, the value of the permanent improvements will be allowed to the mortgagee upon redemption. The improvements, being made by the mortgagee in the belief that he was the owner of the property, and that belief to some extent having been induced by the person entitled to redeem, the person seeking relief at the hands of a court of equity, must do equity and pay for the benefits which he receives from the improvements.⁷⁰

So, where a title had been conveyed by the mortgagor to the mortgagee, the latter was adjudged to be entitled to retain the property, as against a junior lien of which he had no notice, for the amount of his mortgage and valuable permanent improvements put by him upon the estate after the date of the grant.⁷¹ And where the instrument adjudged to be a mortgage was an absolute deed, the equitable owner was required to pay for repairs and improvements, made on the faith of an absolute title, which enhanced the value of the property.⁷²

Where the grantor in such a deed brings an action to redeem and for an accounting against the grantee it is held that, the defendant being in possession as a trespasser and having ousted the true owner, the court in its discretion has the power to deny him credit for any improvement he may have made upon the property.⁷³

70 *Miner v. Beekman*, 50 N. Y. 337; *Mickles v. Dillaye*, 17 N. Y. (3 Smith) 80; *Wetmore v. Roberts*, 10 How. Pr. 51, and cases cited; *Fogal v. Pirro*, 17 Abb. 113; 10 Bosw. 100; *Chalmers v. Wright*, 5 Robt. 713; *Benedict v. Gilman*, 4 Paige, 58; *Putnam v. Ritchie*, 6 Paige, 390; see also *Fraser v. Prather*, 1 MacA. (D. C.) 206; *Roberts v. Fleming*, 53 Ill. 198; *Troost v. Davis*, 31 Ind. 34; *Spurgin v. Adamson*, 62 Iowa 661; 18 N. W. 293; *Poole v. Johnson*, 62 Iowa 611;

17 N. W. 900; *Dougherty v. Colgan*, 6 Gill & J. (Md.) 275; *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Cooke v. Culbertson*, 9 Nev. 199; *Harper's Appeal*, 64 Pa. St. 315; *Morgan v. Walbridge*, 56 Vt. 405.

71 *Troost v. Davis*, 31 Ind. 34. But see *Catterlin v. Armstrong*, 101 Ind. 258.

72 *Harper's Appeal*, 64 Pa. St. 315.

73 *Shelley v. Cody*, 187 N. Y. 166; 79 N. E. 997.

§ 274. In cases where a mortgagee is not compensated for improvements, he is not charged with the profits received by him from such improvements.⁷⁴ But if a charge is made and allowed for the expense of improvements, the mortgagee is also chargeable with the increased rental resulting therefrom.⁷⁵

So, a mortgagor cannot charge a mortgagee in possession for waste for clearing and cultivating the land, and also with the improved rent arising from such clearing; though it has been said that he may do either at his election.⁷⁶

Claims for money disbursed in making repairs should be asserted before judgment in the action to foreclose or redeem, since they cannot be made charges on the land independent of such judgment.⁷⁷

§ 275. Counsel fees.—A mortgagee of land in possession is entitled to be allowed for reasonable counsel fees, paid in a proper endeavor to collect the rents and profits; and he is not liable for damages done to the estate, without his knowledge, by his tenant, provided the latter was one to whom the estate might properly be leased; or for wood cut and used on the premises, for firewood and repairs, by such tenant.⁷⁸

§ 276. Compensation for services in taking charge of estate.—The English courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt. They have allowed the mortgagee to agree with the mortgagor for the appointment of a receiver to be paid by the latter, but they have held that neither the mortgagee, nor his assignee or executors, can have any allowance for personal care or trouble in receiving the rents of the estate, notwithstanding an agreement with the mortgagor for that purpose.⁷⁹ As a general rule, they have imposed on the mortgagee the duty of collecting the rents himself, without compensation; but they have allowed him to employ another

⁷⁴ Moore v. Cable, 1 Johns. Ch. 385; Bell v. The Mayor, 10 Paige, 49. See also Jones v. Fletcher, 42 Ark. 422; Hopkins v. Stephenson, 1 J. J. Marsh (Ky.) 341; Clark v. Smith, Saxt. (N. J.) 121, 138.

⁷⁵ Montgomery v. Chadwick, 7 Iowa, 114.

⁷⁶ Morrison v. McLeod, 2 Ired. Ch. 108.

⁷⁷ Dewey v. Brownell, 54 Vt. 441; 41 Am. R. 852.

⁷⁸ Blunt v. Syms, 40 Hun, 566; 1 N. Y. St. R. 455. See also Hubbard v. Shaw, 94 Mass. (12 Allen) 120.

⁷⁹ Moore v. Cable, 1 Johns. Ch. 385, 388; Fisher on Morts. 499; French v. Baron, 2 Atk. 120; Godfrey v. Watson, 3 Atk. 518.

person to do so at the expense of the estate, when the nature of the property was such that great time and trouble would be sacrificed by personal receipt of the rents, so that a provident owner, whose time was of value, would probably have appointed a bailiff receiver.⁸⁰ The reason given for refusing to allow the mortgagee for time and trouble spent in taking care of the estate is, that such an arrangement tends directly to facilitate usury and oppression. So, where a mortgage provided that the mortgagee should be in receipt of the rents and have £60 a year for his trouble, and, after retaining this amount with the interest, should pay the balance to the mortgagor, it was held that he was liable to *qui tam* action for usury.⁸¹

§ 277. Rule in this State.—In the other States the rule is similar to that adopted in England, in refusing the mortgagee compensation for his own services,⁸² but allowing him to charge as against the rent for the expense of collecting it where such expense was actually incurred, and where the premises were so situated that the employing of an agent was a reasonable and a proper thing to do.⁸³

It has been said that in this State there is no fixed rule applicable to all cases determining whether or not a mortgagee in possession is, upon an application of the mortgagor to redeem, entitled to commissions upon the amount received and expended by him, and that the decision of this question rests in the discretion of the court or referee trying the action. In one case commissions were refused to the mortgagee, and costs were also adjudged against him. No rule is suggested by which the discretion of the court is to be guided.⁸⁴ In a later case compensation was refused, and it was said that no commissions can be legally claimed or allowed.⁸⁵

⁸⁰ Fisher on Mortg. 499; Coote on Mortg. 353, 557; Davis v. Dendy, 3 Mad. 170.

⁸¹ Scott v. Brest, 2 Term. R. 238.

⁸² Benham v. Rowe, 2 Cal. 387; Clark v. Robins, 6 Dana (Ky.) 350; Breckenridge v. Brooks, 2 A. K. Marsh (Ky.) 335; Eaton v. Simonds, 14 Pick. (Mass.) 98; Elmer v. Loper, 25 N. J. Eq. 475; Clark v. Smith, Saxt. (N. J.) 121.

⁸³ Harper v. Ely, 70 Ill. 581; Scarborough v. Stinson, 15 La. An. 665; Lowndes v. Chisholm, 2 McCord Ch. (Md.) 455; Davis v. Dendy, 3 Mad. 170.

⁸⁴ Green v. Lamb, 24 Hun, 87. See Moore v. Cable, 1 Johns. Ch. 385, 388.

⁸⁵ Blunt v. Syms, 40 Hun, 566; 1 N. Y. St. R. 455.

In Massachusetts, when a mortgagee enters upon default for the purpose of foreclosure, the question as to commissions has arisen more frequently than in this State. In an action to redeem it has been held that the mortgagee in possession, having entered for breach of condition, is entitled to ordinary commissions, and, in special cases, to more.⁸⁶ A similar rule prevails in Connecticut.⁸⁷

The fact that the mortgagor consented to the appointment of an agent at a fixed compensation for a part of the time the mortgagee was in possession, has been held to be competent though not conclusive evidence that the continued employment of an agent at the same rate was proper.⁸⁸

§ 278. Accounting between mortgagor and mortgagee.—An account between the mortgagor and mortgagee as to the amount due upon the mortgage debt, may be required by any person obligated to pay that debt, or having any interest in or lien upon the mortgaged estate subordinate to the mortgage. Questions as to the amount due to the mortgagee can be raised in any litigation in which the mortgage is sought to be enforced or relief is asked against it. The methods for raising questions of account are pointed out in chapters of this work touching "Foreclosure" and "Redemption."

§ 279. Money paid for taxes, assessments, and other charges.—A mortgagee, whether in or out of possession, who has paid taxes on the mortgaged premises in order to preserve his security, may charge such taxes in his account against the mortgagor, and recover them under the mortgage.⁸⁹ So, also, he may charge money used in paying a valid assessment for a public improvement;⁹⁰

⁸⁶ *Casenove v. Cutler*, 4 Met. (Mass.) 246; *Adams v. Brown*, 7 Cush. (Mass.) 220; *Montague v. Boston & Alb. R. R.*, 124 Mass. 242; *Gerrish v. Black*, 104 Mass. 400.

⁸⁷ *Waterman v. Curtis*, 26 Conn. 241.

⁸⁸ *Casenove v. Cutler*, 4 Met. (Mass.) 246.

⁸⁹ *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. R. 163; *Marshall v. Davies*, 78 N. Y. 414; *Weed v. Hornby*, 35 Hun, 580; *Faure v. Winans*, Hopk. Ch. 283; *Burr v. Veeder*, 3 Wend. 412; *Eagle Fire Ins. Co. v. Pell*, 2

Edw. 631; *Kortright v. Cady*, 23 Barb. 490; *Robinson v. Ryan*, 25 N. Y. 320. See also *Ring's Ex'r v. Woodruff*, 43 Ark. 469; *Mix v. Hotchkiss*, 14 Conn. 32; *Wright v. Langley*, 36 Ill. 381; *Stancliff v. Norton*, 11 Kans. 218; *Sharp v. Barker*, 11 Kans. 381; *Walton v. Hollywood*, 47 Mich. 385; *Johnson v. Payne*, 11 Neb. 569; 9 N. W. 81; *Southard v. Dorington*, 10 Neb. 122; 4 N. W. 935.

⁹⁰ *Rapelye v. Prince*, 4 Hill, 119; *Dale v. McEvers*, 2 Cow. 118; *Brevoort v. Randolph*, 7 How. Pr. 398.

or in paying rent on a perpetual lease in fee to prevent a re-entry and to preserve his security;⁹¹ or in satisfying an execution upon a prior judgment.⁹² If the mortgagee pays a tax or assessment which he is under no obligation to pay, he will be preferred, to the extent of the money thus paid, to prior incumbrancers whose liens the payment has served to protect.⁹³

The right of the mortgagee to protection for moneys disbursed by him in discharge of taxes and other prior liens on the property, depends upon equitable principles alone, and not upon the presence of a "tax clause" or other stipulation in the mortgage,⁹⁴ though such a clause is valid.⁹⁵

Money paid by a mortgagee for taxes on other prior charges or liens on the estate is not chargeable against the estate apart from the mortgage, and is uncollectible when the mortgage is satisfied; and, whether the amount paid is or is not included in the sum for which the mortgage is foreclosed, there can be no subsequent or separate proceeding against the mortgagor to enforce its payment.⁹⁶

A mortgagee in an invalid mortgage has been held to be entitled to a lien on the land for taxes paid by him.⁹⁷ And as between the mortgagor and mortgagee payments made in good faith by the mortgagee for taxes and assessments which prove to have been illegally assessed, may be included in the foreclosure decree.⁹⁸ Under a clause in a mortgage authorizing the mortgagee to pay taxes or assessments on the premises "with any expense attending" in case of a default in payment of same by the mortgagor, and making any amount so paid a lien, the fee paid an expert to determine what taxes were legal, and to see that proper deductions were made for illegal taxes is a proper item of expense and became a lien on the mortgaged premises.⁹⁹

⁹¹ Robinson v. Ryan, 25 N. Y. 320.

⁹² Silver Lake Bank v. North, 4 Johns. Ch. 370.

⁹³ Cook v. Kraft, 3 Lans. 512.
See also Davis v. Bean, 114 Mass. 360.

⁹⁴ Sidenberg v. Ely, 90 N. Y. 257;
43 Am. R. 163.

⁹⁵ Hamilton v. Jones, 62 Cal. 473.

⁹⁶ McCrossen v. Harris, 35 Kans.

178; 10 Pac. 583; Vincent v. Moore, 51 Mich. 618; 17 N. W. 81; Young v. Brand, 15 Neb. 601; 19 N. W. 494.

⁹⁷ Aultman v. Jenkins, 19 Neb. 209; 27 N. W. 117.

⁹⁸ Bates v. People's, etc., Asso'n, 42 Ohio St. 655.

⁹⁹ Equitable Life Ins. Society v. Von Glahn, 107 N. Y. 637; 13 N. E. 993.

§ 280. **An assignment** to the mortgagee of the charge or lien paid by him, is neither necessary nor proper if it is desired to collect the amount paid, under the mortgage. By a purchase at a tax sale, the mortgagee may acquire a lien which he will be allowed to enforce, but he will not be able to enforce a claim for the amount thus paid in his character as mortgagee.¹ He will have the rights of a purchaser at a tax sale, and he will also be a mortgagee; thus being the holder of two different demands, each secured by its appropriate remedies. But it has been held that, if he will waive his tax title, he may add the amount paid for it to his claim as mortgagee.²

The owner of an undivided half interest in real estate who has mortgaged his half interest is liable only for the tax on his share, and cannot be made to pay the whole tax by the mortgagee who pays the same to protect his lien.³

§ 281. **Purchase at tax sale.**—If a mortgagee in possession be in the receipt of rents or profits, it is not only his right but his duty to use them in the preservation of the estate by paying taxes or other incumbrances prior to the mortgage. If he suffers the land to be sold for taxes, in violation of his duty, and purchases on the sale, he would, upon general principles, be deemed to hold the title as trustee.⁴ He cannot set up against the mortgagor a tax title acquired while thus in possession.⁵

On a like principle, neither the mortgagor nor his grantee in possession can acquire any right hostile to the mortgage by paying taxes on the mortgaged premises, since it is his duty to make such payment.⁶ And a payment made in the form of a purchase on a sale for such tax has no greater effect.⁷

An exception to this equitable doctrine appears to have been set up by the provisions of chapter 583 of the Laws of 1888, revising the charter of the City of Brooklyn.⁸ But this is no longer law.

¹ *Williams v. Townsend*, 31 N. Y. 411. See also *Fiacre v. Chapman*, 32 N. J. Eq. 463.

² *Strong v. Burdick*, 32 Iowa, 630; *Baker v. Clark*, 52 Mich. 22; 17 N. W. 225.

³ *Weed v. Hornby*, 35 Hun, 580.

⁴ Per *ANDREWS, J.*, in *Ten Eyck v. Craig*, 62 N. Y. 406, 422.

⁵ *Schenck v. Kelley*, 88 Ind. 444.

⁶ *Medley v. Elliott*, 62 Ill. 532.

⁷ *Voris v. Thomas*, 12 Ill. 442.

⁸ *Sutherland v. City of Brooklyn*, 156 N. Y. 605; 51 N. E. 433, rev'g 87 Hun, 82; 67 St. R. 642; 33 N. Y. Supp. 959.

§ 282. **Insurance premiums.**—As a general rule, if no provision is made in the mortgage for insuring the premises, a mortgagee has no right to charge in his account for premiums paid for effecting insurance upon the mortgaged premises.⁹ In *Slee v. Manhattan Co.* (1 Paige, 81), where the mortgagees had long been in possession of the premises, the court allowed them to charge for insurance premiums “under the peculiar circumstances of the case.”

Questions of insurance are further considered in Chapter XIII of this work.

⁹ *Faure v. Winans*, Hopk. Ch. 283; *v. Brown*, 2 Cush. (Mass.) 412; *Fisher on Morts.* 493, 494; *Bellamy Booth v. Packet Co.*, 63 Md. 39. *v. Brickenden*, 2 J. & H. 137; *White*

CHAPTER IX

THE PRIMARY FUND FOR THE PAYMENT OF MORTGAGES AND PRIORITIES INDEPENDENT OF THE RECORDING ACTS

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THE PRIMARY FUND FOR THE PAYMENT OF MORTGAGES.

§ 283. Statute.—It is provided by statute that “where real property, subject to a mortgage executed by any ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee

must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.”¹

§ 284. **Rule prior to Revised Statutes.**—This is a different rule from that which prevailed prior to the Revised Statutes. The rule then was that when a man gave a bond and mortgage for a debt of his own contracting, the mortgage was understood to be merely a collateral security for the personal obligation, and the debt was required to be paid out of personal assets. But when a man had purchased, or had received by devise to him, land with an incumbrance on it, he became a debtor only in respect to the land; and if he promised to pay it, it was said to be a promise rather on account of the land, which continued notwithstanding to be the primary fund. It was sometimes said that the estate which had received the benefit should also bear the burden. As to wills, the testator might, by express directions, charge a mortgage debt upon his personal assets, or, even without express words, he might do so by such dispositions and language as were tantamount; as, for instance, if the continuance of the charge primarily on the land would be repugnant to some of the provisions of the will and defeat them.²

§ 285. **Application of the statute.**—The statute in its present form was first passed to remedy what seemed to the revisers to be an injustice,³ and it plainly has an advantage over the former rule in being definite and intelligible. The rule of the statute applies as well to cases of intestacy as to cases where the mortgagor has disposed of the whole or a part of his estate by will,⁴ and the provision which makes the real estate the primary fund for the payment of the mortgage debt, or, in other words which gives the land to the heir or devisee *cum onere*, is never discharged⁵

¹ Real Prop. Law, § 250; 1 R. S. 749, § 4.

² *Cumberland v. Codrington*, 3 Johns. Ch. 229, 257, 272; *Mollan v. Griffith*, 3 Paige, 402. See also *Campbell v. Campbell*, 30 N. J. Eq. 415.

³ See Revisers' Notes, 3 R. S. (2d ed.) 600.

⁴ *House v. House*, 10 Paige, 158.

⁵ *Erwin v. Loper*, 43 N. Y. 521, 525; *Matter of Humphrey*, 54 Misc. R. 198; 105 N. Y. Supp. 972; *Matter of Keene*, 8 Misc. R. 102; 29 N. Y. Supp. 1078; *Taylor v. Wendell*, 4 Bradf. 324; *Waldron v. Waldron*, 4 Bradf. 324.

except by some clear and express direction in the will.⁶ The personal estate of the decedent is liable only for deficiencies.⁷ The heir or devisee is not personally liable and the statute is not intended to give mortgage creditors of a decedent preference over other creditors in respect to property not covered by the mortgage.⁸ The general expression in the will, "after all my lawful debts are paid and discharged, I give," etc., is not "an express direction that the mortgage be otherwise paid," such as the statute requires, in order to exempt the devisee from its payment, and charge the executors with the payment thereof out of the assets of the testator in their hands.⁹ The statute applies to a devise of real estate though it is mortgaged to its full value and the provision is made in lieu of dower,¹⁰ unless the testator has otherwise directed.¹¹

Where a father assumed a mortgage upon taking title and subsequently conveyed to his daughter, by a deed which contained full covenants, made no mention of the mortgage, and expressed a consideration although none actually passed other than love and affection, it was held the father's estate could not be compelled to pay the mortgage debt, for the land was the primary fund.¹²

§ 286. **Limitations of the rule.**—But this provision of the statute does not apply to a case where the mortgage is a collateral security only for the debt of others, and the executors have funds in their hands of the principal debtors, which the law devotes to the payment of such principal debt. It only applies as between devisee or heirs and the personal representatives of the estate of the testator or intestate. So, where the land of one partner is mortgaged to pay a copartnership debt, the copartnership assets are the primary fund for its payment.¹³

The statute only applies to mortgages where the lien is created by the act of the parties, and is without effect upon liens which arise by operation of law, as in the case of the equitable lien of a vendor for unpaid purchase money. It has often been held,

6 Van Vechten v. Kealor, 63 N. Y. 52, 56.

7 Glacius v. Fogel, 88 N. Y. 434.

8 Hanselt v. Patterson, 124 N. Y. 349.

9 Rapalye v. Rapalye, 27 Barb. 610.

10 Meyer v. Cahen, 111 N. Y. 270; 18 N. E. 862.

11 De Graaf v. Cochrane, 21 App. Div. 381; 47 N. Y. Supp. 502.

12 Wilbur v. Warren, 104 N. Y. 192; 10 N. E. 263.

13 Robinson v. Robinson, 1 Lans. 117.

both before and since the statute, that in case of such unpaid purchase money, the heir or devisee is entitled to have the same paid out of the personal property.¹⁴

§ 287. **The sole object of the statute** was to change the rule of the common law, under which the heir or devisee had the right, in certain cases, to call upon the personal representatives of the decedent to pay off the mortgage. It does not, by its terms, purport to affect the rights of creditors, but simply to establish a rule of liability as between devisees or heirs and the personal representatives. Where there is a personal liability by contract, to which the mortgage is a collateral security, it was not the design of the statute to deprive the party of his right to enforce that liability; nor was it intended to compel a resort to any mode of marshalling assets for the purpose of adjusting the equities as between the representatives and third parties.¹⁵ It does, however, make the land the primary fund for the payment of the mortgage debt,¹⁶ and where the rights of the creditor will not be prejudiced, a court of equity may compel the land to be sold and the proceeds applied to the debt, before allowing the mortgagee to proceed against the personal assets of a deceased mortgagor.¹⁷

§ 288. **Mortgages of leaseholds.**—The mortgage of a leasehold interest in lands is a mortgage upon part of the personal estate, and is payable out of personal assets, though this does not impair the right of a creditor to enforce his specific lien.¹⁸

§ 289. **Charging parcels of land in inverse order of alienation.**—As a mortgagor who conveys with warranty against incumbrances and who receives the whole purchase price, remains primarily liable for the debt,¹⁹ so, when the mortgagor sells a parcel of the land, with warranty against the incumbrance, or for full consideration, the parcel remaining in his hands is the primary fund for the payment of the mortgage, that is to say, the different

¹⁴ *Wright v. Holbrook*, 32 N. Y. 587; *Livington v. Newkirk*, 3 Johns. Ch. 312; *Cogswell v. Cogswell*, 2 Edw. 231; *Johnson v. Corbett*, 11 Paige, 265; *Lamport v. Beeman*, 34 Barb. 239.

¹⁵ Per DAVIS, J., in *Wright v. Holbrook*, 32 N. Y. 587; *Roosevelt v. Carpenter*, 28 Barb. 426.

¹⁶ *Mosely v. Marshall*, 27 Barb.

⁴² See *Woolf v. Leicester Realty Co.*, 134 App. Div. 484; 119 N. Y. Supp. 288.

¹⁷ *Rice v. Harbeson*, 2 N. Y. Sup. (T. & C.) 4. See also *Moore v. Dunn*, 92 N. C. 63.

¹⁸ *Sheldon v. Ferris*, 45 Barb. 124.

¹⁹ *Lagrange v. Hellinger*, 144 App. Div. 397; 129 N. Y. Supp. 291.

parcels of land are to be charged in the inverse order of their alienation.²⁰ The same principle is applicable to subsequent incumbrances upon different parcels of the mortgaged premises, either by mortgage or judgment.²¹ For the purpose of determining the equity between the respective owners of parcels of land subject to a mortgage upon all, a mortgage is to be regarded as an alienation *pro tanto* at the time of its date;²² and a purchaser at a foreclosure sale acquires the equity of a grantee as of the date of the mortgage foreclosed.²³

A parol sale of part of the mortgaged premises, followed by possession and improvements on the same by the vendee, is sufficient as between the vendee and the mortgagor and those claiming under him, having actual notice of the parol sale, to throw the burden of the mortgage upon the part of the premises retained by the mortgagor.²⁴

The principle of charging different parcels of the mortgaged premises, which have been sold at various times subsequent to the mortgage, in the inverse order of their alienation, is not always confined to the original alienations by the mortgagor, who is personally liable for the payment of the debt. The principle is

20 Wood v Harper, 9 App. Div. 229; 41 N. Y. Supp. 242; Gill v. Lyon, 1 Johns. Ch. 447; Clowes v. Dickinson, 5 Johns. Ch. 235; Gouverneur v. Lynch, 2 Paige, 300; Guion v. Knapp, 6 Paige, 35; Patty v. Pease, 8 Paige, 277; Snyder v. Stafford, 11 Paige, 71; Kellogg v. Rand, 11 Paige, 59; New York Life Ins. and Trust Co. v. Milnor, 1 Barb. Ch. 353; Stuyvesant v. Hall, 2 Barb. 151; The New York Life Ins. and Trust Co. v. Cutler, 3 Sandf. Ch. 176; La Farge Ins. Co. v. Bell, 22 Barb. 54; Warren v. Boynton, 2 Barb. 13; Van Slyke v. Van Loan, 26 Hun, 344. See also Sanford v. Hill, 46 Conn. 42; Looney v. Quill, 3 Mackey (D. C.) 51; Lock v. Fulford, 52 Ill. 166; Gilbert v. Haire, 43 Mich. 283; McKinney v. Miller, 19 Mich. 142; Niles v. Coult, 30 N. J. Eq. 30; Schrack v. Shriner, 100 Pa. St. 451.

It is immaterial what considera-

tion a mortgagee receives for releasing part of the mortgaged premises, where it is agreed that the rest of the land shall remain as security for the mortgage debt. So held in Eyring v. Hercules, 9 App. Div. 307; 41 N. Y. Supp. 191.

21 Stuyvesant v. Hall, 2 Barb. Ch. 151; James v. Hubbard, 1 Paige, 228; Jenkins v. Freyer, 4 Paige, 47; Skeel v. Spraker, 8 Paige, 182; Schryver v. Teller, 9 Paige, 173; New York Life Ins. and Trust Co. v. Vanderbilt, 12 Abb. Pr. 458. See also Andreas v. Hubbard, 50 Conn. 351.

22 Mulligan's Appeal, 104 Pa. St. 503.

23 Hart v. Wandle, 50 N. Y. 381; Kellogg v. Rand, 11 Paige, 60; La Farge Fire Ins. Co. v. Bell, 22 Barb. 67. See also Fassett v. Mulock, 5 Col. 466; Sibley v. Baker, 23 Mich. 312; Lyman v. Lyman, 32 Pt. 79.

24 Root v. Collins, 34 Vt. 173.

equally applicable to several conveyances at different times by a grantee of the whole or a part of the mortgaged premises, where he conveys with warranty. In such case the several grantees take the land with all of its equitable rights and burdens.²⁵ And the right of each purchaser or incumbrancer to have the parcels in the hands of the debtor, at the time he makes his purchase or acquires his lien, applied to the payment of the prior lien, cannot be disturbed by anything which takes place after his title or lien is perfected, and each new claimant must take subject to prior equities.

The principle under which several parcels of land covered by the same mortgage are subjected to the lien in the inverse order of their alienation, has no application where the successive conveyances are to the same party. A purchaser of all of the parcels of the mortgaged property has no equity to require that they shall be sold away from him in the inverse order in which he purchased.²⁶ Nor does it apply where the parcel was taken expressly subject to the mortgage and an amount equal to the mortgage indebtedness deducted from the purchase price.²⁷

§ 290. Examples.—One who takes a deed of a parcel of real estate with warranty against incumbrances may, upon discovering that it is incumbered, in common with other property, with a prior mortgage, purchase such mortgage and enforce it primarily against the balance of the mortgaged property remaining in the hands of his grantor. And such grantor cannot protect himself or his property by the purchase of a subsequent mortgage upon it.²⁸

Where land which was subject to a mortgage was afterward sold, with full covenants of warranty and against incumbrances, in two different lots to different purchasers at different times, and the mortgagee afterward entered (under the law of Massachusetts) for the purpose of strict foreclosure, and the foreclosure became absolute as to the lot last sold, it was held that the owner of the lot first sold might redeem by paying the balance due upon the mortgage debt after deducting the full value of the other lot with

²⁵ *Guion v. Knapp*, 6 Paige, 35.

See also *Sanford v. Hill*, 46 Conn. 42;

Sager v. Tupper, 35 Mich. 134.

²⁶ *Steere v. Childs*, 15 Hun, 511.

²⁷ *Wood v. Harper*, 9 App. Div. 229; 41 N. Y. Supp. 242.

²⁸ *Kilborn v. Robbins*, 90 Mass. (8 Allen) 466.

the buildings thereon, and that it was immaterial that the buildings had been erected after he acquired his title.²⁹

§ 291. Land conveyed expressly subject to mortgage debt.—Where land is conveyed expressly subject to a mortgage thereon, the land is the primary fund as between grantor and grantee, and those deriving title from the grantee, for the payment of the mortgage debt;³⁰ and this is so even if the mortgagee holds other collateral security;³¹ and so also in a case where a mortgagor conveys the mortgaged premises to the mortgagee under a deed providing that the mortgage is not to merge in the fee but to continue as an existing and enforceable lien. For by such a stipulation the land becomes, between the parties, the primary fund and the mortgagee cannot recover upon his bond without first applying his interest in the premises to the satisfaction of the mortgage debt. The fact that the mortgagee has gained title to the mortgaged premises does not prevent an action by him to foreclose the lien on his own land.³² The purchaser of the land acquires the equity of redemption merely, that is to say, the right to own the premises on paying the mortgage debt; and he must either pay the debt, or allow the lands to be appropriated toward its payment. So, too, where land is sold under a junior judgment or mortgage, the purchaser acquires the equity of redemption merely, and the land is the primary fund for the payment of the mortgage.³³

If the purchaser of the mortgaged premises assumes the payment of the mortgage debt, the land is the primary fund for the payment,³⁴ but if this be insufficient, the purchaser must, as between him and his grantor, discharge the obligation. The land is the se-

29 *George v. Wood*, 93 Mass. (11 Allen) 41.

30 *Lagrange v. Hellinger*, 144 App. Div. 397; 129 N. Y. Supp. 291; *Cohen v. Hecht*, 128 App. Div. 511; 112 N. Y. Supp. 809; *Wiener v. Boehm*, 126 App. Div. 703; 111 N. Y. Supp. 126; *Jumel v. Jumel*, 7 Paige, 591. See also *Huebsch v. Scheel*, 81 Ill. 281.

31 *Brewer v. Staples*, 3 Sandf. Ch. 579.

32 *Eagan v. Engeman*, 125 App. Div. 743; 110 N. Y. Supp. 366.

33 *Tice v. Annin*, 2 Johns. Ch. 125; *McKinstry v. Curtis*, 10 Paige, 503; *Russell v. Allen*, 10 Paige, 249; *Vanderkemp v. Shelton*, 11 Paige, 28; *Weaver v. Toogood*, 1 Barb. 238; *Matthews v. Aikin*, 1 N. Y. (1 Comst.) 595.

34 *Torrey v. Bank of Orleans*, 9 Paige, 649; *Waters v. Hubbard*, 44 Conn. 340; *Briscoe v. Power*, 47 Ill. 447; *Welch v. Beers*, 90 Mass. (8 Allen) 151; *Swett v. Sherman*, 109 Mass. 231; *Mich. State Ins. Co. v. Soule*, 51 Mich. 312; 16 N. W. 662.

curity both of the mortgagor and of his grantee, as against their respective covenants; but the debt is that of the grantee, and the mortgagor stands merely as his surety.³⁵ But where the purchaser of the equity of redemption does not assume the mortgage it is held that the mortgagor remains primarily liable, although the former gives a bond to the holder of the mortgage to secure its payment.³⁶ On the other hand it has been decided that the grantee of a mortgagor, who has not assumed the payment of the mortgage, but who procures the discontinuance of a foreclosure action subsequently brought, by executing a bond conditioned for the payment of the mortgage debt, is, thereafter, liable not as surety but as a principal, and chargeable with any deficiency arising on the sale of the premises in a subsequent action. And this is so held although both the assignees' bond and the complaint describe such bond as "collateral security."³⁷

A subsequent purchaser or incumbrancer of a portion of the mortgaged property takes subject to any explicit provisions in a prior grant or mortgage of the property as to the order in which the parcels shall be sold, and that without any reference to the considerations for which such preferences were agreed upon.³⁸ Each purchaser and incumbrancer is chargeable with notice of the provisions of the previous deeds of his grantor, and of mortgages executed by him.³⁹

§ 292. Where parcels are expressly charged with mortgage.—But if a portion of mortgaged land be conveyed subject to the whole mortgage, the amount of which is allowed out of the purchase money, the parcel conveyed is the primary fund to pay the debt.⁴⁰

35 *Rubens v. Prindle*, 44 Barb. 336; *Tripp v. Vincent*, 3 Barb. Ch. 613; *Jumel v. Jumel*, 7 Paige, 591; *Halsey v. Reid*, 9 Paige, 446; *Marsh v. Pike*, 10 Paige, 595; *Cornell v. Prescott*, 2 Barb. 16; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Ferris v. Crawford*, 2 Den. 595; *Mills v. Watson*, 1 Sweeny, 374.

36 *Baker v. Potts*, 73 App. Div. 29; 76 N. Y. Supp. 406.

37 *Wysong v. Meyer*, 58 App. Div. 422; 69 N. Y. Supp. 286.

38 *Mickle v. Maxfield*, 42 Mich. 304; 3 N. W. 961.

39 *Eyring v. Hercules*, 9 App. Div. 307; 41 N. Y. Supp. 191; *Steere v. Childs*, 15 Hun, 511; *Jumel v. Jumel*, 7 Paige, 591; *Harris v. Fly*, 7 Paige, 421; *Knickerbocker v. Boutwell*, 2 Sand. Ch. 319.

40 *Bowne v. Lynde*, 91 N. Y. 92; *Halsey v. Reed*, 9 Paige, 446; *Russell v. Pistor*, 7 N. Y. (3 Seld.) 171; *Zabriskie v. Salter*, 80 N. Y. 555; *Hart v. Wandle*, 50 N. Y. 381; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Brewer v. Staples*, 3 Sand. Ch. 579; *Coles v. Appleby*, 22 Hun, 72, *aff'd*

So, too, if by the terms of the bargain, the grantee of a parcel of the land is to assume a specified portion of the mortgage, such portion then becomes a specific lien on the parcel so conveyed.⁴¹

And where a mortgagor conveys a part of the mortgaged lands by warranty deed, without reference to the incumbrance, such deed exempts the part sold from contribution, either to the mortgagor or to subsequent purchasers of the residue of the mortgaged lands.⁴²

Where a conveyance was made "subject, however, to the payment by the grantee of all existing liens upon said premises," this was held to charge the part conveyed with a portion of the mortgage in the proportion which its value bore to the whole security at the time of the conveyance.⁴³

The primary liability of a portion of the mortgaged property, under a stipulation on the part of the grantee assuming the whole mortgage as part of the purchase money of such portion, will not be disturbed by a reconveyance of a part of the portion so conveyed to the grantor, and the several parts will remain liable for their proportions of the debt.⁴⁴

It has been held that where a conveyance is made of a portion of the mortgaged property in which no mention is made of incumbrances, and there are no circumstances showing a contrary intention, the presumption is that the grantor is to pay the whole mortgage, and the portion of the mortgaged lands remaining in his hands will be the primary fund for such payment.⁴⁵

Where joint owners of property, subject to a mortgage executed by themselves, made partition, and one of them assumed to pay off the whole of the incumbrances on the property, the portion of the property granted to the person so assuming will, as between

87 N. Y. 114; *Lagrange v. Hellinger*, 144 App. Div. 397; 129 N. Y. Supp. 291. See also *Lilly v. Palmer*, 51 Ill. 331; *Canon v. Kreipe*, 14 Kan. 324; *Caruther v. Hall*, 10 Mich. 40; *Engle v. Haines*, 5 N. J. Eq. (1 Halst.) 186; 43 Am. Dec. 634.

⁴¹ *Torrey v. Bank of Orleans*, 9 Paige, 649; *Waters v. Hubbard*, 44 Conn. 340; *Briscoe v. Power*, 47 Ill. 447; *Welch v. Beers*, 90 Mass. (8 Allen) 151; *Swett v. Sherman*, 109 Mass. 231; *Michigan State Ins. Co. v. Soule*, 51 Mich. 312; 16 N. W. 662.

⁴² *Henderson v. Truitt*, 95 Ind., 309; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Kilborn v. Robbins*, 8 Allen (Mass.) 466.

⁴³ *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Hill's Administrators v. McCarter*, 27 N. J. Eq. 41; *Briscoe v. Power*, 47 Ill. 447.

⁴⁴ *Bowne v. Lynde*, 91 N. Y. 92; *Weber v. Zeimet*, 30 Wis. 283.

⁴⁵ *Hopkins v. Wolley*, 81 N. Y. 77; *contra*, *Haskell v. The State*, 31 Ark. 91.

the mortgagors, be the primary fund for the payment of the mortgage, and on foreclosure will be first sold.⁴⁶

§ 293. Land of one person mortgaged for debt of another.—

Where money is raised on the real estate of a wife for the benefit of a third person, the husband joining with his wife in the bond, the land is the primary fund for the payment of the debt.⁴⁷ And where a husband and wife owning undivided half parts of real estate, mortgaged the whole to secure a debt of the husband, his half was held in equity to be primarily liable to pay the debt.⁴⁸

So, where a husband and wife mortgaged a homestead to secure the payment of a partnership debt of a firm of which the husband was a member; and subsequently to the execution of the mortgage the said firm made an assignment for the benefit of its creditors, the mortgagors were held entitled to have a *pro rata* share of the proceeds of the assets of the partnership in the hands of the assignee, applied in relief of the obligation, their homestead standing as security only for the balance.⁴⁹

Where one mortgage is made to secure unpaid purchase money of two parcels of land belonging to different owners, each parcel is primarily liable for its own price.⁵⁰

Where two persons jointly purchased land and gave a mortgage for the purchase money and made amicable partition, and one paid his share of the mortgage debt, the parcel held by the other was directed to be sold first in satisfaction of the balance due upon the mortgage.⁵¹

Where a testator mortgaged his individual real estate to secure the payment of the notes of his firm, and died before their payment, having devised the mortgaged property without express direction in his will for the payment of the mortgage, it was held that the firm assets in the hands of his executors were primarily liable to satisfy the mortgage.⁵²

To charge a purchaser with the equity of one person whose

46 *Hards v. Burton*, 79 Ill. 504.

47 *Moore v. Moore*, 21 How. Pr. 211; *Moffett v. Roche*, 77 Ind. 48.

48 *Erie County Savings Bank v. Roop*, 80 N. Y. 591; *White v. Rovall*, 121 App. Div. 12; 105 N. Y. Supp. 624; *Loomer v. Wheelwright*, 3 Sand. Ch. 135; *Niemcewicz v. Gahn*, 3 Paige, 614; *Vartie v. Underwood*, 18

Barb. 561; *Smith v. Townsend*, 25 N. Y. 479; *Bank of Albion v. Burns*, 46 N. Y. 170.

49 *Dickson v. Chorn*, 6 Iowa. 19.

50 *Coutant v. Servoss*, 3 *Barb.* 128.

51 *Roddy's Appeal*, 72 Pa. St. 98.

52 *Robinson v. Robinson*, 1 *Lans.* 117.

lands are mortgaged for the debt of another, such purchaser must have notice of the facts. Thus, two persons owned a piece of land in common, and one of them owned another piece; both pieces were mortgaged to secure the debt of the person owning the latter parcel, who thereafter conveyed the latter parcel to a purchaser without notice and with warranty against incumbrances. Subsequently he sold his undivided interest in the parcel owned in common to one without knowledge of the other facts, and it was held that the purchaser of the parcel held in severalty might insist upon the whole debt being satisfied out of the parcel held in common, and that the purchaser of the half interest in the latter piece was to be in no degree prejudiced by the rascality of his grantor, but was to take as if the mortgage debt had been the debt of both of the parties to the instrument.⁵³

§ 294. **Release from primary liability.**—One who purchases part of mortgaged lands and agrees with his grantor to assume the whole mortgage in exoneration of the residue of the lands, can discharge his land from the consequences of that assumption by agreement with his grantor, made while still the owner of the residue of the land subject to the mortgage, and a grantee of the residue after such discharge cannot claim the benefit of the assumption. The grantee succeeds only to the equities of the grantor existing at the time of the conveyance, and that without any question of notice. The case will be quite different if the discharge is given after the grantor has sold the residue of the land to a party who has relied on the assumption.⁵⁴

§ 295. **Subrogation.**—Where a creditor has two funds, to either of which he may resort for the satisfaction of his debt, and one of which is primarily liable for the payment thereof, the owner of the latter fund stands in the relation of surety for the owner of the primary fund in the application of the equitable principle of substitution in behalf of sureties. A surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity which the creditor had against any other person or property on account of such debt.⁵⁵

53 *Kennelly v. Kelly*, 51 Conn. 329.

54 *Judson v. Dada*, 79 N. Y. 373.

55 *Dunlop v. James*, 174 N. Y.

411; 67 N. E. 60; *Eddy v. Traver*, 6 Paige, 521; *Cheesebrough v. Millard*, 1 Johns. Ch. 412.

If the mortgagee knowingly and voluntarily do any act which shall impair or destroy this right of subrogation, he, and not the person who stands as surety, can be made to suffer; and it is on this principle that the release of a portion of the mortgaged premises, which are primarily liable, with notice of the equities of other parties, is held to be *pro tanto* a discharge of the mortgage.⁵⁶

It has also been said that a mortgagee having a claim upon two funds, may lose his claim upon one of them by mere laches, and that if a mortgagee, to accommodate the heirs of a deceased mortgagor, delays foreclosure until the lands fall in value, he cannot thereafter call upon the personal estate.⁵⁷

§ 296. Junior liens protected.—Where the holder of a first mortgage has received ample collateral security for its payment, the rights of a subsequent mortgagee cannot be defeated by the assignment of the first mortgage without the collaterals to a person having knowledge of the facts.⁵⁸

So, stock in a corporation assigned as collateral to a mortgage upon real estate, will, as between the mortgagor and the second mortgagee, be applied to the payment of the mortgage before recourse is had to the land; and this equity will not be defeated by a levy on the stock under a judgment against the mortgagor.⁵⁹

§ 297. Controlling remedy of mortgagee.—The duty of the creditor holding the prior lien is a negative one, and consists in refraining from doing any act which shall injure or destroy the rights of the person who stands in the situation of surety for the debt. There is no general rule which compels the creditor to look to the principal debtor, and exhaust his remedy against the primary fund, before he can be permitted to resort to the fund which is only secondarily liable;⁶⁰ but there are cases where the remedy of a creditor may, in equity and good conscience, be so controlled by the court as to preserve the rights of both creditor and surety, and enable them both to escape without injury.⁶¹ But a court of equity will take care not to give the surety or junior creditor this

⁵⁶ *Ingalls v. Morgan*, 10 N. Y. (6 Seld.) 187.

⁵⁷ *Johnson v. Corbett*, 11 Paige, 265, 272.

⁵⁸ *Bergen Savings Bank v. Barrows*, 30 N. J. Eq. 89.

⁵⁹ *Loan Association v. Hawk*, 27 N. J. Eq. 335.

⁶⁰ *Hayes v. Ward*, 4 Johns. Ch. 131; *Jerry v. Rosell*, 32 Ark. 478.

⁶¹ *Ingalls v. Morgan*, 10 N. Y. (6 Seld.) 178, and cases cited; *Harrison v. Guerin*, 27 N. J. Eq. 219.

relief, if it will endanger thereby the prior creditor, or in the least impair his prior right to raise the debt out of both funds. The utmost that equity enjoins in such a case is, that the creditor who has a prior right to two funds, shall exhaust that to which the junior creditor cannot resort. But when there exists any doubt as to the sufficiency of that fund, or even where the prior creditor is unwilling to run the hazard of getting it out of that fund, there is no principle which can take from him any part of his security until he is completely satisfied.⁶² The cases have never gone so far as to sanction an interference with the remedies of the mortgagee, when such action will trench upon his rights or operate to his prejudice.⁶³

A mortgagee's right to prompt foreclosure will not be impeded by compelling him, in the interest of a subsequent purchaser of the remaining land, to first resort to his personal remedy against a purchaser of a part of the mortgaged premises from the mortgagor, who assumed to pay a part of the mortgage debt.⁶⁴

In some cases, it has been said that the junior creditor who desires to control the remedy of the senior creditor should give security against the expense and risk involved in the proceeding;⁶⁵ and if any right of the senior creditor would be sacrificed by delay, he will not be compelled to wait without indemnity in order to protect junior equities.⁶⁶

A mortgagee of land on which there is an outstanding prior vendor's lien, whose mortgage also includes other lands as well as personal property, will be compelled in equity at the suit of the vendor holding such vendor's lien, to exhaust the other lands and property before resorting to the land affected by the vendor's lien, and this although the mortgagee holds a lien superior to the vendor's lien, because he had no notice thereof when he took his mortgage.⁶⁷

In a case where a mortgagee had intentionally refrained from taking satisfaction out of a fund primarily liable, his bill to foreclose on the remaining property was dismissed.⁶⁸

⁶² *Evertson v. Booth*, 19 Johns. 493; *King v. McVickar*, 3 Sandf. Ch. 192.

⁶³ *Story's Eq. Jur.* § 633; *Slater v. Breese*, 36 Mich. 7; *Walker v. Co-var*, 2 S. C. 16.

⁶⁴ *Palmer v. Snell*, 111 Ill. 161.

⁶⁵ *Hayes v. Ward*, 4 Johns. Ch. 131.

⁶⁶ *James v. Hubbard*, 1 Paige, 228.

⁶⁷ *Gordon v. Bell*, 50 Ala. 213.

⁶⁸ *Moffett v. Roche*, 77 Ind. 48.

Where a mortgagee holding a lien upon two funds comes into a court of equity to ask equitable relief, as, for instance, to set aside a sale made against the fund secondarily liable, he may be compelled to exhaust the primary fund for the payment of his debt; ⁶⁹ so, too, if the primary fund is outside of the jurisdiction of the court, the creditor may be refused relief until he shows that he has exhausted his other remedy.⁷⁰ And the court, on the foreclosure of a first mortgage, may, for the protection of junior liens, require the plaintiff first to make application of collateral security in his hands.⁷¹

The rule requiring the mortgagee to seek satisfaction out of the fund in which the junior lienor has no interest, is subject to the limitation that if other persons have a superior equity, their rights must be respected.⁷²

Where a member of a firm gives two mortgages, one on firm property and the other on his own property, to secure firm indebtedness, it is held that equity requires that the debt secured shall be satisfied from the mortgaged firm property before recourse is had to the individual property of the mortgagor.⁷³

§ 298. *Sale made in one parcel.*—Where several parcels of mortgaged land are included in one judgment of foreclosure, the equities of the various parties in interest are commonly protected by selling the parcels in the order of their equitable liability to pay the mortgage debt. Where the mortgaged premises can be economically or profitably sold in parcels, this affords a convenient method of protecting the rights of all concerned, without trespassing on the just claims of the prior creditor; ⁷⁴ but cases may be supposed of several parcels of land bound by the same judgment, and subject also to a prior lien, where a sale in gross under the judgment would be more beneficial to all the parties concerned than one in detail,⁷⁵ and, in such cases, the court will not compel the mortgagee to adopt a disadvantageous method of sale, in order to enable junior

⁶⁹ Soule v. Ludlow, 3 Hun, 503;
6 N. Y. Sup. (T. & C.) 24.

⁷⁰ Rice v. Harbeson, 2 N. Y. Sup.
(T. & C.) 4, aff'd 63 N. Y. 493.

⁷¹ Pettibone v. Stevens, 15 Conn.
19.

⁷² Baird v. Jackson, 98 Ill. 78.

⁷³ Bell v. Hepworth, 134 N. Y.
442.

⁷⁴ Walcott v. Schenck, 23 How.
Pr. 385.

⁷⁵ Cunningham v. Cassidy, 17 N.
Y. 276; American Ins. Co. v. Oakley,
9 Paige, 259.

incumbrancers or owners the more easily to adjust their equities as between themselves.⁷⁶

It will be remembered that the order of sale in parcels is only of value to preserve equitable rights, and that equitable rights do not depend upon forms. No matter how the fund may have been created, it will be marshalled and distributed according to equitable rules, quite independent of the form in which the sale was made, and the parcels are sold separately or in a certain order for mere convenience of the court in applying such rules.⁷⁷

PRIORITIES INDEPENDENT OF THE RECORDING ACTS.

§ 299. **In general.**—Independent of the recording acts, and where no other equities control, the common law doctrine that first in time is first in right, prevails, either as between mortgages or as between a mortgage and a valid lien of some other sort.⁷⁸

But this is unquestioned law only if by "time" is meant the time of the inception of the lien, and not the time of the maturity of the debt.⁷⁹ Valid liens subsisting against realty at the time of its conveyance, follow it into the hand of the new owner and are superior even to a mortgage executed by him previous to his taking title and intended to bind the property on its acquisition.⁸⁰

Where one gives a mortgage on realty prior to his acquisition of the title to the realty, such mortgage is a lien only on the interest which he thereafter acquires in the land and does not displace the lien of a mortgage on the same property given by a prior owner.⁸¹ So judgment liens against the purchaser will at once attach to the land and be prior to any but purchase-money mortgages.⁸²

⁷⁶ Frost v. Frost, 3 Sandf. Ch. 188.

⁷⁷ Clowes v. Dickinson, 5 Johns. Ch. 235, aff'd 9 Cow. 405; James v. Hubbard, 1 Paige, 228; Snyder v. Stafford, 11 Paige, 71; Oppenheimer v. Walker, 3 Hun, 30; 5 N. Y. Sup. (T. & C.) 325.

⁷⁸ Central Trust Co. v. West India Imp. Co., 169 N. Y. 314; 62 N. E. 387, rev'g 48 App. Div. 147; 63 N. Y. Supp. 853; People v. Bacon, 99 N. Y. 275; 2 N. E. 4; Stevens v. Watson, 4 Abb. Dec. 302; Brockway v.

Taynter, 5 N. Y. St. Rep. 73. See also Morgan v. Hammett, 34 Wis. 512; Ray v. Hallenbeck, 42 Fed. 381; Marlow v. Johnson, 31 Miss. 128.

⁷⁹ § 293.

⁸⁰ Root v. Curtis, 38 Ill. 192; Louisville Bldg. Ass'n v. Korb, 79 Ky. 190.

⁸¹ Johnson v. Bratton, 112 Mich. 319; 70 N. W. 1021; Hitchcock v. Nixon, 16 Wash. 281; 47 Pac. 412.

⁸² Tallman v. Farley, 1 Barb. 286; Ryder v. Cobb, 68 Iowa, 235; 26 N. W. 91.

§ 300. Priority of mortgages as controlled by agreements of parties.

—Where two mortgages have the same date, and are acknowledged and delivered at the same time, the recording acts have no application in determining their priority.⁸³ In such a case, the understanding, agreement, and intention of the parties will control as to which shall have a preference over the other, so as to be a prior lien upon the premises,⁸⁴ and the assignees of such mortgages, even without notice, would, it seems, be bound by such agreements.⁸⁵

An agreement as to priority may also be made between owners of a mortgage in severalty,⁸⁶ or between the several owners of a mortgage given to secure several debts.⁸⁷

It has been frequently held that where a mortgage is given to secure several notes or instalments maturing at different times, they are to be paid in the order of their maturity, in the absence of any contrary agreement of parties or other equities which should control.⁸⁸ In the case of a mortgage given to secure various debts where the proceeds are insufficient to satisfy them all, the court may direct that the proceeds be applied *pro rata* without regard to priority of date or the fact that for some of the debts the creditors hold other security.⁸⁹

In the absence of agreement or equities to the contrary, two mortgages executed and delivered at the same time are of equal

83 Granger v. Crouch, 86 N. Y. 494; Stafford v. Van Rensselaer, 9 Cow. 316, aff'g Van Rensselaer v. Stafford, Hopk. 569; Douglass v. Peele, Clarke, 564; Collier v. Miller, 137 N. Y. 332; 33 N. E. 874.

84 Londner v. Perlman, 129 App. Div. 93; 113 N. Y. Supp. 420; Abert v. Kornfeld, 128 App. Div. 547; 112 N. Y. Supp. 884; Peters v. Eden, 36 Misc. R. 490; 72 N. Y. Supp. 936, aff'd 72 App. Div. 585; 76 N. Y. Supp. 1028; Jones v. Phelps, 2 Barb. Ch. 440, 446; Fort v. Burch, 5 Den. 187; Jackson v. Post, 15 Wend. 588; Van Rensselaer v. Clark, 17 Wend. 25; Greene v. Warnick, 64 N. Y. 220, rev'g Greene v. Deal, 4 Hun, 703; Wheeler v. McFarland, 10 Wend. 318; Freeman v. Schroeder, 43 Barb. 618; Wray v. Fedderke, 43 N. Y. Super. Ct. (11 J. & S.) 335. See

also Chadborn v. Rahilly, 28 Minn. 394; 10 N. W. 420; Gilman v. Moody, 43 N. H. 239; Matthews v. Everett, 23 N. J. Eq. 473; Rigler v. Light, 90 Pa. St. 235.

85 Greene v. Warnick, 64 N. Y. 220, rev'g Greene v. Deal, 4 Hun, 703.

86 Lowenfeld v. Wimpie, 139 App. Div. 617; 124 N. Y. Supp. 178.

87 Walters v. Ward, 153 Ind. 578; 55 N. E. 735; Dunham v. W. Steele Packing Co., 100 Mich. 75; 58 N. W. 627.

88 Chandler v. O'Neil, 62 Ill. App. 418; Horn v. Bennett, 135 Ind. 158; 34 N. E. 321; 24 L. R. A. 800; Walker v. Schreiber, 47 Iowa, 529; Wood v. Trask, 7 Wis. 566; 76 Am. Dec. 230.

89 Orleans County National Bank v. Moore, 112 N. Y. 543; 20 N. E. 357.

lien,⁹⁰ even though maturing at different dates,⁹¹ and recorded at different times.⁹²

Although one mortgage cannot acquire priority over another delivered at the same time, by being recorded earlier, still where one is recorded shortly before the other, this may furnish evidence of an intention to give it priority.⁹³ And in the absence of evidence of any other fact, priority of record will control.⁹⁴

In order to avoid the effect of the recording act, and to award to one mortgage equality of lien over another, previously recorded, it should appear clearly and beyond doubt that the two mortgages were in fact executed not only on the same day, but at the same time, and that each mortgagee had knowledge of the rights being acquired by the other.⁹⁵

The owner of a mortgage may contract to relinquish his right of legal precedence to another of junior date, and if the contract be made in good faith and be founded on a valuable consideration, a court of equity will adjust the rights of the parties accordingly.⁹⁶ Such an agreement, however, is not entitled to be recorded, nor would the record be constructive notice to anybody.⁹⁷

§ 301. Examples.—Where a mortgagee without payment released his mortgage of record to enable the mortgagor to mortgage the same lands to another person and for an agreed amount, but with the agreement that as between the parties it should remain in full force thereafter, and subsequently a third mortgage was made to a person having notice of the facts, it was held that the first mort-

90 Eleventh Ward Savings Bank v. Hay, 55 How. Pr. 444; Vredenburg v. Burnet, 31 N. J. Eq. 229; Riddle v. George, 58 N. H. 25; Gausen v. Tomlinson, 23 N. J. Eq. 405.

91 Collerd v. Huson, 34 N. J. Eq. 38, and valuable note of the reporter.

92 Gausen v. Tomlinson, 23 N. J. Eq. 405; Walker v. Buffands, 63 Cal. 312.

93 Naylor v. Throckmorton, 7 Leigh (Va.) 98; 30 Am. Dec. 492.

94 Clabaugh v. Byerly, 7 Gill (Md.) 354; 48 Am. Dec. 575; White v. Leslie, 54 How. Pr. 394.

95 White v. Leslie, 54 How. Pr. 394.

96 Taylor v. Wing, 84 N. Y. 471; Paris v. Lawyers Title Ins. & Trust Co., 141 App. Div. 866, 126 N. Y. Supp. 753, aff'd 206 N. Y. 637; Peters v. Meyer, 72 App. Div. 585; 73 N. Y. Supp. 936; 76 N. Y. Supp. 1028; Kam v. Benjamin, 10 App. Div. 419; 42 N. Y. Supp. 99, aff'd 158 N. Y. 725; 53. N. E. 1126. See also Darst v. Bates, 95 Ill. 493; Beers v. Hawley, 2 Conn. 467; Hasenritter v. Kirchhoffer, 79 Mo. 239; Brown v. Baker, 22 Nebr. 708; 36 N. W. 273.

97 Gillig v. Maas, 28 N. Y. 191, 213; Bank for Savings v. Frank, 56 How. Pr. 403, aff'd 45 N. Y. Super. (13 J. & S.) 404.

gage, though released of record, continued a lien as against the third.⁹⁸

If a mortgagor and mortgagee agree that the mortgage shall not be recorded, in order that the mortgagor may raise more money on the land, notice of such mortgage and agreement on the part of a second mortgagee, who records his mortgage first, will not let in the first mortgage to priority.⁹⁹

A mortgage to secure \$1,200, with an incorrect description, was recorded, and thereafter a second mortgage, covering the same property intended to be mortgaged by the first, was made, which contained the words, "except one mortgage for \$1,200. Subsequently the mortgagor executed a new mortgage to correct the mistake in the first description, and it was held that the second mortgagee was charged with notice of the first mortgage, and the corrected mortgage was given a prior lien.¹

Where a mortgage was given on real estate, incumbered by an unrecorded mortgage, with an agreement that the second mortgage should be a prior lien and first recorded, but the holder of the first mortgage fraudulently recorded his first, it was held that, as between the original parties and all persons with notice of the facts, the second mortgage was the prior lien; but that the rule was otherwise as against the innocent assignee of the first mortgage.²

Where a mortgagor executed two mortgages covering the same land on the same day of which the one first delivered was the last recorded and was given in payment of a debt, while the last to be delivered was the first to be recorded and was given as collateral security for the payment of a debt only, the first mentioned was given priority.³

Where a street railway has a franchise permitting it to charge a ten cent fare, and subsequent to mortgaging its property and franchise, enters into an agreement to operate at a lower fare, this agreement is subordinate to the lien of the mortgage and might be rejected by the mortgagee, trustee or bondholder.⁴

98 Bank v. Butterfield, 100 Ind. 229.

99 Hendrickson v. Wooley, 39 N. J. Eq. 307.

1 Clark v. Bullard, 66 Iowa, 747.

2 Cook v. Shone, 63 Iowa, 352.

3 Wilcox v. Drought, 71 App. Div. 402; 73 N. Y. Supp. 587.

4 Public Service Com. v. Westchester St. R. R. Co., 206 N. Y. 209.

§ 302. **Conflicting claims to priority.**—Where D had a first mortgage on certain lands, which was void for uncertainty as to G as to part of the land, but good as to L, who had notice of the mistake; while L has a second mortgage which sufficiently described the land, and which was prior to G, who had attached, it was held that the third incumbrancer (G) was entitled to nothing until the second (L) was paid; and that the second had no right to any of the fund until an amount equal to the first mortgage (D), had been taken therefrom, and that the first mortgagee should not be allowed to charge against the second any sum which, by reason of his laches, had been appropriated to the third incumbrancer.⁵

§ 303. **Priority of purchase-money mortgages.**—It is provided by statute that where real property is sold and conveyed, and, at the same time, a mortgage thereupon is given by the purchaser, to secure the payment of the whole or part of the purchase money, the lien of the mortgage, upon the real property is superior to the lien of a previous judgment against the purchaser.⁶ And also that, where a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands as against the mortgagee or those claiming under him, although she shall not have united in such mortgage, but she shall be entitled to her dower as against all other persons.⁷

The equity of the rule which secures to the vendor of property a priority of lien for the purchase price, commends itself to our sense of justice, and, quite independent of statute, the rule would be the same. Indeed, even if no mortgage were given, the vendor would hold a lien for his unpaid purchase money, which would be prior to the claims of all persons, except *bona fide* purchasers from his vendee, unless he should do some act which manifested a willingness to waive the lien.⁸ The theory upon which the rule is based seems to be that neither the vendor nor any person claiming under him, unless for a valuable consideration and without notice,

⁵ Goodbar v. Dunn, 61 Miss. 618.

⁶ Code, § 1254; Curtis v. Root, 20 Ill. 53; Parsons v. Hoyt, 24 Iowa, 154. See Hubbard v. Lydecker, 78 Misc. R. 80.

⁷ Real Prop. Law, § 193; 1 R. S.

741, § 5; Walters v. Walters, 73 Ind. 425.

⁸ See Vendor's Lien for Purchase Money, §§ 53 et sequi; Seymour v. McKinstry, 106 N. Y. 230; 12 N. E. 348.

shall hold and enjoy the estate without paying for it, and that, to the extent of the unpaid purchase money, the title still remains in the vendor. The deed and the mortgage back are regarded as the same transaction, and taking the whole together the purchaser acquires only the right of redemption.⁹

§ 304. **Examples.**—A mortgage for purchase money has no priority over other liens upon the property existing at the time of the conveyance to the mortgagor.¹⁰

A purchase-money mortgage has priority over a mechanic's lien for work and materials done and furnished on the employment of the purchaser, before the time of delivery of the deed, for which the vendor has contracted no personal obligation.¹¹

Where a widow assigns her dower right and takes back a mortgage to secure the consideration, her equities are the same as if she had conveyed the land and taken back a mortgage for the purchase price, and such mortgage is prior to the lien of a judgment against the grantee, though he was the heir of the husband of the dowress.¹²

A purchase-money mortgage is also a prior lien to a mortgage subsequently executed by the grantee and which is given solely to secure an antecedent debt even though the latter instrument is first recorded. Where, however, it appears that the consideration also consisted of a valid agreement to extend the time of payment of such indebtedness then, under such circumstances, the subsequent mortgage will be given priority over the purchase-money mortgage.¹³

§ 305. **What is a purchase-money mortgage.**—A mortgage given to a third person who advances the purchase money, has the same priority over a prior judgment as if made to the vendor.¹⁴ It has

⁹ *Houston v. Houston*, 67 Ind. 276.

¹⁰ *Stow v. Tift*, 15 Johns. 458; *Jackson v. Austin*, 15 Johns. 477; *Van Horne v. Crain*, 1 Paige, 455; *Rawson v. Lampman*, 5 N. Y. (1 Seld.) 456; *Hitchcock v. The Northwestern Ins. Co.*, 26 N. Y. 68; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Savage v. The Long Island Ins. Co.*, 43 How. Pr. 462. See also *Curtis v. Root*, 20 Ill. 53; *Clark v. Brown*, 85 Mass. (3 Allen) 509; *Bolles v. Carli*,

12 Minn. 113; *Moring v. Dickerson*, 85 N. C. 466.

¹¹ *Lamb v. Cannon*, 38 N. J. Law, 362; *Huber v. Disbold*, 25 N. J. Eq. 170; *Strong v. Van Duerson*, 23 N. J. Eq. 369.

¹² *Pope v. Mead*, 99 N. Y. 201.

¹³ *O'Brien v. Fleckenstein* (No. 3) 86 App. Div. 140; 83 N. Y. Supp. 499; *aff'd* 180 N. Y. 350; 73 N. E. 30.

¹⁴ *Jackson v. Austin*, 15 Johns.

also been said that the mortgage given for future advances to improve the property at the time of the mortgagor's taking title, would be entitled to a preference over the prior creditors of the mortgagor.¹⁵ A mortgage from a lessee to his lessor, delivered at the same time with a lease for ninety-nine years, to secure future advances, has also been held to have a preference over a previous judgment against the mortgagor.¹⁶ So, a mortgage executed some time after the mortgagor acquired title, to a person who was his surety for the purchase money, was preferred to a prior judgment against the mortgagor.¹⁷

When a deed and mortgage back are acknowledged and recorded simultaneously, the presumption is that the latter was for purchase money.¹⁸

A recital in a mortgage that it was given for purchase money will not make it a purchase-money mortgage if it was not so in fact.¹⁹ And, on the other hand, a mortgage actually given for purchase money will have all of its proper qualities though no such recital is contained in it.²⁰

§ 306. **Conflicts between mortgages given by purchaser at time of purchase.**—In *Dusenbury v. Hulbert* (59 N. Y. 541), a curious question was presented upon the conflicting claims of two mortgages to priority. In that case a contract was made by the owner of the land to sell it, part of the price to be paid in cash and part to be secured by a purchase-money mortgage. Prior to receiving the deed, the intended purchaser falsely represented to a third person that he had title and could give a first mortgage, and upon this statement and upon his promise to make such a mortgage, he obtained a loan of \$1,500. Subsequent to getting the money the transfer was closed, and a purchase-money mortgage was given. The vendee then executed a mortgage to secure the \$1,500 loaned,

477; *Ray v. Adams*, 4 Hun, 332; *Kittle v. Van Dyck*, 1 Sand. Ch. 76; *Clark v. Munroe*, 14 Mass. 351; *McCauley v. Grimes*, 2 Gill & Johns. 318; *McGowan v. Smith*, 44 Barb. 232. See *Crombie v. Rosenstock*, 19 Abb. N. C. 312, 321, *contra*, *Alderson v. Ames*, 6 Md. 56; *Henesler v. Nickum*, 38 Md. 270; *Stansell v. Roberts*, 13 Ohio, 148; *Foster's Appeal*, 3 Pa. St. 79.

15 *Tallman v. Farley*, 1 Barb. 280.

16 *Ahern v. White*, 39 Md. 409.

17 *Haywood v. Nooney*, 3 Barb. 643.

18 *Cunningham v. Knight*, 1 Barb. 399.

19 *Taylor v. Post*, 30 Hun, 446; *Crombie v. Rosenstock*, 19 Abb. N. C. 312.

20 *Appeals of City National Bank and York County National Bank*, 91 Pa. St. 163.

and recorded it with his deed, but the vendor omitted to record his mortgage for some days afterward. The court held that the purchase-money mortgage had priority; the mortgage to the third person did not take effect until it was executed and after the delivery of the deed, and it then became a lien on his interest only, which was a mere equity of redemption. The third person was not protected by the recording acts, because the mortgage, when made, was in payment of an antecedent indebtedness, and the mortgagee did not part with anything on the faith of the mortgage, or because of the condition of the public records.

Where a purchaser of land gave two mortgages for purchase money, one to his vendor and another to a third person for money used to make a cash payment, and both mortgages were recorded on the same day, the latter first, the mortgage given to the vendor was held to have priority.²¹ And an agreement that the papers should be simultaneously recorded would not, as a matter of law, place the two liens on an equality.²²

An assignee of a purchase-money mortgage will be bound by an agreement between the vendor and vendee that a mortgage given by the latter to secure advances to him to enable him to complete the purchase shall have priority.²³

Where a grantee gave back a purchase-money mortgage before delivery of the deed, and afterward, at the time the deed was actually delivered, he also mortgaged the premises to a third party, in whose presence the delivery of the deed was made, and who had no notice of the prior mortgage, it was held that the delivery of the deed in the latter's presence was notice to him that, until then, the mortgagor had no title to incumber to his prejudice, and that the second mortgage took precedence of the mortgage given to the vendor of the property.²⁴

§ 307. Mortgages for purchase money given after delivery of deed.

—A mortgage, to be entitled to all of the special qualities of a mortgage for purchase money, should be given at the time of the

²¹ Turk v. Funk, 68 Mo. 18; 30 Am. R. 771; Clark v. Brown, 3 Allen (Mass.) 509; Heffron v. Flanigan, 37 Mich. 274; Brasted v. Sutton, 29 N. J. Eq. 513.

²² Boies v. Benham, 127 N. Y. 620; 28 N. E. 657.

²³ Dodge v. Manning, 19 App. Div. 29; 46 N. Y. Supp. 1049.

²⁴ Heffron v. Flanigan, 37 Mich. 274; Farmers' L. & T. Co. v. Maltby, 8 Paige, 361; State v. Bradish, 14 Mass. 296.

delivery of the deed. If it be given to a third person for money loaned to purchase the property, it will stand, as any other mortgage for borrowed money as of its date, and will consequently be inferior in lien to prior judgments against the mortgagor, unless given at the very time of the vesting of the title in him, and as a part of that transaction.²⁵ If given to the vendor of the land it will hold priority over judgments obtained against the mortgagor prior to the vesting of the title in him,²⁶ as well as over the claim of his widow for dower.²⁷ As a general rule, the lien will prevail against general judgment creditors of the vendee.²⁸

Where a vendor does not receive payment of the entire amount of the consideration for the purchase money, he has an implied lien for the balance which may be enforced as against the vendee and all persons holding under him, except purchasers in good faith.²⁹ If a mortgage is given by the vendor for such purchase money, its validity as against creditors and other liens will be tested by the sufficiency of the vendor's implied lien at the time of the delivery of such mortgage.³⁰ Such lien cannot generally exist against purchasers in good faith, under a conveyance of the legal estate without notice, where the purchase money has been paid.³¹ It has also been determined that a judgment creditor who advances his money upon the faith of an unincumbered title upon the record, without notice, is entitled to the lien acquired thereby, in preference to the secret, unrecorded lien of the vendor for part of the purchase money.³² But such a judgment will not prevail unless it is procured and docketed so as to become a legal lien prior to the delivery and recording of a mortgage executed for such unpaid purchase money.³³

§ 308. **No priority for money paid for improvements.**—There is no principle of equity by which a purchaser of real estate which,

25 *Garson v. Green*, 1 Johns. Ch. 308; *Clark v. Hall*, 7 Paige, 382.

26 In the matter of *Howe*, 1 Paige, 129; *Lane v. Ludlow*, 6 Paige, 316 n.; *Parks v. Jackson*, 11 Wend. 442; *Robinson v. Williams*, 22 N. Y. 386.

27 *Warner v. Van Alstyne*, 3 Paige, 513.

28 *Hulett v. Whipple*, 58 Barb. 224.

29 See *Vendor's Lien*, *ante*, §§ 53 et sequi.

30 *Spring v. Short*, 90 N. Y. 538.

31 *Fisk v. Potter*, 2 Keyes, 64; 2 Abb. App. Dec. 140; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Garson v. Green*, 1 Johns. Ch. 308, 309.

32 *Hulett v. Whipple*, 58 Barb. 224.

33 *Spring v. Short*, 90 N. Y. 538.

at the time of the purchase, is subject to the lien of a judgment, can claim improvements subsequently made by him, although without knowledge of the judgment, to be exempt from the lien. The law supposes the party purchasing to know of the lien, and charges on him the consequences of such knowledge. If, when such a lien exists, he voluntarily expends money on the premises, the same becomes subject to lien. Any other rule would actually destroy the lien of a judgment on real estate. The principle upon which equitable liens are allowed to have priority, is that the contract was made before the docketing of the judgment. After that date the property, with any subsequent improvements, is subject to the lien.³⁴

So, money expended in improvements by the mortgagor or his grantee subsequent to the mortgage, cannot be given a lien prior to that of the mortgage.³⁵

§ 309. **Priority of mortgages over judgments.**³⁶—The recording acts are only intended to protect *bona fide* purchasers; that is to say, purchasers for a present and valuable consideration, who have notice of no facts except those which are disclosed by the public records. An unrecorded mortgage will therefore be entitled to a preference over a subsequent assignment for the benefit of creditors, which was duly recorded,³⁷ or over a subsequently docketed judgment,³⁸ or over a subsequent attachment.³⁹ But a *bona fide* purchaser at a sheriff's sale under the docketed judgment would be protected against the unrecorded mortgage.⁴⁰

A purchaser of a judgment takes subject to prior equities, and even though he buy in good faith, is bound by an unrecorded agreement, subordinating the judgment to a mortgage.⁴¹ Where the liens of a mortgage and of a judgment attach at the same time, the former is paramount.⁴²

³⁴ Per INGRANAM, J., in *Cook v. Kraft*, 3 Lans. 512; 41 How Pr. 279; 60 Barb. 409, *aff'd sub nom.* *Cook v. Banker*, 50 N. Y. 655.

³⁵ *Martin v. Beatty*, 54 Ill. 100.

³⁶ Code Civ. Proc., § 1251.

³⁷ *Wyckoff v. Remsen*, 11 Paige, 564.

³⁸ *Jackson v. Dubois*, 4 Johns. 216; *Schmidt v. Hoyt*, 1 Edw. 652. See also *Williams v. Tatnall*, 29 Ill. 553; *Follett v. Hall*, 16 Ohio, 111;

47 Am. Dec. 465; *Brittons Appeal*, 45 Pa. St. 172.

³⁹ *First National Bank v. Hayzlett*, 40 Iowa, 659; *Rogers v. Abbott*, 128 Mass. 102; *Reed v. Ounby*, 44 Mo. 204; *Campion v. Kille*, 15 N. J. Eq. 476.

⁴⁰ *Jackson v. Dubois*, 4 Johns, 216.

⁴¹ *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; 8 Hun, 26.

⁴² *Tift v. Buell*, Gen. T., March, 1856, cited in *Clinton's Digest*.

The lien of a mortgage unrecorded at the date of a judgment, but recorded before a sale upon an execution issued thereon, is prior to the lien of the judgment, and the purchaser buys with constructive notice of the mortgage.⁴³

Where a judgment is marked "secured on appeal," or "lien suspended on appeal," pursuant to the provisions of our Code, a mortgage thereafter given, though for an antecedent debt, acquires priority if the mortgagee acts in good faith.⁴⁴

In order that a mortgage lien shall take precedence of a judgment, it must be a valid and consummated lien. So, a mortgage executed but not delivered to or accepted by the mortgagee, will not displace an attachment,⁴⁵ even though such undelivered mortgage has been recorded.⁴⁶

A purchaser on sale of land on execution, having paid the purchase price, and received the sheriff's certificate of sale, after obtaining the sheriff's deed is in the same position as if the deed had been executed by the judgment debtor when the judgment was docketed, and while holding the certificate he is to be regarded the same as if the debtor had, at the time of docketing the judgment, executed a contract of sale and received the full purchase price. Such a purchaser, therefore, is entitled to protection against an outstanding and unknown lien for purchase money in favor of a former grantor, and his rights will not be affected by the fact the price paid by him was small.⁴⁷

A mortgage to secure future advances, the limit of which is not defined, is good for the amount of the advances thus made as against a creditor by judgment recovered before such advances become due.⁴⁸

§ 310. Lien of tax collector's bond.—Under the provisions of the Consolidated Laws, providing for the filing of a collector's bond and the entry thereof by the county clerk "in the same manner in which judgments are entered of record," and declaring that every such bond "shall be a lien on all the real estate held jointly or severally by the collector or his sureties," the lien so created is a

⁴³ Holden v. Garrett, 23 Kans. 98.

⁴⁴ Union Dime Savings Institution v. Duryea, 67 N. Y. 84.

⁴⁵ Evans v. White, Adm'r, 53 Ind. 1.

⁴⁶ Woodbury v. Fisher, 20 Ind. 387.

⁴⁷ Maroney v. Boyle, 141 N. Y. 462; 36 N. E. 511.

⁴⁸ Robinson v. Williams, 22 N. Y. 380.

general one, having no greater force than the lien of a judgment, and a prior unrecorded mortgage is entitled to priority over the bond.⁴⁹

§ 311. Priority of mortgages securing building loan.—Under the provisions of the Lien Law⁵⁰ building loan contracts, and modifications thereof, must be filed within ten days after their execution in order to maintain the priority of the mortgage given to secure the loan over mechanics' liens subsequently filed. A modification or variation of the written contract must be material in order to give a mechanic's lien priority. Thus where a contract provided that the mortgage should be a first lien on the premises, but made no provision for the payment of a prior mortgage, a subsequent oral agreement that existing incumbrances should be satisfied out of the building loan, was held not to be a material variation.⁵¹

Where, before the time contemplated in the contract of sale, the owner delivers a deed and takes back a mortgage a mechanic cannot recover his lien out of the mortgage where the notice of lien does not name the mortgagee as an owner against whose interest in the premises a lien is claimed, nor mention him at all.⁵²

§ 312. Defective mortgages.—A defective mortgage, though constituting a valid lien in equity will be postponed to the lien of a junior mortgage, valid at law and taken in good faith and without notice;⁵³ but this is not the case where the subsequent mortgage is in terms inferior to the prior defective mortgage.⁵⁴ The defects of the prior mortgage must be substantial.⁵⁵ But a defective mortgage has been held superior to a subsequent judgment.⁵⁶

§ 313. Reforming mortgages.—A judgment being a general lien on the land of the debtor, is subject to every equity which exists

⁴⁹ Town Law, § 115, 1 R. S. 346, Sec. 20; *Grisfield v. Murdock*, 127 N. Y. 315; 27 N. E. 1046.

⁵⁰ Lien Law § 22.

⁵¹ *Penn. Steel Co. v. Title Guarantee & Trust Co.*, 193 N. Y. 37; 85 N. E. 820; rev'g 120 App. Div. 879; 105 N. Y. Supp. 1135.

⁵² *Packard v. Sugarman*, 31 Misc. R. 623; 66 N. Y. Supp. 30.

⁵³ *Livingston v. Murphy*, 187 Mass. 315; 72 N. E. 1012; *Wright v. Franklin Bond*, 59 Ohio St. 80; 51

N. E. 876; *Stead v. Grosfield*, 67 Mich. 286; 34 N. W. 871.

⁵⁴ *Hardin v. Hyde*, 40 Barb. 435; *Lanier v. Milliken*, 25 Misc. 59; 54 N. Y. Supp. 424; *Clapp v. Halliday*, 48 Ark. 258; 2 S. W. 853.

⁵⁵ *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152; 45 N. Y. Supp. 141, aff'd 163 N. Y. 423; 57 N. E. 614.

⁵⁶ *Taylor v. Wing*, 84 N. Y. 471; *Lake v. Doud*, 10 Ohio, 415; *Welton v. Tizzard*, 15 Iowa, 495; *Martin v. Nixon*, 92 Mo. 26; 4 S. W. 503.

against the land in the hands of the judgment debtor at the time of docketing the judgment.⁵⁷ So, where a defective mortgage is perfected or corrected, and subsequent judgments are recovered prior to such correction, the mortgage will be prior,⁵⁸ though this might depend upon the character of the mistake and the nature of the transaction.⁵⁹

The description of property contained in a mortgage cannot be reformed or changed to the prejudice of a *bona fide* purchaser, and a person who takes a junior lien for a past due indebtedness and, in consideration of the lien, extends the time of payment and also agrees to purchase and carry another mortgage executed by the debtor, is such a purchaser.⁶⁰

Where, upon the renewal of a note, the mortgage securing the same was cancelled and a new one executed upon the same property, the lien of the second mortgage was held to date only from its execution as against one who, without actual notice of any claim to the contrary, purchased the property under a judgment which was a lien prior to the date of such execution.⁶¹

§ 314. **The doctrine of tacking.**—It is an established doctrine in the English chancery that a *bona fide* purchaser, and without notice of any defect in his title at the time of the purchase, may lawfully buy any statute, mortgage, or incumbrance, and if he can defend by them at law, his adversary shall have no help in equity to set those incumbrances aside. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine is extended to them, and a mortgagee who has advanced his money without notice of any prior incumbrance, may, by getting an assignment of a statute, judgment, mortgage or recognizance, protect himself from an incumbrance subsequent to such statute, judgment, mortgage or recognizance, though prior to his mortgage; that is, he is allowed to *tack* or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the intermediate mort-

57 Kierstead v. Avery, 4 Paige, 9.

58 Cook v. Kraft, 41 How. Pr. 279; 60 Barb. 409; 3 Lans. 512; Foster v. Fouat, 2 S. & R. (Pa.) 11; Burrs v. Burrs, 3 Ves. Jr. 576.

59 Van Thornily v. Peters, 26 Ohio St. 471.

60 Port v. Embree, 54 Iowa, 14; 6 N. W. 83.

61 Washington Co. v. Slaughter, 54 Iowa, 265; 6 N. W. 291.

gagees are entitled to recover anything.⁶² Thus if a third mortgagee without notice of a second mortgage, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee would not be allowed to redeem the first mortgage without redeeming the third mortgage also.⁶³ The general reasoning by which this doctrine is maintained is that as between the various incumbrancers the equities are equal, and that "Where equity is equal the law shall prevail, and he that hath only a title in equity shall not prevail against law and equity."⁶⁴

This doctrine is known as the "equitable doctrine of tacking"; it has been disapproved by most writers as tending to gross injustice and severely criticized from the English bench.⁶⁵

Corrected by an act of parliament in 1874,⁶⁶ it was subsequently reinstated⁶⁷ and stands as a monument of the misleading tendency of technical rules which have no foundation in the principles of natural justice.

The doctrine of tacking is inconsistent with our recording acts, and has never been adopted or recognized in this State. In the first place the English rule only protects a third mortgagee who purchases without notice of the second mortgage, and the record gives such notice; in the second place the recording acts themselves control in regulating priority.⁶⁸ The doctrine of tacking has also been repudiated in other states having recording acts.⁶⁹

⁶² Bouvier's Law Dict., tit. *Tacking*; 2 Fonbl. Eq. 306.

⁶³ Story's Eq. Jr., § 412; Marsh v. Lee, 1 Ch. Ca. 162.

⁶⁴ "If a third mortgage buy in a first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and having the law on his side and equal equity, he shall thereby squeeze out the second mortgage." Brace v. Duchess of Marlborough, 2 Peere Williams, 491.

"The rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it is by lending the money without notice that he be-

comes an honest creditor, and acquires the right to protect his debt." Belchier v. Butler, 1 Ed. 522 at p. 530.

⁶⁵ Holt v. Neill, 2 Vern. 279; Jennings v. Jordan, 6 App. Ca. at p. 714.

⁶⁶ 37 and 38 Vict., c. 78, s. 7.

⁶⁷ 38 and 39 Vict., c. 87, s. 129.

⁶⁸ Grant v. Bissett, 1 Cai. Cas. 112; Frost v. Beekman, 1 Johns. Ch. 298, 299; Parkist v. Alexander, 1 Johns. Ch. 398, 399; McKinstry v. Mervin, 3 Johns Ch. 466; Burnet v. Denniston, 5 Johns. Ch. 35; St. Andrew's Church v. Tompkins, 7 Johns. Ch. 14; Brigden v. Carhart, Hopk. Ch. 234; Bank of Utica v. Finch, 3 Barb. Ch. 293, 298; 4 Kent (13 ed.) 177-179.

⁶⁹ Osborn v. Carr, 12 Conn. 196;

§ 315. Several debts secured by the same mortgage.—A class of decisions in some of the other States seem to establish as an arbitrary rule that where there are several holders of notes or bonds secured by one mortgage, and such notes or bonds mature at different dates, those first falling due have priority of lien, for the reason that the power to first foreclose implies such priority.⁷⁰ They treat the holders of such notes and bonds as having successive mortgages whose liens arise in the order of agreed payment. After all, these decisions probably rest upon the idea of intention and equity, although they seem to infer the intention somewhat arbitrarily from the one fact of a difference in the maturing of the notes and bonds. While it may be granted that such a fact is one to be taken into consideration and have its weight, it should not be deemed as controlling or to serve as the basis of an arbitrary and inelastic rule.⁷¹

The authorities are not uniform, and numerous cases hold that where a mortgage is made to secure two or more obligations, each must, in the absence of special agreement, share *pro rata* in the fund irrespective of their dates of maturity.⁷²

Where two or more debts are secured by as many mortgages executed at the same time, they take equal liens and one does not gain priority by its earlier maturity.⁷³

And a single mortgage given to secure obligations to different persons, maturing at different times, has been held, in Indiana, to be equivalent to the simultaneous giving of separate mortgages, and no priority was allowed, although in that State the rule is other-

Averill v. Guthrie, 8 Dana, 82; Thompson v. Chandler, 7 Me. 381; Braze v. Lancaster Bank, 14 Ohio, 318; Anderson v. Neff, 11 S. & R. 208; Siter v. McClanachan, 2 Gratt. 305; Chandler v. Dyer, 37 Vt. 345.

⁷⁰ Roberts v. Mansfield, 32 Ga. 228; Humphreys v. Martin, 100 Ill. 592; Koester v. Burke, 81 Ill. 436; Flower v. Elwood, 66 Ill. 438; Gardner v. Diedrichs, 41 Ill. 158; Moore v. Titman, 33 Ill. 358; Funk v. McReynold's Adm'rs, 33 Ill. 481; Gerber v. Sharp, 72 Ind. 553; Murdock v. Ford, 17 Ind. 521; Hough v. Osborne, 7 Ind. 140; Stanley v. Beatty, 4 Ind. 134; State Bank v. Tweedy, 8 Blachf. (Ind.) 447; 46 Am. Dec.

486; Ayers v. Rivers, 64 Iowa, 543; Isett v. Lucas, 17 Iowa, 503; 85 Am. Dec. 572; Aultman v. McGregor, 31 Kan. 329; Richardson v. McKim, 20 Kan. 346; Winters v. Bank, 33 Ohio St. 250.

⁷¹ Per FINCH, J., in Granger v. Crouch, 86 N. Y. 494, 500.

⁷² Wilcox v. Allen, 36 Mich. 160; McCurdy v. McCurdy, 27 Mich. 445; English v. Carney, 25 Mich. 178; Wilson v. Eigenbrodt, 30 Minn. 4; Cage v. Iler, 5 Sm. & M. (Miss.) 410; Hancock's Appeal, 34 Pa. 155; Belding v. Manly, 21 Vt. 550.

⁷³ Granger v. Crouch, 86 N. Y. 494; Cain v. Hanna, 63 Ind. 408; Collier v. Huson, 34 N. J. Eq. 38.

wise if the notes had been payable to the same party and had passed into the hands of different owners.⁷⁴

§ 316. Assignment of part of debt secured by mortgage.—It has been determined in some other States that where a mortgage secures several notes, and the mortgagee assigns one of them, retaining the others, the claim first assigned is entitled to priority of payment.⁷⁵ But this doctrine has been rejected in this State,⁷⁶ and in many others.⁷⁷ In making the assignment it is competent for the assignor, with the assent of the assignee, to award such priority as he may see fit to each of the notes;⁷⁸ and, if there is no special agreement, the court will nevertheless award such priority as under the special circumstances of the case will be found to be in accord with the intention of the parties, either as actually expressed or as derived from the natural equity of the situation.⁷⁹ Thus, if one of several notes so secured is assigned by the mortgagee upon a representation that it is a first lien, such representation will make it so as against the assignor.⁸⁰

In the absence of agreement or of special circumstances, showing a contrary intention, or creating a different equity, the assignee of a fractional part of a debt secured by mortgage, will take *pro rata* with the holders of the other parts where the proceeds of the property are not sufficient to pay all.⁸¹

The circumstance that the assignor has or has not guaranteed the payment of a note does not affect the question of priority of lien, and where one of two notes secured by the same mortgage was assigned in the usual form, and the other was transferred by indorsement, the mortgagee was held entitled to be protected as

⁷⁴ Shaw v. Newsam, 78 Ind. 335.

⁷⁵ Knight v. Ray, 75 Ala. 383; Cullum v. Erwin, 4 Ala. 452; Roberts v. Mansfield, 32 Ga. 228; Bryant v. Damon, 6 Gray (Mass.) 564; Foley v. Rose, 123 Mass. 557; Whitehead v. Fisher, 64 Tex. 638.

⁷⁶ Granger v. Crouch, 86 N. Y. 494.

⁷⁷ Moore v. Ware, 38 Me. 496; Johnson v. Brown, 31 N. H. 405; Swartz v. List, 13 Ohio St. 419; Hancock's Appeal, 34 Pa. St. 155.

⁷⁸ Grattan v. Wiggins, 23 Cal. 16; Walker v. Dement, 42 Ill. 272; Noyes v. White, 9 Kan. 640; Sol-

berg v. Wright, 33 Minn. 224; Bank of England v. Tarleton, 23 Miss. 173; Ellis' Adm'r v. Lamine, 42 Mo. 153.

⁷⁹ Per FINCH, J., in Granger v. Crouch, 86 N. Y. 494, 498; Mechanics' Bank v. Bank of Niagara, 9 Wend. 410; Stafford v. Van Rensselaer, 9 Cow. 316. See also Grattan v. Wiggins, 23 Cal. 16; Vredenberg v. Burnet, 31 N. J. Eq. 229.

⁸⁰ Vredenberg v. Burnet, 31 N. J. Eq. 229.

⁸¹ McLean & Jackson's Appeal, 103 Pa. St. 255; Patrick's Appeal, 105 Pa. St. 356.

against the indorsed note to the extent of a *pro rata* share in the security.⁸²

Where an account for future advances was secured by mortgage, and a note for part of the account was taken and transferred to one person, and the mortgage and account was afterward transferred to another, who was ignorant of the note, each was held entitled to a *pro rata* share of the proceeds of the mortgaged property.⁸³

Where a grantee of an equity of redemption, who was not personally obligated for a mortgage debt, paid and took up one of several notes secured by the mortgage, under an agreement with the mortgagee that he might hold them in the same manner that the mortgagee had held them, it was held that he was entitled to the same priority of lien that a stranger would have who took an assignment thereof.⁸⁴

§ 317. **Priority awarded to defeat fraud.**—As a court of equity will keep an incumbrance alive or consider it extinguished as will best serve the purpose of justice,⁸⁵ so will priorities of successive mortgage liens be controlled to promote justice and prevent fraud. Thus, where the parties to a mortgage agreed that a new mortgage should be executed to cure a defect in the title, and on the same day that the new mortgage was given, but prior thereto, a mortgage was fraudulently given by the mortgagor to his father-in-law, which was first recorded, it was held that the latter security must give way to the other lien.⁸⁶ So, where a trustee unlawfully invested trust funds in a mortgage upon lands upon which he held a mortgage of older date, it was adjudged that equity would give priority to the second mortgage over the first, even in the hands of an assignee having notice of the facts.⁸⁷

Where two mortgages were made to a vendor of land at the time of the delivery of the deed, and were both recorded at the same minute, one being for \$1,000, payable in five years, and containing a recital that it was given for purchase money, and the other being for \$2,000, payable in ten years, and not containing any such re-

⁸² English v. Carvey, 25 Mich. 178.

⁸³ Adger v. Pringle, 11 S. Car. 527.

⁸⁴ Morrow v. U. S. Mortgage Co., 96 Ind. 21.

⁸⁵ Lumber Exchange Bank v. Mil-

ler, 18 Misc. 127; 40 N. Y. Supp. 1073, citing Barnes v. Camack, 1 Barb. 396.

⁸⁶ Eggeman v. Harrow, 37 Mich. 436; Waldo v. Richmond, 40 Mich. 380.

⁸⁷ Shuey v. Latta, 90 I-d. 136.

cital; and the mortgagee sold the \$1,000 mortgage to a person to whom he represented that it was a first mortgage, and that he had purposely made it so, so that he could sell it, it was held that such representations gave priority to the \$1,000 mortgage, and that it retained such priority against a subsequent *bona fide* purchaser of the \$2,000 mortgage.⁸⁸

If a mortgagee of land represents to a third person that the debt, which his mortgage was given to secure, is paid or satisfied, and that nothing is due on the mortgage, and such person, by reason of that representation, relinquishes rights and takes a mortgage on the land, his mortgage will be prior to the first, though that was on record when the representation was made.⁸⁹

The owner of a second mortgage who stands by in silence while the mortgagor induces the first mortgagee to release his lien, and to accept a third mortgage, in reliance upon a false statement that it is next to the one released, will be postponed to the mortgagee attempted to be defrauded.⁹⁰

§ 318. Agreements for priority where there are intermediate liens.—Where the holder of a first lien agrees to surrender his priority to the holder of a third, the effect of such an agreement is, not to give the last lien a preference over the intermediate lien or to give it an interest in the first one. If the first lien is satisfied and paid, the demands of the stipulation are fully met, and the owner of the last lien has all his rights secured to him by permitting him to proceed against the property, and he can have no interest in the money paid by the mortgagor or owner of the premises. If, in such a case, foreclosure and sale should be necessary, and the proceeds of such sale should be insufficient to pay all of the liens, so much of such proceeds as would otherwise be applicable upon the first lien must be applied to the last as will be necessary to satisfy it.⁹¹

In *Sayre v. Hewes* (32 N. J. Eq. 652), the complainant was a judgment creditor with an execution lien junior to two prior chattel mortgages. The first chattel mortgage was filed in the wrong county, and the filing was therefore not available; the sec-

⁸⁸ *Lane v. Nickerson*, 17 Hun, 148.

⁸⁹ *Platt v. Squire*, 53 Mass. (12 Metc.) 494.

⁹⁰ *Stafford v. Ballou*, 17 Vt. 329.

⁹¹ *Taylor v. Wing*, 84 N. Y. 471, rev'g 23 Hun, 233. See also *Hinchman v. Stiles*, 9 N. J. Eq. (1 Stock.) 361.

ond chattel mortgage was filed in the proper county, but the second mortgagee had actual notice of the first lien and therefore took subject to it. The execution lien was prior to the first mortgage because it had not been properly filed, and it was adjudged that since the execution creditor could not be advanced before the first without advancing him also before the second, his lien must of necessity be advanced to the first place as against both the first and second incumbrances.

§ 319. **Assignees bound by equities controlling priority.**—The principle is fully settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot enforce it, then the assignee has no greater rights. The true test is to inquire, what can the mortgagee do by way of enforcement of it against the property mortgaged; and what he can do, the assignee can do, and no more. As a purchaser of a chose in action, he must always abide the case of the person from whom he buys, and he stands entirely in the place of the latter.⁹² Where the assignor of a mortgage has knowledge of facts that will affect its priority with respect to other liens on the property, the assignee will be charged by and affected with such knowledge, even though he has no actual notice.⁹³

An agreement between a mortgagee and the holder of a prior judgment giving the mortgage priority, affects and attaches itself to the securities whoever thereafter owns them, and this without any record of such agreement or memorandum made of it on the docket of the judgment. A purchaser at an execution sale under such judgment would get no better title than the judgment actually gave him, and that would be a title subject to the mortgage. The docket of a judgment is not for the protection of purchasers under the judgment. It is for the benefit of the judgment creditor and the protection of purchasers from the judgment debtor.⁹⁴

It has been doubted whether an assignee of a mortgage is charged with knowledge of an agreement for priority executed after the inception of the mortgage,⁹⁵ but he has been held bound

⁹² Per MILLER, J., in *Crane v. Turner*, 67 N. Y. 437, 440; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Greene v. Warnick*, 64 N. Y. 220.

⁹³ *Crane v. Turner*, 67 N. Y. 437, aff'd 7 Hun, 357. See also *Mason v.*

Ainsworth, 58 Ill. 163; *Sims v. Hammond*, 33 Iowa, 368.

⁹⁴ *Frost v. Yonkers Savings Bank*, 70 N. Y. 553, 560, rev'd 8 Hun, 26.

⁹⁵ *Bank for Savings v. Frank*, 56 How. Pr. 403, aff'd 45 N. Y. Super. (13 J. & S.) 404.

by the estoppel of his assignor in dealing with another security of equal date and record by reason of which priority was awarded to it.⁹⁶

The mere fact that a wife joins in the execution of a mortgage given by her husband to secure his individual debt does not impair her rights to priority as assignee of a prior mortgage given by her husband upon the same premises.⁹⁷

96 Lane v. Nickerson, 17 Hun, 210; 47 N. Y. Supp. 1038; Kingman v. Dunspaugh, 19 App. Div. 545; 46 N. Y. Supp. 602. See Ryan v. Ed-

ings Bank *supra*.
97 Hewett v. Smith, 22 App. Div. 711.

CHAPTER X

ASSIGNMENT OF MORTGAGES

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§ 320. **How an assignment of a mortgage can be made.**—As a mortgage is a mere incident of the debt which it is intended to secure,¹ it follows that whatever is sufficient to transfer the title to the debt will also transfer the interest of the mortgagee in the land.² Upon this principle, since one of several executors or joint creditors can assign a debt, one of them can also assign the security which accompanies the debt.³ Upon a like principle, the debt being the principal obligation, a guaranty of its payment will generally pass with an assignment of the debt as a security collateral thereto, and a formal assignment of the guaranty will not be necessary to vest the same in the assignee of the bond;⁴ but this will not apply unless the covenant of guaranty is such that it can properly be assigned.⁵

An assignment of a mortgage and of the debt secured by it may be by parol,⁶ and no seal being required on such an assignment⁷ it follows, that while an assignment of a mortgage not under seal, but containing a recital that it was sealed and delivered in the presence of a certain witness, becomes a sealed instrument for the purpose of the Statute of Limitations, yet such recital in the actual absence of a seal, does not make it a sealed instrument within the rule prohibiting parol evidence to show that it was executed for the benefit of a third party, if such evidence is offered in behalf of a third party claiming an interest, and not in behalf of a party to the instrument to impeach his own claim and relieve himself from liability.⁸

1 *Green v. Hart*, 1 Johns. 580; *Jackson v. Blodgett*, 5 Cow. 202; *Jackson v. Bronson*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 231; *Cooper v. Newland*, 17 Abb. 342.

2 *Wyman v. Smead*, 31 How. Pr. 1; *Langdon v. Buel*, 9 Wend. 80; *Jackson v. Blodgett*, 5 Cow. 202; *Parmelee v. Dann*, 23 Barb. 461; *Pattison v. Hull*, 9 Cow. 747. See also *Fassett v. Mulock*, 5 Cal. 466; *Lawrence v. Knapp*, 1 Root (Conn.) 248; 1 Am. Dec. 42; *Johnson v. Johnson*, 81 Mo. 331; *Adair v. Adair*, 78 Mo. 630; *Pickett v. Jones*, 63 Mo. 195; *Savings Bank v. Grewe*, 84 Mo. 477; *Ford v. Stuart*, 15 Neb. 92.

3 *Bogert v. Hertell*, 4 Hill, 492;

9 Paige, 52; 3 Edw. Ch. 20; *Everit v. Strong*, 5 Hill, 163.

4 *Stillman v. Northrup*, 109 N. Y. 473; 17 N. E. 379; *McLaren v. Watson's Ex'rs*, 26 Wend. 425; *Craig v. Parkis*, 40 N. Y. 181; *Clafin v. Ostrom*, 54 N. Y. 581; *Cady v. Sheldon*, 38 Barb. 103.

5 *Smith v. Starr*, 4 Hun, 123.

6 *People's Trust Co. v. Tonkonogy*, 144 App. Div. 333; 128 N. Y. Supp. 1055; *Breed v. National Bank*, 57 App. Div. 468; 68 N. Y. Supp. 68. See also *Kiff v. Weaver*, 94 N. C. 274.

7 *Roder v. Ervin*, 1 Mont. 632.

8 *Slade v. Squier*, 133 App. Div. 666; 118 N. Y. Supp. 278.

An assignment executed in blank is valid, the person to whom it is delivered being authorized by the mortgagee to fill in the name of an assignee, and a purchaser, acting in good faith, will be protected, though the authority of the agent is to do nothing but deliver the assignment.⁹

A mortgage given to indemnify the mortgagee against a contingent liability, is assignable.¹⁰

§ 321. Assignments under powers.—A foreign executor or administrator may make a valid assignment of a mortgage on lands in this State without qualifying under our laws.¹¹

An assignment by trustees must not be contrary to the provisions of Section 103 of the Real Property Law¹² nor otherwise than in strict conformity with the terms of their trust.¹³ Trustees may not assign mortgages of their own to themselves as trustees, or otherwise deal in their own behalf with the funds of the cestui.¹⁴

An assignment of a mortgage by an administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually, is not void, but voidable at the election of the next of kin of the intestate.¹⁵

§ 322. Assignment of a mortgage as collateral security.—Where an assignment of a mortgage is absolute, the assignee may recover the full amount of the mortgage, although he bought at a discount.¹⁶

It frequently happens, however, that a mortgage of a mortgage is made, in the form of an assignment, absolute on its face. In such cases the same equitable doctrines control, as govern the courts where deeds, absolute in form, are in fact mortgages.¹⁷

⁹ *Phelps v. Sullivan*, 140 Mass. 36; 2 N. E. 121; *White v. Duggan*, 140 Mass. 18; 2 N. E. 110.

¹⁰ *Carper v. Munger*, 62 Ind. 481.

¹¹ *Peterson v. Chemical Bank*, 29 How. Pr. 240; 32 N. Y. 21; *Smith v. Tiffany*, 16 Hun, 552. *Contra*, *Cutter v. Davenport*, 18 Mass. (1 Pick.) 81.

¹² *Matter of Kirby*, 113 App. Div. 705; 100 N. Y. Supp. 155.

¹³ *Spencer v. Weber*, 163 N. Y. 493; 57 N. E. 753; *Suarez v. de Mon-*

tigny, 1 App. Div. 494; 37 N. Y. Supp. 503.

¹⁴ *Matter of Long Isd. Loan & Trust Co. (In re Garretson)*, 92 App. Div. 1; 87 N. Y. Supp. 65.

¹⁵ *Read v. Knell*, 143 N. Y. 484; 36 N. E. 4.

¹⁶ *Knox v. Galligan*, 21 Wis. 470; *Urann v. Coates*, 117 Mass. 41.

¹⁷ *Barker v. Hathaway*, 47 App. Div. 165; 62 N. Y. Supp. 329; *United States v. Sturges*, 1 Paine (U. S.) 525. See *ante*, § 15 et *sequi*.

So parol evidence is admissible to establish the redemption agreement.¹⁸

Such a mortgagee does not lose his interest in the mortgage even though he stipulates in the assignment that he is to forfeit all such interest if he fails to pay the debt on a specified day;¹⁹ nor if he takes the note of the assignee for the balance due him, payable when the mortgage is collected.²⁰

Where the mortgage of a third person has been assigned by the mortgagee as collateral for his own debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee, as against the assignor, where the latter is not made a party to the action and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as security merely, subject to the right of the assignor to redeem by payment of the debt.²¹ And where a bond and mortgage intended as security for a loan theretofore made, is executed by a brother of the borrower to the clerk of such borrower and assigned by the clerk to the lender who has knowledge of all the material facts, the lender cannot recover upon the bond and mortgage its full face value, but only the amount of the loan.²²

Where the assignor of bonds and mortgages guaranteed them and subsequently executed to the assignee a bond, secured by a mortgage, as collateral security for their payment, stipulating in the collateral bond that his "liability by virtue hereof for such deficiency shall not exceed \$3,500," it was held that the assignors liability on the guaranty of the mortgages was unlimited, the words of limitation quoted applying merely to his liability on that bond.²³

§ 323. Assignment by one of several mortgages.—Where a mortgage is made to a copartnership firm composed of several persons, it may be assigned by any one of them.²⁴ So, a mortgage made

¹⁸ Wormuth v. Tracy, 15 Hun, 180; Pond v. Eddy, 113 Mass. 149.

¹⁹ Hughes v. Johnson, 38 Ark. 285.

²⁰ Fithian v. Corwin, 17 Ohio St. 118.

²¹ Matter of Gilbert, 104 N. Y. 200. See Bloomer v. Sturges, 58 N.

Y. 168; Hoyt v. Martense, 16 N. Y. 231.

²² Rollins v. Barnes, 11 App. Div. 150; 42 N. Y. Supp. 954.

²³ Wood v. Ludlow, 110 N. Y. 154; 17 N. E. 726.

²⁴ Everit v. Strong, 5 Hill, 163, aff'd 7 Hill, 585; Bogart v. Hertell, 4 Hill, 492; 9 Paige, 52.

to two or more persons to secure a debt payable to them jointly, may be assigned by either of them on behalf of both.²⁵

It is well settled that if a man appoints several executors, they are esteemed in law as but one person representing the testator, and that acts done by any one of them which relate to the delivery, gift, sale, or release of the testator's goods, are deemed the acts of all.²⁶ Accordingly, an assignment of a mortgage by one of several executors will be valid and effectual.²⁷

The rule which permits one of several executors to transfer a debt due to the estate which he represents, does not apply in the case of several trustees who are not executors. Thus, a mortgage made to certain persons as trustees of an association not incorporated, can be transferred only by an assignment executed by all of the trustees.²⁸

§ 324. Assignment of debt carries with it the mortgage lien.—

In the absence of an express agreement to the contrary, an assignment of a note or other evidence of debt secured by mortgage, however informally made, will carry with it the mortgage lien,²⁹ and its incidents.³⁰

The assignee of the debt secured by mortgage is entitled to the benefit of the security, though he did not know of its existence at the time of the assignment.³¹

25 *Bruce v. Bonney*, 12 Gray (Mass.) 107.

26 *Bac. Abr. Executors and Administrators D.* and cases cited.

27 *Bogart v. Hertell*, 4 Hill, 492; *Wheeler v. Wheeler*, 9 Cowen, 34; *Murray v. Blatchford*, 1 Wend. 583; *Douglas v. Satterlee*, 11 Johns. 16. See also *Ex parte Rigby*, 19 Ves. 462.

28 *Chapin v. First Universalist Church*, 8 Gray (Mass.) 580; *Austin v. Shaw*, 10 Allen (Mass.) 552; *Webster v. Vandeventer*, 6 Gray (Mass.) 428.

29 *Parmelee v. Dann*, 23 Barb. 461; *Neilson v. Blight*, 1 Johns. Cas.

35 *Mortgage Notes*||Brownf 7-2 **16** 205; *Green v. Hart*, 1 Johns. 590; *Evertson v. Booth*, 19 Johns. 491; *Ford v. Stuart*, 19 Johns. 342; *Briggs v. Dorr*, 19 Johns. 95; *Pattison v. Hull*, 9 Cow. 747; *Barclay v. Blod-*

gett, 5 Cow. 202; *Langdon v. Buel*, 9 Wend. 80. See also *Holmes v. French*, 70 Me. 341; *Whittemore v. Gibbs*, 24 N. H. 484; *Keyes v. Wood*, 21 Vt. 331; *Roberts v. Halstead*, 9 Pa. St. 32; 49 Am. Dec. 541; *Jerry v. Woods*, 6 Sm. & Marsh (Miss.) 139; 45 Am. Dec. 274; *Johnson v. Johnson*, 81 Mo. 331. Where deeds of trust are used instead of mortgages, the same principle applies, and the lien passes by an assignment of the debt. *Stiger v. Bent*, 111 Ill. 328. An equitable assignment of the note has the same effect to transfer the security. *Sedgwick v. Johnson*, 107 Ill. 385.

30 *Jermain v. Sharpe*, 29 Misc. R. 258; 61 N. Y. Supp. 700; *Goettlicher v. Wille*, 76 Misc. R. 361.

31 *Betz v. Heebner*, 1 Penn. 280.

Upon the assignment of a bond with a forged mortgage, delivery of the bond to the assignee carries with it a genuine mortgage given to secure it.³²

An assignment of a judgment for a debt carries the debt, and if the debt is secured by a mortgage it carries also the mortgage interest. So, if the assignment be of only a part of the judgment, a proportionate interest in the mortgage passes.³³

An assignment by a member of a copartnership of "all debts due to the firm," carries a mortgage given to secure a firm debt.³⁴

The assignee of a debt secured by a reservation in the deed of the vendor, may enforce such lien without any formal transfer of it.³⁵

A mortgage of indemnity given to a surety does not pass with a transfer of the debt, and the surety can release the mortgage; although, if unreleased, it would have inured to the benefit of the creditor and of his assignee.³⁶

§ 325. Several notes secured by the same mortgage.—Where a mortgage is given to secure payment of several notes or demands, it is an incumbrance upon the land for the security of all and each of the notes in whose hands soever they may legally be until all are paid.³⁷ An assignment of one of the notes or claims so secured will transfer a proportionate part of the lien,³⁸ unless an agreement is made to the contrary, which agreement will then control.³⁹ So, an assignment of part of the notes secured by a mortgage, accompanied by an assignment of the mortgage itself, and of all the mortgagor's right to the premises conveyed thereby, does not extinguish his interest in the mortgage for one of the notes retained by him and subsequently assigned to another.⁴⁰

Where a note and a mortgage to secure it were made and the mortgage was duly recorded, and the note was indorsed and trans-

32 Goettlicher v. Wille, 76 Misc. R. 361.

33 Pattison v. Hull, 9 Cow. 747; Wayman v. Cochrane, 35 Ill. 152.

34 Du Bois' Appeal, 38 Penn. St. 231.

35 Lindsey v. Bates, 42 Miss. 397.

36 Jones v. Quinnipack Bank, 29 Conn. 25.

37 Johnson v. Brown, 31 N. H. 405.

38 Gould v. Marsh, 1 Hun, 566; 4 T. & C. 128. See also Phelan v. Olney, 6 Cal. 478; Smith v. Stevens, 49 Conn. 181; Sample v. Rowe, 24 Ind. 208; Stanley v. Beatty, 4 Ind. 134; Henderson v. Herrod, 18 Miss. 631; Belding v. Manly, 21 Vt. 550.

39 Rolston v. Brockway, 23 Wis. 407.

40 Page v. Pierce, 26 N. H. 317.

ferred by the mortgagee, who thereafter also sold another note of similar tenor to a person without notice, giving him also an assignment of the mortgage, it was held that the holder of the first note had the better title to the security.⁴¹

If a mortgage is given to secure negotiable promissory notes, and the notes are transferred, the mortgagee and all persons claiming under him will hold the mortgaged property in trust for the holders of the notes,⁴² although such holders did not know of the mortgage.⁴³ So, where several debts secured by one mortgage have become the property of different persons, and the assignee of the mortgage has foreclosed and has thereby acquired legal title to the property, he holds it with its rents and profits in trust for the holders of the debts, according to their respective amounts.⁴⁴

§ 326. In strictness the lien not transferable apart from the debt.

—A mortgage is not considered a conveyance of land within the statute of frauds, and it may be assigned by parol.⁴⁵ The assignment must, however, be of the bond or evidence of debt as well as of the mortgage, since the transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it,⁴⁶ and it is a legal maxim that the incident shall pass by the grant of the principal, but not the principal by the grant of the incident.⁴⁷ If, therefore, the wife of a mortgagor is also the owner of the mortgage, the mortgage will not be assigned to a purchaser by a conveyance in which she joins, nor will her lien be inferior to a subsequent mortgage in which she joins in order to bar her inchoate right of dower;⁴⁸ and the same rule will apply where one of several joint owners of property holds a mortgage upon it, and joins in a deed of all his estate, title and interest.⁴⁹

⁴¹ *Morris v. Bacon*, 123 Mass. 58.

⁴² *Jordan v. Cheney*, 74 Me. 359.

⁴³ *Keyes v. Wood*, 21 Vt. 331; *Roberts v. Halstead*, 9 Penn. St. 32; 49 Am. Dec. 541.

⁴⁴ *Johnson v. Candage*, 31 Me. 28.

⁴⁵ *Allerton v. Lang*, 10 Bosw. 362; *Bedell v. Carll*, 33 N. Y. 581; *Westerlo v. De Witt*, 36 N. Y. 340; *Mack v. Mack*, 3 Hun, 323; 5 N. Y. Sup. (T. & C.) 528; *Runyan v. Mersereau*, 11 Johns. 534; 6 Am. Dec. 393. See also *Pease v. Warren*, 29 Mich. 9;

Wilson v. Kimball, 27 N. H. 300.

⁴⁶ *Jackson v. Willard*, 4 Johns. 41; *Aymar v. Bill*, 5 Johns. Ch. 570; *Cooper v. Newland*, 17 Abb. 342.

⁴⁷ *Merritt v. Bartholick*, 36 N. Y. 44; 47 Barb. 253; *Carpenter v. O'Dougherty*, 67 Barb. 397.

⁴⁸ *Power v. Lester*, 23 N. Y. 527; 17 How. Pr. 413; *Gillig v. Maas*, 28 N. Y. 191; *Van Amburgh v. Lester*, 16 Hun, 205.

⁴⁹ *Aymar v. Bill*, 5 Johns. Ch. 570; *Purdy v. Huntington*, 42 N. Y.

The right of a mortgagee to hold the mortgaged premises as security for his debt does not pass by a conveyance of "all his lands, tenements, and hereditaments."⁵⁰

In *Wanzer v. Cary* (76 N. Y. 526, aff'g 12 Hun, 403), a bond and mortgage was executed by a wife as collateral security for her husband's debt. The mortgagee assigned the bond and mortgage to bona fide purchasers, and afterward received the debt due him from the husband, and promised to discharge the mortgage. In an action to foreclose the mortgage, it was held that the assignment of the bond and mortgage was an assignment of a mere security, while the principal debt remained untransferred, and that it was inoperative. The debt of the husband being cancelled, the mortgage was not supported by any consideration. A different rule would have been applied if the bond and mortgage had been given not as security for, but in payment of, the husband's debt.

§ 327. **Rule where there is no personal liability.**—The rule that the mortgagee's interest in the land is not capable of being assigned by itself, must be qualified so as to include only cases where there is a mortgage debt, for a mortgage lien may exist without any personal obligation.⁵¹ The assignment of a mortgage given without a bond or other extrinsic evidence of debt, and containing no express covenant to pay, transfers to the assignee all of the mortgagee's claim under the mortgage; that is to say, his remedy against the land.⁵² And while an assignment of the mortgage without the debt is inoperative at law, it will be protected in equity in order to carry out the manifest intention of the parties.⁵³

§ 328. **Transfer of mortgage construed to assign the debt.**—Although an assignment of a mortgage apart from the bond is not availing, still where a contract is made for an assignment of the mortgage, the court may infer an obligation to assign the bond also,⁵⁴ and a power of attorney authorizing the assignment

334. See, *contra*, *Williams v. Thorn*, 11 Paige, 459; *Swan v. Yople*, 35 Iowa, 248.

50 *Mack v. Wetzlar*, 39 Cal. 247, 254; *Sims v. Hammond*, 33 Iowa, 368.

51 *Real Prop. Law*, § 249; 1 R. S. 738, § 139. See *ante*, § 102.

52 *Hone v. Fisher*, 2 Barb. Ch.

560; *Severance v. Griffith*, 2 Lans. 38; *Caryl v. Williams*, 7 Lans. 416; *Coleman v. Rensselaer*, 44 How. Pr. 368; *Carpenter v. O'Dougherty*, 67 Barb. 397.

53 *Raynor v. Raynor*, 21 Hun, 36.

54 *Foster v. Van Reed*, 70 N. Y. 19.

of mortgages, impliedly includes the assignment of bonds accompanying the mortgages.⁵⁵ So, an assignment of a mortgagee's interest in the mortgaged premises has been held to carry with it the right to receive payment of notes secured by the mortgage,⁵⁶ or to enforce a judgment for the payment of which the mortgage was collateral security.⁵⁷ And a deed of conveyance of the mortgaged property executed by the mortgagee, duly executed and recorded, has been awarded priority over a prior unrecorded assignment of the debt and mortgage.⁵⁸

If a mortgage is assigned without any express mention of the debt, it would nevertheless be presumed to be the intention of the parties to transfer the debt as well, if it has not already been assigned to another person.⁵⁹

Where land is mortgaged by an absolute deed with a secret defeasance, an absolute conveyance of the premises by the mortgagee to a third person amounts to an assignment of the mortgage.⁶⁰

And where the mortgagee has made an effort to foreclose his mortgage, which, by reason of irregularities in his proceedings, is not sufficient to cut off all of the persons having rights in the equity of redemption, the purchaser acquires by virtue of such proceedings, and as against all of the persons not cut off, all of the rights of an assignee of the mortgage and of the debt secured by it.⁶¹

§ 329. The bond should be delivered on assignment.—Since the transfer of the debt carries with it the mortgage, it is quite important for the purchaser of the mortgage to require the production and delivery of the bond where there is one. If he neglects to do so, he is said to be chargeable with negligence fatal to his right to recover upon the mortgage as against a prior purchaser

⁵⁵ *Feldman v. Beier*, 78 N. Y. 293.

⁵⁶ *King v. Harrington*, 2 Aikens (S. C.) 33; 16 Am. Dec. 675.

⁵⁷ *Williams v. Cornell*, 137 App. Div. 795; 122 N. Y. Supp. 670.

⁵⁸ *Welch v. Priest*, 90 Mass. (8 Allen) 165.

⁵⁹ *Cooper v. Newland*, 17 Abb. 342; *Merritt v. Bartholick*, 36 N. Y. 44; 47 Barb. 253; *Ross v. Terry*, 63

N. Y. 613. See also *Fletcher v. Carpenter*, 37 Mich. 412; *Phillips v. Bank of Lewiston*, 18 Pa. St. 394; *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311.

⁶⁰ *Berdell v. Berdell*, 33 Hun, 535; *Halsey v. Martin*, 22 Cal. 645.

⁶¹ *Hart v. Wandle*, 50 N. Y. 381; *Robinson v. Ryan*, 25 N. Y. 320; *Benedict v. Gilman*, 4 Paige, 58.

who had acquired possession of the written evidence of the debt, and in this respect he is not protected by the recording act.⁶²

§ 330. Presumption is against a parol assignment.—While a mortgage, and the debt which it secures, may be assigned by delivery, the possession of a bond and mortgage, coupled with proof of an advance of money, is not in itself sufficient to establish a transfer, either absolute or conditional. In England, a very common mode of securing a loan of money is by depositing the title deeds of the borrower with the lender for that purpose, and such deposit constitutes a valid lien in equity; but here mortgages are very rarely transferred by an agreement and delivery without writing. and, in the absence of written evidence, there is a presumption against any transfer.⁶³ There must be an intention so to transfer accompanying the delivery. Where there is an intention to have a written assignment, a mere manual delivery does not pass title,⁶⁴ and the written paper must not only be executed, but it must also be delivered.⁶⁵

A transfer has, however, been inferred where a bond and mortgage were found among the papers of the deceased wife of the mortgagor, who was the daughter of the mortgagee, also deceased. Parol proof was also furnished of declarations on the part of the mortgagee of an intention to give the mortgage to his daughter.⁶⁶ Since title to a bond and mortgage can pass on delivery, a promise by the holder of a mortgage, on delivering a release thereof, that he will also deliver the bond and mortgage when he finds them, is an agreement to assign the same.⁶⁷

§ 331. Noting assignment on margin of record.—It is desirable that the assignment of a mortgage should contain a description sufficiently definite to identify what is intended to be transferred. If possible, the time and place of the record of the mortgage

62 *Syracuse Savings Bank v. Merrick*, 182 N. Y. 387; 75 N. E. 232; *Kellogg v. Smith*, 26 N. Y. 18; *Clark v. Igelstrom*, 51 How. Pr. 407. See *Bergen v. Urbahn*, 83 N. Y. 49.

63 *Bowers v. Johnson*, 49 N. Y. 432; *Cuyler v. Wallace*, 183 N. Y. 291.

64 *Strause v. Josephthal*, 77 N. Y. 622.

65 *People's Trust Co. v. Tonkon-*

ogy, 144 App. Div. 333; 128 N. Y. Supp. 1055; *Urbansky v. Shirmer*, 111 App. Div. 50; *Rose v. Kimball*, 16 N. J. Eq. 185.

66 *Hackney v. Vrooman*, 62 Barb. 650. See *Bouton v. Welch*, 59 App. Div. 288; 69 N. Y. Supp. 407, *aff'd* 170 N. Y. 554; 63 N. E. 539.

67 *Urbansky v. Shirmer*, 111 App. Div. 50; 97 N. Y. Supp. 577.

should be set out, so as to enable the clerk to make a memorandum of the assignment on its margin. An omission of these precautions may operate to create great confusion if not forfeiture of rights.

In *Moore v. Sloan* (50 Barb. 442),⁶⁸ assignments of mortgages were put upon record, which described the mortgages only by the names of the parties to them and their amounts; no memoranda of the assignments were made on the margins of the original mortgages, and no actual notice was given to the prior mortgagees, and the assignees were held foreclosed by sales in actions to which they were not parties, and of which they had no notice. So, also, in *Viele v. Judson* (15 Hun, 328),⁶⁹ an assignment with an indefinite description was recorded at the time of recording the mortgage; the assignment was not noted on the margin of the mortgage, and the clerk thereafter received a certificate of satisfaction executed by the mortgagee, and discharged the mortgage of record. The assignee of the mortgage knowing of its discharge took no steps to restore it, and he was held by the General Term to forfeit his priority of lien in favor of a junior incumbrance in good faith. This latter decision was reversed by the Court of Appeals, and in doing so the ruling in *Moore v. Sloan* (*supra*) was also distinctly and by name overruled. In doing so, FINCH, J., remarked: "It is claimed, however, that the assignment to Viele was so imperfect that the clerk could not note it on the record of the mortgage, and, therefore, it was not constructive notice. The assignment contained the name of the assignor, and of the maker of the mortgage, the date of the same, and a covenant of the amount due. Unless, which is not pretended, there was some other mortgage of Decker bearing the same date, there was no uncertainty or ambiguity. It was entirely possible for the clerk to find this mortgage on his records, and be sure it was the one referred to. No rule compels a statement of the place of record or a description of the lands to make it the duty of the clerk to record. He did do so in fact. That he did not note the assignment in the margin of the record is of no consequence. He might have done so if he had pleased. We have been referred to no statute making it the duty of the clerk to

⁶⁸ Overruled in *Viele v. Judson*, 82 N. Y. 32.

⁶⁹ Reversed in *Viele v. Judson*, 82 N. Y. 32.

thus note the record of an assignment in the margin of the mortgage. It is purely a matter of convenience. Whether done or not, in no manner affects the rights of the assignee. For his protection the law only required his assignment to be recorded. It did not impose the additional condition of a note on the record."⁷⁰

§ 332. **Transfer of negotiable note secured by mortgage.**—Reasons of public policy have created and sustained the rule that a *bona fide* purchaser of commercial paper before maturity will be protected against defenses and equities existing between the original parties. We have already seen that where a negotiable note is secured by mortgage the transferee acquires a title to the security, though it be not named, and even though he had no knowledge of it. In such cases it has been attempted to inquire into the consideration of the debt where the security is sought to be enforced, and in some States this is permitted to be done.⁷¹

In this, as in a majority of the States, however, a purchaser of a note who is permitted to enforce the debt which it represents, is held entitled to the lien by which it is secured, and no defense is permitted against the security which does not operate to defeat the debt.⁷² It is not material as to whether the debtor is or is not also the owner of the mortgaged property, since by creating a lien to secure commercial paper he binds his land by all rules giving such obligations, and a wife of the mortgagor is bound by the lien by executing the mortgage, though not a party to the notes.⁷³

Where notes secured by mortgage are indorsed and transferred

⁷⁰ *Viele v. Judson*, 82 N. Y. 32.

⁷¹ *Towner v. McClelland*, 110 Ill. 542; *Bryant v. Vix*, 83 Ill. 11; *White v. Southerland*, 64 Ill. 181; *Olds v. Cummins*, 31 Ill. 188; *Baily v. Smith*, 14 Ohio St. 396; *Corbett v. Woodward* (Oregon), 11 Chicago L. N. 246.

⁷² *Gould v. Marsh*, 4 N. Y. Sup. (T. & C.) 128; 1 Hun, 566; *Reese v. Scully*, Walker Ch. R. 248. See also *Sawyer v. Pritchett*, 19 Wall. (86 W. S.) 147; *Kenicott v. Supervisors*, 16 Wall (83 U. S.) 452, *Carpenter v. Longan*, 16 Wall, (83 U. S.) 271, *Beals v. Neddo*, 1 McCray (U. S. C. C.) 206; 10 Cent. L. J. 187; *Reeves v. Hayes*, 95 Ind. 521; *Bayles v.*

Glenn, 72 Ind. 5; *Gabbert v. Schwartz*, 69 Ind. 450; *Vandercook v. Baker*, 48 Iowa, 199; *Lewis v. Kirk*, 28 Kans. 497; 26 Alb. L. J. 328; *Burthaus v. Hutcheson*, 25 Kans. 625; *Bassett v. Daniels*, 136 Mass. 547; *Taylor v. Page*, 6 Allen (Mass.) 86; *Helmer v. Krolick*, 36 Mich. 371; *Dutton v. Ives*, 5 Mich. 515; *Logan v. Smith*, 62 Mo. 455; *Mundy v. Whittemore*, 15 Neb. 647; 19 N. W. 694; *Webb v. Haselton*, 4 Neb. 308; 19 Am. Rep. 638; *Paige v. Chapman*, 58 N. H. 333; 21 Alb. L. J. 518; *Kelley v. Whitney*, 45 Wis. 110; *Croft v. Bunster*, 9 Wis. 503, 510.

⁷³ *Gabbert v. Schwartz*, 69 Ind. 450.

before maturity, it is no defense to a foreclosure brought by the holders of such notes to show that payment was thereafter made to the mortgagee,⁷⁴ but where a note so secured and executed by a wife for her husband's accommodation is once paid and re-assigned to the husband, and later wrongfully transferred by him to an innocent party by assignment rather than by indorsement, such third party is held to take subject to all equities which might have been urged against his assignor.⁷⁵

If negotiable notes or drafts secured by mortgage are transferred after maturity,⁷⁶ or for a past consideration,⁷⁷ or to a person having notice of the facts,⁷⁸ they are open to all defenses in like manner as they would be if not accompanied by any security.

A purchaser of a negotiable note before maturity, secured by a mortgage of a woman who did not sign the note, will not be protected if it can be shown that her signature to the mortgage was obtained by duress.⁷⁹

§ 333. Lien controlled by recording acts, though to secure negotiable paper.—The rule which protects commercial paper secured by mortgage is controlled by the recording acts to the extent to which they may be applicable, and where a mortgage which secures a negotiable note has been released of record, it loses its negotiable character to the extent that any third person who may purchase the property in good faith will obtain the full, complete, and absolute title thereto, freed from all equities, liens, interests, trusts, or incumbrances existing in favor of any holder of the note or mortgage, whether the note is satisfied or not.⁸⁰ So,

⁷⁴ *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Dutton v. Ives*, 5 Mich. 515; *Blumenthal v. Jassoy*, 29 Minn. 177; 12 N. W. 217; *Mead v. Leavitt*, 59 N. H. 476; *Croft v. Brunster*, 9 Wis. 503.

⁷⁵ *Pitkin v. Clayton*, 41 App. Div. 363; 58 N. Y. Supp. 483. There was evidence in this case that the assignee knew the note was for the accommodation of the assignor and further the rights of infants had intervened.

⁷⁶ *Howard v. Gresham*, 15 Ga.

347; *Fish v. French*, 15 Gray (Mass.) 520.

⁷⁷ *Glidden v. Hunt*, 24 Pick. (Mass.) 221.

⁷⁸ *Burbank v. Warwick*, 52 Iowa, 493; 3 N. W. 519.

⁷⁹ *First National Bank v. Bryan*, 62 Iowa, 42; 17 N. W. 165; *Burbank v. Warwick*, 52 Iowa, 493; 3 N. W. 519; *Tabor v. Foy*, 56 Iowa, 539; 9 N. W. 897.

⁸⁰ *Conroy v. Fuller*, 30 Iowa, 211; *Lewis v. Kirk*, 28 Kans. 497; 26 Alb. L. J. 328; *Swartz's Ex'rs v. List*, 13 Ohio St. 419.

where there has been a recorded assignment of the mortgage a subsequent transferee of the note will not be entitled to the benefit of the lien.⁸¹

§ 334. Assignee of mortgage takes subject to equities of debtor.

—Where a negotiable note is secured by a mortgage, a *bona fide* assignee, before maturity, takes it free from any equities between the original parties;⁸² but a bond, whether secured by a mortgage or not, and whether it be in the hands of the obligee or of his assignee, carries with it no conclusive presumption of validity. It is a mere chose in action; the obligor may impeach its consideration or establish any other valid defense against it while it remains in the hands of the obligee, and, as a general rule, his rights in this respect cannot be changed by a transfer of the rights of the obligee to a third person. In the transmission of property of any kind from one person to another, the former owner can, in reason, only transfer what he himself has to part with, and the other can only take what is thus transferred to him. The cases in which, from motives of public policy, to promote the currency of certain securities, to prevent fraud, or to aid the vigilant against the careless, the party to whom the transfer is made is allowed to claim a greater interest than was possessed by the other, are exceptional, and no general rule protects the assignees of bonds secured by mortgages from the defects in the titles of their assignors. The rule as generally stated is, that the purchaser takes only the interest which his assignee had to part with; or, as was expressed by Lord THURLOW: “A purchaser of a chose in action must always abide by the case of a person from whom he buys.” “This (he said) I take to be the general rule.”⁸³ In other words, as the doctrine is more commonly expressed, the assignee of a chose in action takes it subject to the same equities to which it was subject in the hands of the assignor. If these equities are understood to mean only the equities residing in the original obligor or debtor, the authorities will be found to be numerous and uniform in favor of the proposition.⁸⁴ Further-

⁸¹ *Morris v. Bacon*, 123 Mass. 58.

⁸² *Bogert v. Bliss*, 148 N. Y. 194; 42 N. E. 582; *Gould v. Marsh*, 4 N. Y. Sup. (T. & C.) 128; 1 Hun, 566; *Reese v. Scully*, Walker Ch. R. 248. See also *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Kenicott v. Super-*

visors, 16 Wall. (U. S.) 452, *Taylor v. Page*, 6 Allen (Mass.) 86; *Paige v. Chapman*, 58 N. H. 333; 21 Alb. L. J. 518; *Croft v. Bunster*, 9 Wis. 510.

⁸³ *Davies v. Austin*, 1 Ves. 247.

⁸⁴ *Owens v. Evans*, 134 N. Y. 514; 31 N. E. 999; *Holcomb v. Campbell*,

more under the provisions of the Code of Civil Procedure (Section 502) the assignment of a mortgage is subject not only to every defense, but to every counterclaim which might have been set up against the assignor.⁸⁵ But the rule that *bona fide* assignees take subject to all equities and defenses valid between the original parties, applies only to those defenses growing out of the original transaction, affecting the legal inception of the bond and mortgage, or which were available to the mortgagor at the time of the assignment of the mortgage. New equities arising, or defenses accruing thereafter are not within its application.⁸⁶

An assignee's claim will be subordinate to a parol agreement between the mortgagor and mortgagee, after the making of the

118 N. Y. 46; 22 N. E. 1107; Murray v. Lylburn, 2 Johns. Ch. 441; Livingston v. Dean, 2 Johns. Ch. 479; James v. Morey, 2 Cow. 246; Pendleton v. Fay, 2 Paige, 202; Evertson v. Evertson, 5 Paige, 644; L'Amoureux v. Vandenburg, 7 Paige, 316; Evans v. Ellis, 5 Den. 640; Ellis v. Messervie, 11 Paige, 467; Richards v. Warring, 1 Keyes, 576; Bush v. Lathrop, 22 N. Y. 535; Reeves v. Kimball, 40 N. Y. 299; Mason v. Lord, 40 N. Y. 476; Moore v. Metropolitan National Bank, 55 N. Y. 41; Ingraham v. Disborough, 47 N. Y. 421; Clute v. Robinson, 2 Johns. 595; Squire v. Greene, 32 App. Div. 258; 5 N. Y. Ann. Cas. 363 (with note); Ely v. McNight, 30 How. Pr. 97; Westfall v. Jones, 23 Barb. 9; Mickles v. Townsend, 18 N. Y. 575; Bockes v. Hathorn, 20 Hun, 503; Davis v. Beckstein, 69 N. Y. 440; Quackenbush v. Wheaton, 46 Misc. R. 357; Parmeter v. Colrick, 20 Misc. 202; 45 N. Y. Supp. 748. See also Tabor v. Fay, 56 Iowa, 539; Horstman v. Gerker, 49 Penn. St. 282; De Witt v. Van Sickle, 29 N. J. Eq. 209; Reddish v. Ritchie, 17 Fla. 867. In Pennsylvania the rules as to equities on the assignment of mortgages differ from most of the other States. The assignee of a mortgage takes the same subject to

all equities between the mortgagor and mortgagee, but not subject to the equities between the mortgagor and a prior assignee of a mortgage. Reineman v. Robb, 98 Penn. St. 474. The assignee of a mortgage is not affected by a collateral agreement made between the mortgagor and mortgagee at the time of the execution of the mortgage, by which it was stipulated that the mortgagee should release the lien from any lots which the mortgagor might sell on receiving a reasonable portion of the purchase money. *McMasters v. Wilhelm*, 85 Penn. St. 218; *Pryor v. Wood*, 31 Penn. St. 142; *Davis v. Barr*, 9 S. & R. 141. And a mortgage debt in the hands of an assignee of the mortgagee is not affected by payments of money made by the mortgagor for the benefit of the mortgagee previous to the assignment, with the understanding that such payments were to be credited on the mortgage debt, unless by indorsement or other mode or memorandum of credits, such proportion of the debt was in fact reduced by an application of the sums so paid. *Post v. Carmalt*, 2 Watts & Serg. 70; 37 Am. Dec. 484.

⁸⁵ *American Guild v. Damon*, 186 N. Y. 360; 78 N. E. 1081.

⁸⁶ *Merchant's Bank of Buffalo v. Weill*, 163 N. Y. 486; 57 N. E. 749.

mortgage, by which the amount secured by the mortgage was reduced⁸⁷ or discharged,⁸⁸ or the time of payment extended.⁸⁹ The assignee is not bound by a secret oral agreement between a purchase-money mortgagor and mortgagee which provides for a reconveyance, especially when the mortgagor has estopped himself⁹⁰ nor by a secret agreement between such mortgagee and mortgagor that the latter shall hold the premises in trust for the mortgagee.⁹¹ Nor, in general, may a mortgagor, avail himself of secret and unrecorded agreements between himself and the mortgagee of which the assignee has no notice.⁹²

§ 335. Where the question is as to validity of the debt.—It would seem to be settled that where the question is as to whether the debt exists, all defenses are as available against the assignee as they were against the original party to the instrument. If the debt is conceded to exist, it at once becomes a piece of property, and the rights of the owner or assignee of a bond must be judged by the same rules which would govern in the case of a horse or of a share of stock.⁹³ But the owner of the debt cannot, by transferring it, make any difference in the obligation of the debtor; and when the validity or the amount of the debt is in dispute, whether the debtor or those claiming under him, as grantees,⁹⁴ or judgment creditors,⁹⁵ or mechanics' lienors,⁹⁶ or otherwise interested, are on the one side; or whether the original creditor or his assignee be found on the other side, are questions of no importance. The debt cannot be either created or enlarged by passing it from hand to hand; and the debtor, or those claiming his rights, may assert them at any time; and as against any person to whom the claims of the creditor may have been transferred. It is a matter of no importance to the debtor as to what the nature of the dealings of the creditor with his debt has been, and unless he has made himself a party to a transfer by his acts or statements, he can defend himself equally well if the transfer be for a valuable

87 *Green v. Fry*, 93 N. Y. 353.

88 *Sumner v. Waugh*, 56 Ill. 531.

89 *Quackenbush v. Wheaton*, 46 Misc. R. 357; 94 N. Y. Supp. 823.

90 *Merchant's Bank v. Weill*, 29 App. Div. 101; 52 N. Y. Supp. 37, aff'd 163 N. Y. 486; 57 N. E. 749.

91 *Curtis v. Moore*, 152 N. Y. 159; 46 N. E. 168.

92 *Merchant's Bank of Buffalo v. Weill*, 163 N. Y. 486; 57 N. E. 749.

93 *Moore v. The Metropolitan National Bank*, 55 N. Y. 41.

94 *Hartley v. Tatham*, 24 How. Pr. 505.

95 *Rosevelt v. Bank of Niagara*, Hopk. Ch. 579.

96 *Schafer v. Reilly*, 50 N. Y. 61.

consideration as if it be for none at all.⁹⁷ Where the holder of a note secured by a bond and mortgage given by the maker and indorser thereof, which had been transferred to him by mesne assignments from the payee, assigned the note and bond and mortgage by an instrument containing a covenant that there was then due thereon a certain sum with interest to date, an action can be maintained against him by the assignee for such sum and interest under the express warranty contained in the assignment, notwithstanding the fact that in an action brought by such assignee upon the bond and mortgage against the maker thereof, such instruments were held to be void by reason of an usurious agreement in which the securities had their inception, and there is no proof to show that the assignor was aware of the usury which tainted the note.⁹⁸

§ 336. **Distinction between latent equities and equities of the obligor.**—In an early case¹ it was said by Chancellor KENT that the rule that the purchaser of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor, was not to be understood to include an equity residing in some third person against the assignor. The assignee can always go to the debtor and ascertain what claims he may have against the bond or other *chose in action* which he is about to purchase from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason it was thought to be equitable that if he became a purchaser for value, without notice of any defect in the title of his assignor, and with no means of ascertaining whether there was any such defect, he ought to be protected.

Chancellor KENT gave, as an illustration of a latent equity, a case of the setting up by a third person of a secret equity against the assignor,² and such an equity would be unquestionably disregarded in favor of a *bona fide* purchaser without notice.³ In all such cases, and wherever notice to an assignee is fatal to his

⁹⁷ Rapps v. Gottlieb, 142 N. Y. 164; 36 N. E. 1052; Hill v. Hoole, 116 N. Y. 299; 22 N. E. 547.

⁹⁸ Buehler v. Pierce, 175 N. Y. 264; 67 N. E. 573.

¹ Murray v. Lylburn, 2 Johns. Ch.

441; Livingston v. Dean, 2 Johns Ch. 479.

² Murray v. Lylburn, 2 Johns, Ch. 441.

³ Crocker v. Crocker, 31 N. Y. 507.

claims, a *bona fide* purchaser without notice is not prejudiced by notice to his assignor.⁴

In *Bebee v. The Bank of New York* (1 Johns. 529), Chancellor KENT attempted to sustain the distinction between latent equities and equities of the obligor, and he was overruled, Judges SPENCER and TOMPKINS both disagreeing with him. He afterward re-affirmed the doctrine in *Murray v. Lylburn* (2 Johns. Ch. 441), and in *Livingston v. Dean* (2 Johns. Ch. 479). It is not clearly defined what a latent equity is, and the phrase could hardly be taken as a safe guide, even if the distinction between patent equities and latent equities could be maintained. In the case of *Bush v. Lathrop* (22 N. Y. 535), it was, indeed, determined, after a very elaborate examination of the authorities by Judge DENIO, that the distinction had no foundation in our jurisprudence.⁵

§ 337. Equities of third persons claiming rights in the property.

—Upon general principles, a mortgagor can only charge the estate to the extent of his interest in it, and the mortgagee can transfer only such interest as he receives. The presumption, therefore, is that, as between the equities of persons claiming interests in or liens upon lands, the one which is prior in time is also prior in right, and that an assignee of a mortgage stands exactly in the position of his assignor, whether the rights of that position were known to him at the time of receiving the assignment or not. Those cases in which the assignee of a mortgage acquires a priority over other rights in the estate which was not possessed by his assignor, are exceptions to the general rule, and such priority is derived in most, if not in all cases, from the provisions of the recording acts, or from the equitable doctrine of estoppel.⁶

§ 338. A review of some of the cases in which such questions have arisen may be useful.

In *Van Rensselaer v. Stafford* (Hopk. 569, aff'd on appeal in 9 Cow. 316), one Van Dusen sold to W. lands which he had bought of Van Rensselaer, and for which he was partly indebted to V. R., and took from W. two mortgages of equal date, intend-

4 Jackson v. Henry, 10 Johns. 185;
Jackson v. Van Valkenburg, 8 Cow.
260; Varick v. Briggs, 6 Paige, 323;
Fort v. Burch, 5 Den. 187; Bush v.
Lathrop, 22 N. Y. 549.

5 Mickles v. Townsend, 18 N. Y.
580.

6 Mickles v. Townsend, 18 N. Y.
580.

ing that one should have priority and be assigned to V. R. for the original purchase money due to him. The mortgages were registered concurrently, but one of them was soon after assigned to V. R. Afterward V. D. assigned the other to Stafford in good faith, for value, without notice of V. R.'s intended priority. It was held that Stafford stood in the place of V. D., and held his mortgage subject to all the equity which V. R. had against V. D., and V. R.'s mortgage was declared to have a priority.

In *Greene v. Deal* (4 Hun, 703), two bonds and mortgages of the same date were executed upon the same property for the purchase money. It was intended by the parties that they should be equal as to priority. They were recorded on the same day, but one was recorded at a later time than the other. After the recording of both of the mortgages, the one which had first been recorded was assigned to a purchaser who paid value, and who had no notice of the agreement that the mortgages should be equal as to priority. The Supreme Court, at General Term (4 Hun, 703), held that the assignee might avail himself of the earlier recording of his mortgage, and that it was a prior lien to the other; but the Court of Appeals reversed this decision, and decided that the assignee of the mortgage was bound by the parol agreement which had been made by his assignor with the owner of the other incumbrance.⁷ Aside from the recording acts, the assignee took his mortgage subject to the equities between his assignor and the other mortgagee; and there was nothing to estop the other mortgagee from asserting his rights, as he did nothing to induce the assignee to purchase, and did not, by any act or omission, mislead him. The recording act did not affect the rights of the parties, as that only applies to *subsequent* incumbrances which are first recorded, and neither mortgage was a subsequent conveyance to the other, both being executed at the same time. The only effect of the recording of an assignment of a mortgage is to protect the assignee against a subsequent sale of the mortgage itself, the recording act only applying to successive purchasers from the same sellers.⁸ The assignee of the mortgage first recorded was held not to have gained any rights by his assignment as against the owner of the other mortgage, except such as had been possessed by his assignor.⁹

⁷ *Greene v. Warnick*, 64 N. Y. 220.

⁹ *Greene v. Warnick*, 64 N. Y. 220.

⁸ *Purdy v. Huntington*, 42 N. Y. 334.

In *Delancey v. Stearns* (66 N. Y. 157), B. took a mortgage in payment of an antecedent debt, and without relinquishing any security or giving any new consideration. B. had notice at the time of an unrecorded mortgage on the same premises. Subsequently B. assigned the mortgage for value to R., who had no notice of the unrecorded mortgage. It was held by the Court of Appeals that R. stood in no better position than B. as to such unrecorded mortgage, and that although, on the question of notice, the *bona fide* assignee of a mortgage for value may stand in a better position than the mortgagee, he cannot on the question of the consideration of the mortgage, either as between himself and the mortgagor or third persons.

In *Crane v. Turner* (67 N. Y. 437), Pierce had executed a mortgage upon premises of which he had possession under a contract of sale, and, after the receipt of a deed, he conveyed the premises and received from the grantee, who had notice of the prior mortgage, a mortgage for part of the purchase money. Pierce then assigned his mortgage to the defendant Turner, assuring him that it was the first lien. In an action to foreclose the mortgage, Turner claimed that his mortgage was entitled to priority. Both mortgages having been duly recorded, it was held that, as Pierce would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right, and was also estopped, and that the recording act did not aid the defendant.

In *Bank for Savings v. Frank* (56 How. Pr. 403; 45 N. Y. Super. [13 J. & S.] 404), a mortgagee had executed an agreement postponing the lien of his security to a junior mortgage. He subsequently sold the mortgage to a person whose attorney, in the course of investigating the title, learned of this agreement, and it was therefore held binding upon him.

In *Schafer v. Reilly* (50 N. Y. 61), a mortgage was made without consideration, to be sold by the mortgagee for the benefit of the mortgagor, and it was duly recorded. Subsequent to the record of the mortgage, a mechanic's lien upon the property was perfected. After the perfecting of the mechanic's lien a purchaser of the mortgage received an assignment of it, and paid a valuable consideration therefor, relying upon a sworn statement of the mortgagor (untrue in fact) that the mortgage was a valid security for the whole amount secured by it, and that the money

was advanced by the mortgagee for it. It was held that the mortgage became valid only because of the estoppel of the mortgagor, and that its lien commenced at that time; that the holder of the mechanic's lien was not bound or prejudiced by the acts of the mortgagor subsequent to the time when his rights vested, and that his equities were superior to those of the assignee of the mortgage.¹⁰

It may properly be said that the principles of these cases do not afford encouragement to purchasers of mortgage securities.

§ 339. Curious questions will be presented in connection with negotiable promissory notes secured by mortgages, as between the indorsees or transferees of such notes (whose rights were perfected subsequently to the perfecting of a lien upon or a conveyance of the mortgaged premises), and the lienor or grantee. As against the maker of the note the indorsee will acquire a perfect title free of all defenses;¹¹ but it does not at all follow that if a valid lien is obtained upon the land before the note comes into the hands of a *bona fide* purchaser, the holder of the lien may not assert any of the defenses which existed against the note at the time his right accrued, in order to protect his title.

§ 340. Equities of third persons claiming rights in the mortgage. — If the validity of the mortgage be conceded, and if there be no question as to its priority of lien, there may still be question as to the title of the mortgagee to it, and of his right to assign it. A debt secured by mortgage is an article of personal property, and an assignment of it will, for most purposes, be judged by the same rules which control transfers of other choses in action. If the mortgagee shall have parted with the title to one person, he cannot thereafter confer a title on another;¹² but there are cases where the true owner of a mortgage may, by allowing another person to hold the apparent title, confer upon him the power of conveying it.

§ 341. The following cases will illustrate the rules which govern in this class of questions:

¹⁰ See also *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Mul-lison's Estate*, 68 Pa. St. 212.

¹¹ *Gould v. Marsh*, 4 N. Y. Sup.

(T. & C.) 128; 1 Hun, 566; *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Longan v. Carpenter*, 1 Col. J. 205.

¹² *Kellogg v. Smith*, 26 N. Y. 18.

In *Covell v. The Tradesmen's Bank* (1 Paige, 131), Covell had a sealed note for \$2,425 against Hunt, payable to himself in a year. He borrowed \$100 of Mullins, and pledged the note to secure it, indorsing his name in blank. M. being indebted to the Tradesmen's Bank in \$2,600, and pretending to own the note, transferred it to the bank in payment of \$1,000 of that debt, and received the balance of the note in money. He indorsed the note in blank, and delivered it to the bank. All this was within two months after the sealed note was given. Covell having paid M. in full, claimed the note of the bank, and it was held, that having both the prior equity and the legal title, he was entitled to the note.

In *Poillon v. Martin* (1 Sandf. Ch. 569), Poillon, who was the owner of a mortgage, sold and transferred it to the managing clerk of Williams, who was his solicitor and confidential adviser, for worthless notes of a county bank, being persuaded to make the sale in part by the conduct of W. A few days after, the first assignment was destroyed, and a new one was made by P. to B., for the benefit of W. After this, J. bought the mortgage from W. in good faith, for value paid, without notice, and received an assignment from B. It was held, that the transfers to W.'s clerk and to his friend for his benefit were void, because of the confidential relation between him and P. It was further held, that J. was not protected as against P.'s prior equities, and that he must lose the mortgage which he had innocently purchased.

In *Sweet v. Van Wyck* (3 Barb. Ch. 647), it is said that where a bond and mortgage are assigned as security for debt, a subsequent assignee takes the same, subject to the right of the original assignor to redeem the securities, upon paying the amount of the loan for which such bond and mortgage was pledged, with interest. It does not appear, in this case, whether the assignee was or was not a *bona fide* purchaser without notice.

In *Bush v. Lathrop* (22 N. Y. 535), a mortgage for \$1,400 and interest, was assigned as collateral security for \$268.20, by an instrument absolute upon its face, with a consideration expressed of \$268.20. The assignee afterward transferred it for its full value, and the question was presented as to whether the final assignee could hold the mortgage for its full amount. The authorities were quite fully reviewed by DENIO, J., and it was held, by a divided court, that the holder of the mortgage was

bound by the condition for redemption, and that the equity of the assignor was not destroyed by the assignment.¹³

§ 342. A similar question was, however, presented in *Moore v. The Metropolitan National Bank* (55 N. Y. 41; 14 Am. R. 173), and the principle in *Bush v. Lathrop* was there repudiated and overruled. The distinction between patent and latent equities was not relied upon, but it was held that where a person has conferred upon another an apparently valid title to a chattel, he ought, equitably, to be precluded from asserting his title against a *bona fide* purchaser from such apparent owner upon the faith of the title which he had apparently given. Another reason was that were the rule otherwise, it would afford opportunities for the perpetration of frauds upon the purchasers from such apparent owners. Where one, known to be the owner of chattels, delivers them to another, together with an absolute written transfer of all his title thereto, he thereby enables him to hold himself out as owner, and as such, obtain credit upon and make sales of the property; and if, after he had so done, the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practice the grossest frauds. Another reason is that such a case is a proper one for the application of the legal maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed.

§ 343. These principles had been applied in *McNeil v. The Tenth National Bank* (46 N. Y. 325; 7 Am. R. 341), to a case where the transfer was of shares of stock in an incorporated company, and in *Moore v. The Metropolitan National Bank* (*supra*), they were held to apply with all of their force to choses in action. There is no reason why the owner of a horse or of bank shares, who has given to another a transfer of all his right thereto for some other purpose than of passing the title, should be precluded as against a *bona fide* purchaser from such person, from asserting his title, while, under the same state of facts, he may reclaim from such purchaser a bond and mortgage or a certificate of indebtedness. As to the former, he is estopped, and as to the latter, the innocent purchaser will also be protected.¹⁴

¹³ *Kamena v. Huelbig*, 23 N. J. Eq. 78.

¹⁴ See *Cutts v. Guild* (57 N. Y. 229), in which the doctrine of *Bush*

A similar principle was declared in *Dillaye v. The Commercial Bank of Whitehall* (51 N. Y. 345), in which it was determined that where a trustee is clothed with full power to manage and control the trust estate, an assignment by him of a mortgage impressed with the trust to a *bona fide* purchaser or pledgee, cannot be impeached by *cestui que trust*.

§ 344. In *First National Bank of Corry v. Stiles* (22 Hun, 339), a bond and mortgage for \$10,000 had been made by McKay to Nash on an arrangement by which they were to be sold by Nash and the proceeds applied to the payment of certain drafts drawn by McKay on Nash and accepted by him for the accommodation of McKay. Instead of selling them they were assigned by Nash to the Union Banking Company in part as security for past indebtedness, and the bank relying upon the assignment at the same time discounted other paper for said Nash to an amount exceeding \$10,000, the proceeds of which were applied in taking up paper previously discounted for said Nash by said assignees upon which Nash and other parties were liable. The plaintiff, as the owner of one of the drafts which was to have been paid by the mortgage, brought the action against the defendant, as trustee of the Union Banking Company, to restrain the enforcement of the mortgage. It was held that the assignment was sufficient, that the Union Banking Company acquired title to the bond and mortgage thereby, and that the action could not be sustained.

§ 345. When real or personal property is obtained from one by fraud upon the purchase thereof, and the vendor thus intentionally parts with the title, the vendee can always by a sale to a *bona fide* purchaser for value, give a good title as against the vendor. So, where a conveyance of real estate was obtained by fraud and the grantee mortgaged the property and the mortgage was thereafter purchased by a person having no notice of the fraud and for value, it was held that it could be enforced.¹⁵

A *bona fide* assignee of a mortgage is entitled to hold it as against the original assignor, who, by placing it in his agent's

v. Lathrop was approved by the Commission of Appeals. See also to the same effect, *Trustees of Union College v. Wheeler*, 61 N. Y. 88, aff'g 59 Barb. 585; *Clarke v. Roberts*, 25 Hun, 86; *Westbrook v. Gleason*, 79

N. Y. 23, 30; *Simpson v. Del Hoyo*, 94 N. Y. 189.

¹⁵ *Cornell v. Maltry*, 165 N. Y. 557; 59 N. E. 291; *Simpson v. Del Hoyo*, 94 N. Y. 189.

hands, assigned in blank or for a particular purpose, gave such agent an opportunity to commit a fraud upon him.¹⁶ But a person taking such assignment as security for an antecedent debt is not a *bona fide* assignee for this purpose.¹⁷

A mortgage executed to defraud creditors will be good in the hands of a *bona fide* assignee for value.¹⁸

§ 346. **Limitations of last-mentioned rule.**—The cases of *McNeil v. The Tenth National Bank* (*supra*) and *Moore v. The Metropolitan National Bank* (*supra*) do not either of them interfere with the well-settled rule that the purchaser of a chose in action takes it subject to the equities between the original parties. These cases only have application where the security is valid at its inception and the apparent ownership has been conferred by assignment from the owner. In such case such owner is estopped from asserting his title against a *bona fide* purchaser for value, who purchased upon the faith of such apparent absolute ownership. The equities of mortgagors are in no way affected by those decisions.¹⁹

The title of a bond and mortgage does not pass under an assignment which is neither delivered to nor accepted by the assignee, though it be recorded. So, where an assignment of a mortgage was made as a collateral security and was recorded, but was never delivered, the original bond and mortgage remaining in the hands of the mortgagor, who continued to collect and receipt for the interest in his own name; and the mortgagee assigned them again to a purchaser for value, the second assignee was held to have the better title.²⁰

In *Reid v. Sprague* (9 Hun, 30), a mortgage was held in trust for the use of a lunatic for her life, with remainder to the mortgagee. The mortgage was a part of the purchase money on a sale of a portion of the trust estate, and the nature of the trust did not appear upon its face. The mortgage was assigned as security

¹⁶ *Putnam v. Clark*, 29 N. J. Eq. 412; *Grocers' Bank v. Neet*, 29 N. J. Eq. 449; *Jacobson v. Dodd*, 32 N. J. Eq. 403.

¹⁷ *Hubbell, Hall & Randall Co. v. Brickman*, 64 Misc. R. 370; 118 N. Y. Supp. 340, *aff'd* 139 App. Div. 911; 123 N. Y. Supp. 1121; *Blunt v. Norris*, 123 Mass. 55.

¹⁸ *Mahoney v. McWalters*, 3 App. Div. 248; 38 N. Y. Supp. 256; *De Witt v. Van Sickle*, 29 N. J. Eq. 209.

¹⁹ *Davis v. Bechstein*, 69 N. Y. 440.

²⁰ *Brown v. Johnston*, 7 Abb. N. C. 188.

for a debt, and it was held that the assignee occupied precisely the position of the assignor, and that a court of equity might enforce the trust against him.

§ 347. Rules for determining what equities are destroyed by assignment.—The following propositions appear to be sustained by the decisions already cited:

1. The assignment of a bond and mortgage operates as a grant or transfer of the interest of the assignor in the debt or obligation, and in the land as security therefor. This is all that, in any event, or under any circumstances, can be received by the assignee from the assignor.

2. The assignee may acquire the rights of third persons, either under the recording acts, because the rights of such third persons did not appear upon the public records when a positive rule of law requires that they should so appear, or because such third persons have by their actions or by their omitting to act, rendered it inequitable that they should assert their rights as against him. In either case, the rights of the assignee may be said to depend upon an estoppel against the persons whose rights are cut off for his benefit. Such an estoppel operates as an equitable grant, and the rights which are acquired by the assignee, and which were not possessed by the assignor, depend upon such estoppel or equitable grant, and not upon the assignment.

3. The liability of the mortgagor upon his bond for the debt is inherited by his personal representatives, no matter in whose hands the obligation may be, and he may render a void bond or obligation binding upon himself and them in the hands of a purchaser of it, by acts which render it dishonest to deny that it is so. In the same way he may, so long as the land continues to be his, bind the land by the mortgage by way of estoppel, and thereby cut off a defense which might otherwise be made; and such estoppel will bind him and those who acquire interests in the land under him subsequent thereto. But it will not bind interests which vested previous to such estoppel,²¹ and the owners of interests which had previously vested can only have their property taken away from them by some act or neglect of their own, as, for instance, by omitting to record the instruments upon which their rights depend, when the law requires that they should be recorded.

²¹ Schafer v. Reilly, 50 N. Y. 61.

4. When questions arise as to the title to the mortgage itself, all the claimants agreeing with regard to its validity, such questions are to be decided upon the same principles which would govern if the subject of the controversy were a horse or any other chattel, except that the recording acts are to be considered in the cases to which they may apply.

§ 348. **When mortgagor will be estopped from defending against assignee.**—Since an assignee of a mortgage takes it subject not only to all equities of the parties to it, but to equities which third persons could enforce against the assignor,²² and since a mortgage carries with it no conclusive presumption of validity, it is never safe to take an assignment of a mortgage without first making inquiry of the parties who might possibly have some claim or defense against it, as to their rights. If this inquiry be made in good faith, the answers in relation to the instrument are conclusive as against the parties making them, and all persons afterward claiming under such parties, in favor of the person making the inquiry and acting upon the information received, by way of estoppel.²³

If the mortgagor states to a person about taking an assignment that the mortgage is valid and free from defenses, and if such person believes such statement to be true, and if he acts upon it in good faith, it will protect him, even though the mortgage be void for usury.²⁴

§ 349. **Estoppel a protection to extent only of consideration.**—The rule which enforces an estoppel *in pais* is an equitable one,

²² Mertens v. Wakefield, 35 Misc. R. 501; 71 N. Y. Supp. 1062.

²³ Union Dime Savings Inst. v. Welmot, 94 N. Y. 221; Payne v. Burnham, 2 Hun, 143; 4 N. Y. Sup. (T. & C.) 678; 62 N. Y. 69; Eitel v. Bracken, 6 J. & S. 7; Watson v. McLaren, 19 Wend. 557; Lesley v. Johnson, 41 Barb. 359; Ferguson v. Hamilton, 35 Barb. 427; Clark v. Sisson, 5 Duer, 408; Fleischman v. Stern, 24 Hun, 265, *aff'd* 90 N. Y. 110; Carpenter v. O'Dougherty, 2 T. & C. 427; Kelley v. Scott, 4 N. Y. 595; Hirsch v. Trainer, 3 Abb. N. C. 274; Grissler v. Powers, 81 N. Y. 57; 53 How. Pr. 194; 37 Am. R. 475; Real Estate Trust Co. v. Rader, 53

How. Pr. 231. See also Sweeney v. Williams, 36 N. J. Eq. 627.

²⁴ Mason v. Anthony, 3 Keyes, 609; Real Estate Trust Co. v. Seagreave, 49 How. Pr. 489; L'Amoreaux v. Visscher, 2 N. Y. 278; Nichols v. Nussbaum, 10 Hun, 214; Smyth v. Munroe, 19 Hun, 550; Real Estate Trust Co. v. Rader, 53 How. Pr. 231; Weil v. Fischer, 42 N. Y. Supr. (10 J. & S.) 32; Smyth v. Lombardo, 15 Hun, 415; Barnett v. Zacharias, 24 Hun, 304; Platt v. Newcomb, 27 Hun, 186; Payne v. Burnham, 62 N. Y. 69; Ahern v. Goodspeed, 72 N. Y. 108; Riggs v. Pursell, 89 N. Y. 608; Weyh v. Boylan, 85 N. Y. 394.

and should not be subverted to the assisting of oppression, and there is neither reason nor justice in the enforcing of a rule of ethics to enable the recovery of usurious profits. If a person attempted, by the construction of an estoppel, to enforce a void mortgage of \$1,000 purchased for \$100, it should be permitted upon some other ground than the principles of morality and good conscience. These principles would denounce it as oppression and extortion, and courts should be cautious not to establish an iron rule, the practical operation of which subverts the very principle upon which it is based. For these reasons an estoppel will not operate to enable the purchaser of a mortgage to make a speculation out of the falsehood of the mortgagor, and it will only protect him to the extent of the amount of money actually advanced by him upon the faith of the mortgagor's statement as to the validity of the security, with legal interest.²⁵

§ 350. Form of statement to create estoppel.—To create an estoppel, it is necessary that the statement be made to the person about to act upon it, and with intent that he shall do so. Every mortgage or other written obligation of indebtedness contains within itself a statement of facts which imports validity, but the statement does not prevent the person promising from availing himself of any valid defense; for the declaration falls with the contract.²⁶ But where a certificate is made by a mortgagor in such form as to be an open letter to every person contemplating the purchase of the security, expressly declaring its validity, he will be bound to the truth of his statements in favor of any person who may have relied upon them, even though such certificate bears the same date as the mortgage.²⁷

§ 351. The statement must have been acted upon.—An estoppel *in pais* is defined to be “an admission or statement, made by one individual, intended to influence the conduct of another with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the party making the admission or statement be cut off from the power of

²⁵ *Payne v. Burnham*, 62 N. Y. 69, rev'g 4 N. Y. Sup. (T. & C.) 78; 2 Hun, 143; *Norris v. Wood*, 14 Hun, 196.

²⁶ *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 638; *Clark v.*

Sisson, 22 N. Y. 312; *Weyh v. Boylan*, 85 N. Y. 394.

²⁷ *Weyh v. Boylan*, 85 N. Y. 394, 401; *Mechanics' Bank of Brooklyn v. Townsend*, 29 Barb. 569.

retraction.”²⁸ In such a case it would be against good conscience and a fraud, to deny the truth of the statement thus made and acted upon; and this is the point upon which the question of estoppel turns.²⁹

An indispensable requisite of an estoppel *in pais* is that the conduct or representation was intended to, and did in fact, influence the other party to his injury. It is not sufficient that a person is made to believe that an estoppel will be made in the future.³⁰

§ 352. **The statement must be believed.**—By an estoppel a man's mouth is closed so as to prevent him from showing the truth, and the law will only enforce it when the rule of policy is also a plain rule of morals. The doctrine of estoppel *in pais* rests upon equity, good conscience, and honest dealing; it is not sufficient that the statement was believed to be a protection as a matter of law, but the facts stated must be believed and relied on, and a change of position must be induced by such reliance on their truth.³¹ No mere form will work an estoppel; and if the person inquiring,³² or his agent in the special transaction,³³ have knowledge of the facts, a statement made for the purpose of affording him legal protection will not answer. If he does not believe the statement to be true, it will not protect him.³⁴ A statement that a mortgage is valid, is, therefore, no protection to a party to the transaction out of which the defense arose,³⁵ even though he received the statement and acted upon it, believing that it would afford him protection.³⁶

§ 353. **The statement must be fairly obtained,** without any trick or fraud, since one who claims the protection of an equitable rule,

²⁸ *Dezell v. Odell*, 3 Hill, 219; *Reynolds v. Lounsbury*, 6 Hill, 534.

²⁹ *Baker v. The Union Mutual Ins. Co.*, 43 N. Y. 283.

³⁰ *Payne v. Burnham*, 62 N. Y. 69.

³¹ *Welland Canal v. Hathaway*, 8 Wend. 483; *Shapley v. Abbott*, 42 N. Y. 443.

³² *Shapley v. Abbott*, 42 N. Y. 443; *Kneettle v. Newcomb*, 31 Barb. 169.

³³ *Hutchins v. Hebbard*, 34 N. Y. 24; *Plumb v. Cattaraugus Ins. Co.*,

18 N. Y. 394; *Lawrence v. Brown*, 5 N. Y. (1 Seld.) 401.

³⁴ *Keeler v. Davis*, 5 Duer, 507; *Lawrence v. Brown*, 5 N. Y. 394; *Chautauqua Bank v. White*, 6 N. Y. 236; *Jewett v. Miller*, 10 N. Y. 402; *Eitel v. Bracken*, 6 J. & S. 7.

³⁵ *Van Sickel v. Palmer*, 2 N. Y. Sup. (T. & C.) 612; *Breunich v. Weselmann*, 49 N. Y. Super. (17 J. & S.) 31.

³⁶ *Eitel v. Bracken*, 6 J. & S. 7; *Shapley v. Abbott*, 42 N. Y. 443.

must himself act equitably.³⁷ It is therefore desirable that a person who intends to rely upon such a statement should be satisfied that its meaning is well understood by the person who is making it, and that he should be able to prove that his conduct was such as to exclude all presumption of unfairness or of artifice on his part. If he himself does nothing which ought to mislead, the person with whom he deals will not be allowed to mislead or to defraud him, and will be held to the truth of the statement. The statement will in such a case be held to operate as an estoppel, even though it is signed by a person who does not understand the language in which it is written, or the purpose for which it is to be used,³⁸ or by a person of feeble mind.³⁹

§ 354. An estoppel may also be created by conduct without words, and where a mortgage was paid, but with the knowledge and assent of the mortgagor was assigned to a purchaser for value without notice, it was held valid as against the mortgagor.⁴⁰ So, where an assignee of a right of action takes an assignment with the debtor's assent, though he merely stands by in silence, the debtor is estopped to impeach it,⁴¹ and where a mortgagor induces an innocent party to purchase the mortgage for her advantage, and tacitly represents it to be valid she may not thereafter question its validity.⁴²

§ 355. Estoppel by statements of an agent.—An estoppel is not created by the false statement of an agent as to a matter not within the scope of his agency,⁴³ nor by his forgery.⁴⁴ But . . . where a bond and mortgage are made and delivered to the mortgagee for the purpose of sale, he is thereby constituted the agent of the mortgagor with authority to do any act or make any statement with regard to them found necessary to make a sale and incidental thereto. If such mortgagee declares falsely in the course of a negotiation for such sale that the bond and mortgage were

³⁷ *Place v. Hayward*, 117 N. Y. 487; 23 N. E. 25; *Wilcox v. Howell*, 44 N. Y. 398; 44 Barb. 396; *Mechanics' Bank v. Townsend*, 17 How. Pr. 569; *Nichols v. Nussbaum*, 10 Hun, 214.

³⁸ *Dinkelspiel v. Franklin*, 7 Hun, 339; *Phillip v. Gallant*, 62 N. Y. 256.

³⁹ *Hirsch v. Trainer*, 3 Abb. N. C. 274.

⁴⁰ *Purser v. Anderson*, 4 Edw. 17.

⁴¹ *Watson's Ex'rs v. McLaren*, 19 Wend. 562; *Weyh v. Boylan*, 85 N. Y. 394, 397.

⁴² *Mertens v. Wakefield*, 35 Misc. R. 501; 71 N. Y. Supp. 1062.

⁴³ *N. Y. Life Ins. and Trust Co. v. Beebe*, 7 N. Y. (3 Seld.) 364.

⁴⁴ *Nahe v. Bauer*, No. 1, 141 App. Div. 115; 125 N. Y. Supp. 592.

made to him for full value and are valid securities in his hands, and a purchaser relies on such declaration, the mortgagor is bound by them and cannot assert the facts in defense.⁴⁵ So, where application was made to a banking firm by one of its customers for a "good" bond and mortgage, and they furnished a bond and mortgage executed by one of the members of the firm to another, it was held that all the members of the firm, including the parties to the securities, were estopped from alleging them to be usurious and void,⁴⁶ and where the owner of a bond and mortgage has fraudulently been induced to assign them to a corporation which in turn assigned them to a *bona fide* purchaser for full value, the owner is estopped from questioning the validity of the organization of the corporation as against the *bona fide* purchaser⁴⁷ and where the husband of the owner of property sold the same as her agent and fraudulently procured her consent to having the purchase-money mortgage run to him and thereafter assigned it, the owner may not thereafter question her own act.⁴⁸ In general, one who, by clothing another with the indicia of title has put it within his power to act as the absolute owner of a chose in action, is, as against one dealing in good faith upon the apparent situation, estopped from asserting that the true situation is otherwise than he has stated or represented,⁴⁹ for if one of two innocent persons must suffer by a deceit, he who puts trust and confidence in the deceiver should be the loser rather than a stranger.⁵⁰

§ 356. Who are bound by such estoppel.—An estoppel binds the person making the statement, and all claiming under him subsequent to the time when it has become binding by the change of position which it induces, but it cannot bind strangers. It operates, as it were, as an equitable assignment of the rights of the person estopped, but it concludes no one else.⁵¹

⁴⁵ Ahern v. Goodspeed, 72 N. Y. 108, 114; Platt v. Newcomb, 27 Hun, 186; Hoefler v. Westcott, 15 Hun, 243; Gearon v. Kearney, 22 Misc. R. 285; 50 N. Y. Supp. 26. See also Commonwealth v. Councils of Pittsburgh, 34 Pa. St. 496, 520.

⁴⁶ Hoefler v. Westcott, 15 Hun, 243.

⁴⁷ Green v. Grigg, 98 App. Div. 445; 90 N. Y. Supp. 565.

⁴⁸ Talmage v. Russell, 74 App. Div. 7; 76 N. Y. Supp. 854.

⁴⁹ Green v. Grigg, 98 App. Div. 445; 90 N. Y. Supp. 565; Barnes v. Long Island Real Estate Co., 88 App. Div. 83; 84 N. Y. Supp. 951.

⁵⁰ Carpenter v. Longan, 16 Wall. 273; Savings Bank v. Cresswell, 100 U. S. 643.

⁵¹ Schafer v. Reilly, 50 N. Y. 61.

The grantee of a person bound by an estoppel is also bound by it, upon the principle that a man can only convey such rights as he has, but statements and admissions made by the grantor of a chose in action, and which have not become binding as estoppels, do not have any such effect. A declaration made by a mortgagee prior to an assignment, to the effect that the mortgage is void for usury, is not even admissible against his assignee for value,⁵² neither are any other declarations or admissions which have not influenced the conduct of the persons to whom they were made in dealing with the security.⁵³

A mortgagee who is assignor and guarantor of a mortgage is estopped from alleging in foreclosure where all other defendants have defaulted that, at the time of its assignment, the mortgage was paid. Even a receipt in writing, signed by the mortgagee, is not in itself conclusive evidence of payment as against his assignee for value, for a receipt is but a written admission, and is always capable of explanation.⁵⁴ A receipt is, however, evidence, in connection with proof of payment as part of the *res gestae*.⁵⁵

A statement of the mortgagor to the effect that there was no legal or equitable defense to the mortgage, upon the faith of which a purchaser of the security paid value, estops the mortgagor, and all thereafter claiming under him, from setting up a parol agreement between the mortgagor and mortgagee at the time of the execution of the mortgage, by which the mortgagee was to release certain portions of the premises on specified conditions.⁵⁶

A married woman may be estopped by a statement as to the validity of a mortgage which is relied upon by a purchaser, in the same manner as if she were sole.⁵⁷

§ 357. What covenants are implied in an assignment of a mortgage.—The authorities state in general terms, that the vendor of a chose in action, in the absence of express stipulations, impliedly warrants its legal soundness and validity. If there are

⁵² Booth v. Swezey, 8 N. Y. (4 Seld.) 276.

⁵³ Paige v. Cagwin, 7 Hill, 361; Smith v. Webb, 1 Barb. 230.

⁵⁴ Foster v. Beals, 21 N. Y. 247.

⁵⁵ Bank of Monroe v. Culver, 2

Hill, 531; Van Keuren v. Corkins, 66 N. Y. 77, aff'g 4 Hun, 129.

⁵⁶ Smyth v. Knickerbocker Life Ins. Co., 21 Hun, 241, aff'd 84 N. Y. 589.

⁵⁷ Smyth v. Munroe, 19 Hun, 550.

exceptions to this rule, they do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it.⁵⁸ An absolute transfer carries with it by implication also a covenant that the vendor has a perfect title,⁵⁹ except where the vendor has not the possession of the chose in action, in which case such a covenant is not implied.⁶⁰ In addition to the warranty of title on the sale of a mortgage, there is implied a warranty that it is not a forgery;⁶¹ that it is unpaid; that there is no legal defense to its collection,⁶² and that it can be enforced when it shall become due according to its terms.⁶³

In an action upon such implied warranty it is not necessary before bringing suit to offer to reassign and return the bond and mortgage,⁶⁴ and this although there might be value in their ownership in consequence of the covenant of a subsequent grantee of the mortgagor to pay them, to which defendant would be entitled on paying the judgment.⁶⁵

The implied warranty accompanying the sale of a chattel or of a chose in action is similar in effect to the covenant for quiet enjoyment in respect to lands.⁶⁶ In actions upon such covenants it is necessary to show that the possession of the grantee has been disturbed,⁶⁷ though not necessarily by process of law;⁶⁸ and in order to recover upon the implied covenants in an assignment of a chose in action, it must be shown that the assignee has actually suffered a loss that would not have come to him if the covenants had not been broken. He may voluntarily surrender his rights to the true owner, and take upon himself the burden, as against his assignor, of showing the title of the claimant;⁶⁹ but, so

58 *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Littauer v. Goldman*, 9 Hun, 231; *Farmer's Nat. Bank of Salem v. Fletcher*, 44 Iowa, 252.

59 *Burt v. Dewey*, 40 N. Y. 283; *Carman v. Trude*, 25 How. Pr. 440.

60 *Scranton v. Clark*, 39 Barb. 273, *aff'd* 6 Trans. App. 132.

61 *Corwin v. Wesley*, 2 J. & S. 109.

62 *Gans v. McGowan*, 41 App. Div. 461; 58 N. Y. Supp. 951; *Fake v. Smith*, 7 Abb. N. S. 106; *Hoeffler v. Westcott*, 15 Hun, 243.

63 *Furniss v. Ferguson*, 34 N. Y. 485, *aff'g* 3 Robt. 269.

64 *Parks v. Morris Axe & Tool Co.*, 54 N. Y. 586. See *Collins v. Pearsall*, 134 App. Div. 820; 119 N. Y. Supp. 203.

65 *Ross v. Terry*, 63 N. Y. 613.

66 *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Coolidge v. Brigham*, 5 Mete. (Mass.) 68; *Bordewell v. Colie*, 1 Lans. 141.

67 *Case v. Hall*, 24 Wend. 102.

68 *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 Hill, 599.

69 *Sweetman v. Prince*, 26 N. Y. 224; *Bordewell v. Colie*, 1 Lans. 141; *Burt v. Dewey*, 40 N. Y. 283.

long as the assignee is in the enjoyment of the thing sold, he cannot maintain an action against his assignor. Nor can he, by an amicable arrangement, settle with the claimant and extinguish the adverse title. He must submit and surrender his claims, or there must be a judicial determination in favor of the adverse claimant,⁷⁰ and even a judicial determination is not conclusive until a payment or assignment directed to be made by it has actually been made.⁷¹

On the other hand there is no implied warranty that the debt will be paid and unless the mortgagee has guaranteed the mortgage, the assignee cannot look to him for a deficiency.⁷²

§ 358. Notice of the assignment of a mortgage should be given to the mortgagor.—The assignee of a bond and mortgage, as well as assignees of other choses in action, must give notice of the assignment if he wishes to protect himself against a *bona fide* payment to the assignor, or his duly constituted agent, by the debtor.⁷³ By the express provision of the statute the recording of the assignment is not of itself to be deemed notice of such assignment to the mortgagor, or his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee.⁷⁴ If the assignee neglects to give actual notice himself, he must, in order to avoid the effect of payment to the assignor, show that the debtor, before making it, in some other way acquired knowledge of the fact. Notice may be inferred, of course, from the circumstances attending the transaction; but the true question is one of good faith. The failure to produce the bond and mortgage by the mortgagee at the time of receiving the payment, with the suggestion of a false reason to excuse it, and the insolvency of the mortgagee, are not sufficient, as a matter of law, to put the mortgagor on inquiry and charge

⁷⁰ *Bordewell v. Colie*, 1 Lans. 141.

⁷¹ *Burt v. Dewey*, 40 N. Y. 283.

⁷² *Buehler v. Pierce*, 175 N. Y. 267; 67 N. E. 573; *Willard v. Welch*, 94 App. Div. 179; 88 N. Y. Supp. 173; *Westphal v. Carter*, 1 Misc. R. 402; 20 N. Y. Supp. 945.

⁷³ *James v. Johnson*, 6 Johns. Ch. 427; 2 Cow. 246; *N. Y. Life Ins. & Trust Co. v. Smith*, 2 Barb. Ch. 82; *Trustees of Union College v. Wheeler*,

61 N. Y. 88, 111; *Heermans v. Ellsworth*, 64 N. Y. 159; *Stoddard v. Gailor*, 90 N. Y. 575; *Van Keuren v. Corkins*, 66 N. Y. 77, aff'g 4 Hun, 129; 6 T. & C. 355.

⁷⁴ *Real Prop. Law*, § 324, 1 R. S. 763, § 41; *Reed v. Marble*, 10 Paige, 409; *Barnes v. Long Island Real Estate Co.*, 88 App. Div. 83; 84 N. Y. Supp. 951; *Mueller v. Goerlitz*, 53 Misc. R. 53; 103 N. Y. Supp. 1037.

him with notice that the mortgage has been assigned.⁷⁵ A colorable or fictitious payment, plainly contrived by the mortgagor and mortgagee for the purpose of defrauding the assignee, will not affect his rights,⁷⁶ and the fact of payment must be shown by something more than the mere admission or receipt of the mortgagee.⁷⁷ If actual notice of the assignment be given to the mortgagor, subsequent payments to the mortgagee will be invalid, and will not operate to reduce the mortgage debt.⁷⁸ But if no notice is given to him, even a tender to the mortgagee, without actual payment, may discharge the mortgage lien.⁷⁹

One who purchases land from a mortgagee thereof who has purchased the land subsequent to assigning the mortgage, when the mortgage is on record without making inquiry or requiring the production of the mortgage or of the note which it was given to secure, is not a *bona fide* purchaser as against the prior assignee of the mortgage, although the assignment was not recorded, since it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only as against a subsequent purchaser of the mortgage itself.⁸⁰

In the absence of notice of the assignment, the mortgagor may negotiate with the mortgagee for a discharge of the debt upon a surrender of the land.⁸¹

If the assignment be properly recorded, it is notice to the holders of prior mortgages to such an extent as to entitle the assignee of the subsequent incumbrance to be made a party to the foreclosure of the senior one.⁸² If, however, by any means the assignment is not duly recorded, the assignee must give actual notice to the holder of a prior mortgage; and if he fails to do so, he will be cut off by a decree of foreclosure of such mortgage, although he was not made a party to the foreclosure.⁸³

⁷⁵ Foster v. Beals, 21 N. Y. 247.

⁷⁶ Brown v. Blydenburgh, 7 N. Y. 141.

⁷⁷ Foster v. Beals, 21 N. Y. 247.

⁷⁸ Mitchell v. Cook, 17 How. Pr. 110, aff'd 29 Barb. 243; s. c. rev'd on other grounds, 7 N. Y. (3 Seld.) 538. See also Reeves, Gd'n., v. Hayes, 95 Ind. 521.

⁷⁹ Hetzell v. Barber, 6 Hun, 534.

⁸⁰ Curtis v. Moore, 152 N. Y. 159;

46 N. E. 168, aff'g 10 Misc. R. 341; Purdy v. Huntington, 42 N. Y. 334. See also § 363.

⁸¹ Wanzer v. Cary, 12 Hun, 403.

⁸² Vanderkemp v. Shelton, 11 Paige, 28; Pickett v. Barron, 29 Barb. 505; Winslow v. McCall, 32 Barb. 241; Ely v. Scofield, 35 Barb. 330.

⁸³ Moore v. Sloan, 50 Barb. 442.

No notice to the mortgagor of the assignment of a bond and mortgage is necessary to protect the assignee thereof against a counterclaim arising subsequent to such assignment in favor of the mortgagor and against the mortgagee.⁸⁴

84 Central Trust Co. v. Weeks, 15 App, Div. 598; 44 N. Y. Supp. 828. See Beckwith v. Union Bank of New York, 9 N. Y. 211.

CHAPTER XI

THE PAYMENT AND DISCHARGE OF MORTGAGES

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WHAT PAYMENT WILL DISCHARGE A MORTGAGE.

§ 359. As to whether a payment effects a discharge or a transfer.—The fact that a mortgagor pays money to the mortgagee, or that, after the making of the mortgage, the mortgagee becomes indebted to the mortgagor in continuing the transactions out of which the mortgage indebtedness arose, does not necessarily operate to satisfy or discharge the mortgage. Whether the payment is or is not to be credited on the mortgage debt, or the new debt is or is not to be offset against the old, are questions purely of fact, depending upon the intentions of the parties.¹ In the case of bonds secured by a mortgage endorsements upon the former are not conclusive as a matter of law as to the amount paid.²

Payment of a mortgage by a third person is a good payment if it is afterward ratified.³ But an agreement to pay a mortgage before it is due is not enforceable unless founded upon some new consideration.⁴

Where lands were condemned and the awards were made to the holders of mortgages executed by the owners, with the latter's consent, under the erroneous assumption that both mortgages covered the lands taken and the mortgagees applied the money upon the mortgages and satisfied one of them, the owners are estopped from alleging that the lands were not covered by both of the mortgages and may not afterward have the award modified so as to be payable to them, without reinstating or offering to reinstate the mortgage that has been satisfied.⁵

A direction in a will for the application of a stated percentage

¹ *Peck v. Minot*, 3 Abb. App. Dec. 465; *Bookes v. Hathorn*, 20 Hun, 503; *Toll v. Hiller*, 11 Paige, 228.

Where a trial court makes no finding of payment and no request for such a finding is made, though evidence is introduced to show it, the Court of Appeals will not look into the facts to reverse the judgment. *Ostrander v. Hart*, 130 N. Y. 406; 29 N. E. 744.

² *Whitman v. Foley*, 125 N. Y. 651; 26 N. E. 725, holding that a finding by the referee of the pay-

ments of a greater sum than indicated by the endorsements is not an error in law when supported by parol evidence.

³ *Heermans v. Clarkson*, 64 N. Y. 171.

⁴ *Feldman v. Rockford Co.*, 70 Misc. R. 66; 126 N. Y. Supp. 646; *Lee v. Timken*, 23 App. Div. 349; 48 N. Y. Supp. 251.

⁵ *Matter of Grade Crossing Commissioners*, 65 Misc. R. 73; 119 N. Y. Supp. 84.

of the net income of the trust estate to the discharge of mortgages on real estate forming a part thereof is invalid, not only for the reason that it essays to set up a trust for a purpose prohibited by the statutes, but also because it involves an accumulation of income for a purpose not permitted.⁶

§ 360. Keeping mortgage alive by express agreement.—Even if the payment is made by the mortgagor out of his own means on account of the mortgage debt, yet if it is agreed at the time of the payment that the mortgage shall not be extinguished, but shall be kept alive and be transferred to another creditor of the mortgagor, and payment is made and received on that condition, the agreement is valid, and such a payment will not extinguish the mortgage; and the creditor to whom the mortgage is assigned under such an arrangement may enforce it. No one is injured by such a transaction. The debtor could make the payment for the account of the creditor to whom he desired the mortgage assigned, and the creditor could ratify the transaction by accepting the assignment. The result is the same as if the creditor had himself purchased the mortgage with means furnished by the debtor.⁷ Thus the performance of an agreement by a mortgagor to pay the mortgagee a sum equal to the amount of his debt, if he would assign the mortgage to the mortgagor's attaching creditor as security instead of the attachment, does not extinguish the mortgage; and it can be enforced by the creditor, although, for a temporary purpose, he had reassigned it to the mortgagee, who afterward assigned it back again.⁸

Where a person paying the amount due upon a bond and mortgage is under no equitable obligation to discharge it, the question as to whether such payment is or is not a discharge will be governed by the intent with which the payment is made, and the mortgage will not be deemed to be discharged if the intent was to keep it alive as a valid security.⁹

⁶ Real Prop. Law, § 76; 1 R. S. 726, §§ 37, 38; *Hascall v. King*, 162 N. Y. 134; 56 N. E. 515; *Matter of Fisher*, 4 Misc. R. 46; 25 N. Y. Supp. 79; *Matter of Snyder*, 35 Misc. 588; 72 N. Y. Supp. 61.

⁷ Per *RAPALLO, J.*, in *Hubbell v. Blakeslee*, 71 N. Y. 63, 70, rev'g 8 Hun, 603; *Coles v. Appleby*, 22 Hun, 72. See also *Sheddy v. Geran*, 113

Mass. 378; *Bolles v. Wade*, 4 N. J. Eq. (3 Green.) 458; *Hoy v. Bramhall*, 19 N. J. Eq. 74; *Goulding v. Bunster*, 9 Wis. 513.

⁸ *Sheddy v. Geran*, 113 Mass. 378.

⁹ *Coles v. Appleby*, 87 N. Y. 114; *Champney v. Coope*, 32 N. Y. 543; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Kellogg v. Ames*, 41 N. Y. 263.

Where money was advanced to a mortgagor to take up a mortgage, and the money was paid to the mortgagee, who, some days later assigned the mortgage to the person who had advanced the money, it was held that if this assignment was made in pursuance of a contract between the assignee and the mortgagor, it was a valid security; but if the assignment was made after the money had been paid to the mortgagee, and not in pursuance of any contract, the mortgage was extinguished and afforded no security to the assignee.¹⁰

§ 361. A mortgage lien may be kept alive to do equity.—A mortgage is not discharged, either as to the owner of the property or as to subsequent incumbrancers, if paid by the owner of the equity of redemption, but with the funds of a third person, for the purpose of purchasing it for such third person.¹¹

Where a bond and mortgage was owned by a corporation which declined to execute an assignment, but delivered instead a certificate of satisfaction, it was nevertheless held to be unpaid, and was enforced in favor of a person who, at the request of the owner of the equity of redemption, and under an agreement for the assignment, had paid the money.¹²

A mortgage is not satisfied when paid by joint mortgagors unequally, and assigned by consent to the wife of the largest payer,¹³ or when paid by and assigned to one of two tenants in common of the equity of redemption.¹⁴ In these cases the mortgage survives for the purpose of enforcing contribution.

A mortgage given to an accommodation indorser of a note to indemnify him, is not discharged by a payment of the note made by such indorser, even though a memorandum of full payment is made on the note.¹⁵ On the same principle a mortgage of personal property, made to secure an indorser on a note, is not discharged by the indorser's lending money to the mortgagor which is applied to the payment of the note, unless the parties intend that the mortgage shall thereby be discharged.¹⁶

A junior mortgagee who pays a senior mortgage, and has it

10 *Nosler v. Haynes*, 2 Nev. 53.

11 *Denton v. Cole*, 30 N. J. Eq. 244; *Nosler v. Haynes*, 2 Nev. 53; *Champney v. Coope*, 32 N. Y. 543.

12 *Johnson v. Parmly*, 14 Hun, 398.

13 *Gantt v. Gantt*, 15 S. C. 619.

14 *Barker v. Flood*, 103 Mass. 474.

15 *Bendey v. Townsend*, 109 U. S. 665; 3 S. Ct. 482.

16 *Bryant v. Pollard*, 92 Mass. (10 Allen) 81.

assigned to himself, and afterward assigns it to a third person in order that a sale may be made under it, and attends at such sale and participates therein by bidding on the property, is estopped from claiming that the mortgage is paid, though the result of the sale is to deprive him of his junior lien.¹⁷

§ 362. A mortgage may be held discharged though an assignment be taken.—The same principles of equity which will keep a mortgage alive in order to do justice, will operate to decree a mortgage satisfied where that is necessary to protect substantial rights, and payment by a person equitably bound is a discharge, even though an assignment be taken.¹⁸

A person who, with the funds of the mortgagor and as his agent, has paid off a mortgage, cannot keep the security alive by having it assigned to himself;¹⁹ even if he has a valid claim against the mortgagor and merely seeks to hold the mortgage as security for such claim.²⁰

So, where part of the consideration for the purchase of real property is applied to procuring an assignment of a mortgage thereon to the agent of the purchaser prior to the conveyance of the property, the mortgage being assigned and not satisfied in order to protect the purchaser for the amount advanced, it was held that after the conveyance the purchaser's agent could not enforce the mortgage against other lands covered by it and owned by the seller, the defense of payment being valid.²¹

If an assignment of a mortgage is made at the request of the mortgagor who furnishes a part of the consideration, the mortgage in the hands of the assignee and against subsequent incumbrancers at the time of the assignment, is paid to the extent of the portion of the purchase price advanced by the mortgagor.²²

A grantor who covenants against incumbrances and who subsequently pays off a mortgage existing at the time of the con-

¹⁷ Pursley v. Forth, 82 Ill. 327.

¹⁸ Knolls v. Barnhart, 71 N. Y. 474; Mickles v. Dillaye, 15 Hun, 296; Mickles v. Townsend, 18 N. Y. 575; Russell v. Pistor, 7 N. Y. 171; Fitch v. Cotheal, 2 Sand. Ch. 29; Collins v. Torry, 7 Johns. 278. See also Clay v. Banks, 71 Ga. 363; Carlton v. Jackson, 121 Mass. 592; Wadsworth v. Williams, 100 Mass. 126;

Braman v. Dowse, 12 Cush. (Mass.) 227; Brown v. Lapham, 3 Cush. (Mass.) 554.

¹⁹ Sheffield's Ex'r v. McClain, 18 N. J. Eq. 128.

²⁰ Nichols v. Lee, 10 Mich. 526.

²¹ Mulligan v. Cocks, 150 App. Div. 246.

²² Hoy v. Bramhall, 19 N. J. Eq. 74.

veyance, cannot, by taking an assignment to himself, keep the security alive, since the payment must be regarded as having been made for the benefit of the grantee.²³

If a grantee who has taken land expressly subject to a mortgage which he covenanted to pay, pays the amount due on the mortgage and takes an assignment to himself, the mortgage will be deemed paid as to the widow of the grantor who joined in the mortgage but not in the deed.²⁴ So a purchaser who has not assumed a personal obligation to pay a mortgage, but who has taken his title subject to it, may not, by taking an assignment of the mortgage debt, obtain a right to set it off against an unpaid balance still owing to his vendor on the purchase.²⁵

When a married woman gave to a firm of which her husband was a member, her note for his indebtedness to the firm; and the firm indorsed the note and gave a mortgage to secure its payment, and she voluntarily paid the note and took an assignment of the mortgage, it was held that the mortgage was discharged by her.²⁶

§ 363. An assignment will always be sustained as against one having no equitable claim upon the person paying its consideration. So, where the holder of an equity of redemption in a parcel of land, who was under no obligation to pay either of two mortgages existing on the land and duly recorded, in ignorance of the second mortgage, for the purpose of perfecting his title, made a part payment on the first mortgage, and afterward, on being informed of the second mortgage, paid the balance due on the first mortgage and caused that mortgage to be assigned to a third person in trust for himself, it was held that the holder of the second mortgage was not entitled to redeem the first except by paying its full amount.²⁷

It will not lie in the mouth of a mortgagee whose entire demand has been paid, to complain that the assignment he gave should have been a certificate of satisfaction, and that he was defrauded into executing it.²⁸

23 Brundred v. Walker, 12 N. J. Eq. 140.

24 McCabe v. Swap, 96 Mass. (14 Allen) 188.

25 Atherton v. Torrey, 43 Ind. 211.

26 Whitney v. Franklin, 28 N. J. Eq. 126.

27 Ryder v. Gaes, 130 Mass. 227.

28 Jewitt v. Davis, 92 Mass. (10 Allen) 68.

§ 364. Any act which suffices to discharge a debt discharges also a mortgage made to secure it, and the surrender of a note by the payee to the maker is *prima facie* a satisfaction or release of the debt.²⁹

A parol agreement by which the mortgage debt is consented to be cancelled in compromise of a fraud, is also a sufficient satisfaction of it.³⁰ Payment of a debt secured by mortgage discharges the lien.³¹ Payment may be by rendition of service.³² The debt is, indeed, the life of the mortgage, without which it can have no existence, since there can be no security where there is nothing which can be secured. So it has been said that the arrest of the mortgagor on final process, discharges both the debt and the lien, though this is not the effect of an arrest upon *mesne* process.³³

A mortgage made to a surety on a note of the mortgagor for his indemnity, has no vitality after a new note has been given to, and accepted by, the creditor, signed by the mortgagor with other sureties,³⁴ or after the discharge of the surety by the creditor,³⁵ or after the note has been paid.³⁶

A mortgage has been held to be discharged where a payment was made with intent to effect such discharge, but, by mistake, a certificate of satisfaction of a similar mortgage on adjoining property was given and recorded, by means of which the mortgagee lost his lien on the mortgage described in the certificate.³⁷ The mistake was held to be imputable to the mortgagee under the special circumstances of the case.

Where a judgment of absolute divorce granted in favor of a wife, provided for the payment of a certain sum per year as alimony "so long as she shall live," and that such payments should be secured by a mortgage, the death of the husband subsequent to the execution of such mortgage terminates the lien thereof.³⁸

²⁹ *Sherman v. Sherman*, 3 Ind. 337.

³⁰ *Green v. Fry*, 93 N. Y. 353.

³¹ *Smith v. Durell*, 16 N. H. 344; 41 Am. Dec. 732.

³² *Lombard v. Moore*, 6 Misc. R. 469; 27 N. Y. Supp. 523.

³³ *Terry v. Woods*, 14 Miss. 139.

³⁴ *Abbott v. Upton*, 36 Mass. (19 Pick.) 434.

³⁵ *Stunner v. Bachelder*, 30 Me. 35.

³⁶ *Franklin Bank v. Pratt*, 31 Me. 501.

³⁷ *Barnes v. Wintringham*, 32 Hun, 43.

³⁸ *Wilson v. Henman*, 182 N. Y. 408; 75 N. E. 236, rev'g 99 App. Div. 41; 90 N. Y. Supp. 746.

A claim that a mortgage was discharged by an executory oral agreement will not prevail unless established by clear and convincing proof.³⁹

§ 365. **Loss of the remedy for the debt.**—Where a mortgage was given by a principal debtor to his surety, and was transferred by the latter to the creditor for value; the subsequent discharge in bankruptcy of both principal and surety was held not to destroy the lien of the mortgage, or to affect the right of the assignee to foreclose.⁴⁰ So, the lien of a mortgage is not impaired by a discharge of the mortgagor from the debt by composition proceedings in bankruptcy.⁴¹ And where one mortgaged his real estate to secure the debt of another, a subsequent discharge in bankruptcy of the latter did not release the mortgagor from his obligation on the mortgage as surety.⁴²

A discharge from the debt under a State insolvent law will not operate to discharge the lien of a mortgage given to secure it.⁴³

A mortgage may be enforced though the debt which it is given to secure is barred by the statute of limitations.⁴⁴

Where the claim of the mortgagee against the personal estate of a deceased mortgagor was lost by failure to present the note secured by mortgage within the time required by law, this did not preclude him from enforcing the mortgage security.⁴⁵

And, where the holder of a promissory note indorsed it to a third person, and gave the latter a mortgage to secure its payment, and the assignee failed to charge the indorser by notice of non-payment, this did not release the land from the burden of the mortgage.⁴⁶

39 *Hungerford v. Snow*, 129 App. Div. 816; 114 N. Y. Supp. 127; 1 Civ. Proc. R. N. S. 115.

40 *Carlisle v. Wilkins*, Adm'r, 51 Ala. 371.

41 *Cohn v. Colby*, 57 How. Pr. 168.

42 *Burtis*, Adm'r., v. *Wait*, 33 Kans. 478; *In re Campbell*, 1 N. B. R. 165; *Cole v. Duncan*, 58 Ill. 176; U. S. Rev. St. (1878), § 5118; *In re Hartell*, 7 N. B. R. 559; *Reed v. Bullington*, 11 N. B. R. 408; *Meeks v. Whately*, 10 N. B. R. 498; *Roberts v. Wood*, 38 Wis. 60.

43 *Heyer v. Pruyn*, 7 Paige, 465, 469.

44 *Gillette v. Smith*, 18 Hun, 10; *Pratt v. Huggins*, 29 Barb. 277; *Heyer v. Pruyn*, 7 Paige, 465; *Borst v. Corey*, 15 N. Y. (1 Smith) 510. See also *Baldwin v. Norton*, 2 Conn. 163; *Thayer v. Mann*, 19 Pick. (Mass.) 537; *Powell v. Smith*, 30 Mich. 451; *Spears v. Hartley*, 3 Esp. 81; *Toplis v. Baker*, 2 Cox, 123.

45 *Graton Bank v. Doe*, 19 Vt. 463.

46 *Mitchell v. Clark*, 35 Vt. 104;

Where a mortgagor conveys the mortgaged premises to a mortgagee, who assumes payment of the debt, the grantee thereupon becomes the primary debtor, and the land also stands as the mortgagor's indemnity from his personal obligation. A release of the mortgagor, under these circumstances, from all liability from the debt, is a personal discharge merely, and does not discharge either the mortgage security or the personal obligation of the purchaser.⁴⁷ And even if the purchaser has made no personal covenant to assume, but has merely taken the land charged with the lien, such a release will not exonerate the land.⁴⁸

WHO MAY RECEIVE PAYMENT.

§ 366. Since the debt is the life of the mortgage, payment of the debt will discharge the lien.⁴⁹ The debt may be paid or discharged in any way that the parties may agree upon.⁵⁰ The payment may be either to the owner of the mortgage or one duly authorized by him to receive payment.⁵¹

The person entitled to receive payment of the debt is the person whose certificate of satisfaction is necessary to cancel the lien, and this is so even if such person is not the nominal mortgagee.⁵² Thus, where a mortgage was made to Jasper Waterman, by the terms of which interest was to be paid annually to his mother, Sarah Waterman, during her life, and at her death part of the principal was to be paid to Jasper, and the balance to his brother's minor children as they respectively became of age; and after the death of the mother and the coming of age of such infants, the money was paid to Jasper, who executed a certificate of satisfaction, such certificate of satisfaction was set aside as unauthorized and void.⁵³ The infant beneficiaries under the mortgage were held to be, for all practical pur-

Hilton v. Catherwood, 10 Ohio St. 109.

⁴⁷ Bentley v. Vanderheyden, 35 N. Y. 677.

⁴⁸ Jumel v. Jumel, 7 Paige, 591; Tripp v. Vincent, 3 Barb. Ch. 613.

⁴⁹ Jackson v. Stackhouse, 1 Cow. 122; Jackson v. Blodget, 5 Cow. 202; Langdon v. Buel, 9 Wend. 80.

⁵⁰ Griswold v. Griswold, 7 Lans. 72.

⁵¹ Forbes v. Reynard, 113 App.

Div. 306; 98 N. Y. Supp. 710, Forbes v. Reynard, 49 Misc. R. 154; 98 N. Y. Supp. 708; Conner v. Watson, 27 Misc. R. 444; 59 N. Y. Supp. 213; 29 Civ. Proc. Rep. 153.

See § 378 as to possession of bond and mortgage by agent.

⁵² Stiger v. Bent, 111 Ill. 238; Bank v. Eldridge, 102 U. S. 545.

⁵³ Waterman v. Webster, 33 Hun, 611; McPherson v. Rollins, 21 W. Dig. 254.

poses, parties to the mortgage as effectually as if they had been assignees of it.⁵⁴

The statute directing the clerk to discharge a mortgage on the record on the presentation of a certificate of the mortgagee, his personal representatives or assigns, acknowledged, etc.,⁵⁵ does not give to the mortgagee power to discharge it when he has no right to receive the money secured by it.⁵⁶

A mortgagor may pay or settle with the person having the apparent authority to receive satisfaction, and a discharge executed by such person will prevail against a secret equity, of which the person making the payment has no notice.⁵⁷

A release from the heirs of a deceased mortgagee will be inoperative to cancel the mortgage; such release must be executed by his executor or administrator.⁵⁸ A release from the next of kin will also be void.⁵⁹

§ 367. A mortgage made to several persons to secure several debts or liabilities can be fully discharged only by the consent of all persons claiming rights under it.⁶⁰

So, where a mortgage is made as security for the payment of money to persons other than the mortgagee, the latter has no authority to accept full payment of the mortgage himself and give satisfaction thereof.⁶¹ And, where three indorsements were procured upon a bill of exchange and a mortgage of indemnity given to the three indorsers; and two of them thereafter acknowledged satisfaction after a new obligation, similarly indorsed, had been given to raise money for its payment, it was held that an entry of discharge on such acknowledgment was no release.⁶²

A mortgage made to an indorser by the maker of a note,

⁵⁴ Citing *Pattison v. Hull*, 9 Cow. 747; *Barlow v. Myers*, 64 N. Y. 44; *Payne v. Wilson*, 74 N. Y. 354, 355; *Perot v. Lavasseur*, 21 La. Ann. 529. ⁵⁵ Real Prop. Law, § 321; 1 R. S. 761, § 28.

⁵⁶ *Waterman v. Webster*, 33 Hun, 611; *Heilbrun v. Hammond*, 13 Hun, 475; *Beldon v. Meeker*, 47 N. Y. 308. See *Lynch v. Pfeiffer*, 110 N. Y. 33; 17 N. E. 402 holding that a mortgagee of premises has sufficient title to uphold a release to him of a prior mortgage, and that a prior mortgage,

so released, ceases to be an incumbrance.

⁵⁷ *McConnell v. Mackin*, 22 App. Div. 537; *Mason v. Beach*, 55 Wis. 607.

⁵⁸ *Douglas v. Durin*, 51 Me. 121. ⁵⁹ *Woodruff v. Mutscher*, 34 N. J. Eq. 33.

⁶⁰ *People v. Keyser*, 28 N. Y. 230; *Burnett v. Pratt*, 22 Pick. (Mass.) 556.

⁶¹ *Waterman v. Webster*, 108 N. Y. 157; 15 N. E. 380.

⁶² *Thorton v. Irwin*, 43 Mo. 153.

merely to secure the indorser, may be discharged by the latter at his pleasure; but where it is agreed that the indorser shall hold the mortgage, not only for his own security, but also for security of the creditor, a conveyance of the mortgaged property to a party who had notice of the agreement will not defeat the equitable rights of the creditor.⁶³ The rule would be different if the conveyance had been to a purchaser paying value on the faith of the satisfaction and without notice of the special purpose for which the mortgage had been given.⁶⁴

Where a mortgage is made to trustees for the benefit of themselves and other creditors, it has been held that such trustees could, in the wise exercise of their discretion, execute a satisfaction of the mortgage without the signatures of the other creditors.⁶⁵

If one of two persons holding several demands secured by the same mortgage is also the duly authorized agent of the other, a payment to him discharges the debts of both.⁶⁶

§ 368. The recording acts have application to a certificate of discharge of a mortgage, and therefore where a mortgage is made to secure one or more notes, a discharge upon the record is valid, so as to protect a purchaser or junior incumbrancer, if there be no record of any assignment of any of such notes, and in the absence of notice.⁶⁷ But a mortgagor who pays to the original mortgagee after the transfer of the note is not entitled to any protection.⁶⁸

§ 369. Forged certificate of satisfaction.—No right can be founded upon a forgery, and a forged certificate of satisfaction, though duly recorded, will afford no protection to a purchaser⁶⁹ or mortgagee relying upon it.⁷⁰ But it has been contended and held that a person whose rights are attempted to be affected by

⁶³ *Hartford & N. Y. Transportation Co. v. First Nat. Bank*, 46 Conn. 569.

⁶⁴ *Mason v. Beach*, 55 Wis. 607; 13 N. W. 884.

⁶⁵ *Bendheim v. Morrow*, 9 App. Div. 617; 41 N. Y. Supp. 812.

⁶⁶ *Ely v. Bush*, 89 N. C. 358.

⁶⁷ *Bacon v. Schoonhoven*, 19 Hun, 158, aff'd 87 N. Y. 446. See also *Ayers v. Hays*, 60 Ind. 452; *Bowling*

v. Cook, 39 Iowa, 200; *Cornog v. Fuller*, 30 Iowa, 211; *Swartz's Ex'r v. List*, 13 Ohio St. 419; *Henderson v. Pilgrim*, 22 Tex. 464.

⁶⁸ *Burhams v. Hutcheson*, 25 Kans. 625.

⁶⁹ *Harris v. Cook*, 28 N. J. Eq. 277.

⁷⁰ *Vohmann v. Michel*, 185 N. Y. 420; 78 N. E. 156.

such forgery owes a duty to third persons who may rely upon the record either to enforce his mortgage by foreclosure, or to bring an action to reinstate it upon the record within a reasonable time; and that, if he fails to do one of these, he may be deemed to be estopped from alleging that the paper is a forgery.⁷¹ The notion that a man may be estopped by not bringing a lawsuit, is not in harmony with the general current of judicial reasoning, and the case above alluded to has been criticised and overruled.⁷² The only obligation which a person owes to others likely to rely upon a forged paper purporting to be executed by him, is to answer truthfully all inquiries made to him concerning it, and not to keep silence when silence could be construed as an affirmation of the genuineness of the paper. He must be honest and candid, and when a failure to speak may operate as a fraud upon third persons, even silence may operate as an estoppel.⁷³

But no affirmative action is demanded, and the forged paper being a nullity may be disregarded until some claim is made under it.⁷⁴

Where a mortgagee indorsed his name with seal on the mortgage, and parted with the possession of it, and satisfaction was thereafter written above his signature without his knowledge, and duly recorded, an innocent purchaser was held to be protected.⁷⁵

§ 370. Authority of agent may be established by estoppel.—No equity arises, even in favor of a subsequent incumbrancer, where there is a release by one claiming to be the agent of the mortgagee, but is not so.⁷⁶ But an authority may be inferred from the actions of a mortgagee, which would estop him from denying such authority; as, where a father has so conducted himself as to authorize third persons to believe that his son was the real owner

⁷¹ *Costello v. Mead*, 55 How. Pr. 356.

⁷² *Viele v. Judson*, 82 N. Y. 34, 39, overruling *Costello v. Mead*, 55 How. Pr. 356.

⁷³ *Viele v. Judson*, 82 N. Y. 34, 39; *Niven v. Belknap*, 2 Johns. 573. See also *Gregg v. Von Phul*, 1 Wall. (U. S.) 280; *Horn v. Cole*, 51 N. H. 287; *Stevens v. Dennett*, 51 N. H. 324; *Chapman v. Chapman*, 59 Pa. St. 214; *Hill v. Epley*, 31 Pa. St.

331; *Cornish v. Abington*, 4 Hurl. & N. 550; *Pickard v. Sears*, 6 Ad. & El. 469; *Gregg v. Wells*, 10 Ad. & El. 90.

⁷⁴ *Viele v. Judson*, 82 N. Y. 34. See also *Meley v. Collins*, 41 Cal. 663; *Chandler v. White*, 84 Ill. 435.

⁷⁵ *City Council of Charleston v. Ryan*, 22 S. C. 339; 53 Am. Rep. 713.

⁷⁶ *McKnight v. Clark*, 29 N. J. Eq. 105.

of the mortgage.⁷⁷ An agent may also be clothed with such authority as will estop his principal.⁷⁸

§ 371. When one of several mortgagees may acknowledge satisfaction.—According to the decisions in this State, a mortgage is but a security, and is treated as a mere personal contract.⁷⁹ If there be more than one mortgagee, so far as the mortgagor is concerned they are to be regarded as one person, and he has a right to deal with each as representing all.⁸⁰ By accepting a joint mortgage, each mortgagee gives to every other the power which this principle implies, as each member of a copartnership clothes each of his copartners with power to bind him in all matters within the scope of their joint business. Except for the purpose of receiving payment and acknowledging satisfaction, the powers of an ordinary joint obligee over the obligation would probably not correspond with those of a partner, but to that extent they are identical, and the obligor may safely pay to one of several joint obligees.⁸¹ The death of one of two joint mortgagees does not deprive the other of the right to receive payment of and to discharge a mortgage held by both, but renders such right exclusive in the survivor.⁸² In all cases, however, of a discharge of a mortgage by one of two or more joint mortgagees, the person receiving the payment is, in equity, treated as a trustee for the money received by him for the benefit of those entitled. His right to receive payment and discharge the mortgage is a mere legal right, and he has no exclusive title to the fund.⁸³

§ 372. One of two or more executors may lawfully receive payment of and discharge an obligation due to the estate of his testa-

⁷⁷ McCabe v. Farnsworth, 27 Mich. 52.

⁷⁸ Central Trust Co. v. Folsom, 167 N. Y. 285; 60 N. E. 599; Johnstone v. Horowitz, 139 App. Div. 800; 124 N. Y. Sapp. 689.

⁷⁹ Green v. Hart, 1 Johns. 580; Runyan v. Mersereau, 11 Johns. 534; Martin v. Mowlin, 2 Burr. 978.

⁸⁰ Carman v. Pultz, 21 N. Y. 550.

⁸¹ The People v. Keyser, 28 N. Y. 235; Pierson v. Hooker, 3 Johns. 68; Austin v. Hall, 13 Johns. 286; Fitch v. Forman, 14 Johns. 172;

Bulkley v. Dayton, 14 Johns. 387; Murray v. Blatchford, 1 Wend. 583; Stuyvesant v. Hall, 2 Barb. Ch. 151. See also Wright v. Ware, 58 Ga. 150; Bowes v. Seeger, 8 Watts & S. (Pa.) 222.

⁸² Per SELDEN, J., in The People v. Keyser, 28 N. Y. 235. See also Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. 678.

⁸³ Petty v. Styward, 1 Eq. Cas. Abr. 290; 2 Fonbl. Eq. 103, and notes; 2 Story's Eq. Jur. § 1206; 2 Powell on Morts. 699, 700.

tor, whether it be made to his testator or to him and his co-executor, or whether his co-executor be dead or alive; and one of two administrators may do the same.⁸⁴ The same power belongs to a surviving trustee.⁸⁵ An executor or administrator may make a valid executory contract to release a mortgagor from liability on a bond held by the estate if he will convey the mortgaged premises to other parties.⁸⁶

§ 373. A receiver authorized to execute upon payment formal satisfaction and discharge of mortgages in his hands as such officer, has authority to receive payment of the amount of a mortgage, although the same may not be due at the time.⁸⁷

§ 374. County treasurers have the power to release the whole or any portion of the property covered by mortgages to them, and that without direction of the court, and without the knowledge of the beneficiaries,⁸⁸ or to assign such mortgages to *bona fide* purchasers for full value, and such purchaser or assignee will get a good title even if the county treasurer absconds.⁸⁹ But this rule does not prevail where the moneys invested are the proceeds of the sale of infants' lands in partition. Such mortgages can be regularly cancelled only by order of the court.⁹⁰

§ 375. Power of a foreign executor or administrator.⁹¹—It is a principle arising from international comity, that personal property has no locality, and that it is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon the owner dying intestate.⁹² A

⁸⁴ Stuyvesant v. Hall, 2 Barb. Ch. 151; Douglass v. Satterlee, 11 Johns. 16; Murray v. Blatchford, 1 Wend. 583; Wheeler v. Wheeler, 9 Cow. 34; Bogert v. Hertell, 4 Hill, 492; People v. Miner, 37 Barb. 466; 23 How. 223, rev'g 32 Barb. 612. See also Weir v. Mosher, 19 Wis. 311.

⁸⁵ Hill on Trusts and Trustees (3d Am. ed.) 442; Lewin on Trusts and Trustees, 284; The People v. Keyser, 28 N. Y. 228; The People v. Sigel, 46 How. Pr. 151.

⁸⁶ Sanford v. Story, 15 Misc. R. 536; 38 N. Y. Supp. 104.

⁸⁷ Heermans v. Clarkson, 64 N. Y. 171; Olcott v. Heermans, 3 Hun, 431.

⁸⁸ Baldwin v. Cray, 30 Hun, 422.

⁸⁹ County of Tompkins v. Ingersoll, 81 App. Div. 34; 81 N. Y. Supp. 242; Code Civ. Pro. §§ 741-749.

⁹⁰ Board of Supervisors of Tompkins Co. v. Bristol, 99 N. Y. 316. See Waydell v. Hutchinson, 146 App. Div. 448.

⁹¹ See articles in 34 Alb. L. J. 263, 286.

⁹² Story's Conf. of Laws, §§ 376, 380, 383; 2 Kent's Com. 428, 429; Holmes v. Remsen, 4 Johns. Ch. 460; Shultz v. Pulver, 3 Paige, 182; 11 Wend. 363; Vroom v. Van Horne, 10 Paige, 549.

mortgage is personal property, and the rights of next of kin, legatees, and others, to a mortgage, are to be determined by the law of the domicile of the mortgagee. But the right which an individual may claim to personal property in one country, under title from a person domiciled in another, can be asserted only by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed; but in respect to the legal assertion of that title, it has no extraterritorial force. As a result of this doctrine, it is now generally held everywhere, and it is well settled in this State, that an executor or administrator appointed in another State has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed.⁹³ But if residents of this State have in their possession property which belongs to a party domiciled abroad, or are indebted to him, they may recognize any valid title claimed under him arising out of any act *in pais*, by testament or by succession upon intestacy, and may voluntarily deliver over the property or make payment of the debt. In *Vroom v. Van Horne* (10 Paige, 549), Chancellor WALWORTH stated that the result of the cases in this State seemed to be that a foreign administrator appointed by the proper tribunal of the decedent's domicile, was authorized to take charge of the property here, and to receive debts due to the decedent in this State, where there was no conflicting grant of letters here, and it could be done without suit.⁹⁴

§ 376. (*Continued.*)—An executor or administrator of a deceased non-resident mortgagee, appointed by the proper jurisdiction in the place of domicile of the mortgagee, may receive payment of the mortgage, and execute a satisfaction price thereof, though our courts will not aid him in compelling payment. He may even foreclose the mortgage by advertisement in this State, that being a matter of contract and not of jurisdiction,⁹⁵ and his

93 DENIO, J., in *Parsons v. Lyman*, 20 N. Y. 112; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Vroom v. Van Horne*, 10 Paige, 549.

94 *Parsons v. Lyman*, 20 N. Y. 115; *Trecothick v. Austin*, 4 Mason, 33; *Williams v. Storrs*, 6 Johns. Ch.

353; *Doolittle v. Lewis*, 7 Johns. Ch. 45.

95 *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Averill v. Taylor*, 5 How. Pr. 476; 1 Code R. N. S. 213; *People ex rel. Lewkowitz v. Fitzgerald*, 29 Abb. N. C. 471.

assignee may foreclose by action, the disability to sue being personal, and not an infirmity inhering in the subject of the action,⁹⁶ but he cannot himself be heard in our courts without having qualified under our laws. If there be a conflict between a foreign executor or administrator and one appointed in this State, the authority of the domestic executor or administrator to receive payment of debts and to discharge mortgages is exclusive, and a satisfaction of a mortgage by a foreign executor or administrator is no defense to an action by the domestic executor or administrator to foreclose.⁹⁷

§ 377. An assignee of a mortgage, who holds it as security.—When a mortgage is assigned as security, the assignee may foreclose and hold the fund over and above his debt in trust for the assignor,⁹⁸ and, since he may compel payment, he may lawfully receive it and give a sufficient acquittance and discharge.

§ 378. Possession of the bond is in some cases evidence of an authority to collect.—Payment may as well be made to an agent of the mortgagee as to the mortgagee personally. Possession of the mortgage, and particularly of the bond, as representing the debt, has been thought to be evidence of authority to receive payment of interest,¹ and even of principal. In the latter case, however, it would seem that to hold a person bound by a payment to his alleged agent, such agent must both have invested the money and have possession of the securities, and that either of these elements in the absence of the other would be insufficient.² This rule is most often invoked where the payment has been made to an attorney.³ Payments made in good faith to the son of the mortgagee in possession of the papers are valid, but the presumption of authority in the son to receive payments ceases on the death of his father,⁴ for in the case of any agent his

⁹⁶ Peterson v. Chemical Bank, 29 How. Pr. 240; 32 N. Y. 21; Smith v. Tiffany, 16 Hun, 552.

⁹⁷ Stone v. Scripture, 4 Lans. 186.

⁹⁸ Slee v. Manhattan Co., 1 Paige, 48; Norton v. Warner, 3 Edw. 106.

¹ Van Keuren v. Corkins, 4 Hun, 129, aff'd 66 N. Y. 77.

² Central Trust Co. v. Folsom, 167 N. Y. 285; 60 N. E. 599; Frank v.

Tuozzo, 26 App. Div. 447; 50 N. Y. Supp. 71.

³ Crane v. Gruenewald, 120 N. Y. 274; 24 N. E. 456; O'Loughlin v. Billy, 95 App. Div. 99; 88 N. Y. Supp. 567; Spencer v. Weber, 26 App. Div. 285; 49 N. Y. Supp. 687, aff'd 163 N. Y. 493; 57 N. E. 753; McConnell v. Mackin, 22 App. Div. 537; 48 N. Y. Supp. 18.

⁴ Megary v. Funtis, 5 Sandf. 97.

authority is terminated by the death of his principal.⁵ Where money has been invested through an attorney, who is allowed to retain possession of the bond and mortgage, these facts together justify the mortgagor in assuming that the attorney is authorized to make collections both of principal and interest, and to collect the principal in one sum or in instalments. In order to afford a perfect protection to the mortgagor, however, he should take the precaution to require the production of the bond at the time of each payment, and the indorsement thereon of the payments as made. The withdrawal of the bond by the mortgagee will work a revocation of the implied authority.⁶ On the same principle, the possession of the bond by a legatee, entitled under a will to the interest for life, is evidence of an authority to collect such interest; though, if the principal be not due, it does not authorize a collection of the principal.⁷ So it is incumbent on a debtor who makes a payment to an attorney to show that the securities were in the attorney's possession on each occasion when the payments were made, and it is not incumbent on the creditor to show notice to the debtor of the withdrawal of the papers from the possession of the attorney.⁸

An attorney with whom a bond and mortgage is intrusted "to be foreclosed," is not authorized to receive notes for its payment, payable at a future day, nor is he authorized to extend the time of payment.⁹

A written power of attorney authorizing an attorney in fact to satisfy mortgages, does not authorize him to execute a certificate of discharge without receiving payment of the debt.¹⁰

A person who deals with an agent is bound to know the extent of his agency, and a mortgagor who pays interest or principal to any one but the mortgagee does so at his peril, and must be

⁵ Weber v. Bridgman, 113 N. Y. 600; 21 N. E. 985.

⁶ Williams v. Walker, 2 Sandf. Ch. 325; Hatfield v. Reynolds, 34 Barb. 612; Brown v. Blydenburgh, 7 N. Y. (3 Seld.) 141; Story on Agency, § 104; Whitlock v. Waltham, 1 Salk. 157; River Clyde Trustees v. Duncan, 25 Eng. L. & Eq. 19; Owen v. Barrow, 4 Bos. & Pull. 101; Smith v. Kidd, 68 N. Y. 130, 137; Doubleday v. Kress, 50 N. Y. 410; Henn v. Co-

ninsby, 1 Ch. Cas. 93; Haines v. Pahlman, 25 N. J. Eq. 179; Stiger v. Bent, 111 Ill. 328.

⁷ Giddings v. Seward, 16 N. Y. (2 Smith) 365.

⁸ Smith v. Kidd, 68 N. Y. 130; Brewster v. Carnes, 103 N. Y. 556; 9 N. E. 323; 35 Alb. L. J. 95.

⁹ Heyman v. Beringer, 1 Abb. N. Cas. 315.

¹⁰ Hutchins, Adm'r, v. Clark, 64 Cal. 228; 30 Pac. 805.

prepared to prove the authority of the agent to whom the payment is made. This is peculiarly the case when payments of principal are made before maturity to an attorney whose only authority is to receive interest.¹¹

If, however, it can be shown that the payments were made to one having been clothed with apparent authority, the payment will be treated the same as if authority had been given.¹²

§ 379. Bond should be produced and surrendered on payment in full.—When an obligor has discharged his bond, he is entitled to have it given up and cancelled. Neither the obligee nor any other person is entitled to retain it for their convenience without his assent. A third person discharging a bond and mortgage, for his own safety, may demand possession of the bond and mortgage, and when the maker discharges them he is entitled to have the instruments cancelled.¹³

Payment to a mortgagee after the mortgage has been assigned by him, will be good if the mortgagor have no notice of the assignment;¹⁴ but if the payment be of the whole amount owing upon the mortgage, and the bond is not produced by the mortgagee, this is sufficient to put the mortgagor upon inquiry, and unexplained, to render him chargeable with knowledge of the fraud.¹⁵

If payment is made to the mortgagee of only a portion of the amount due, the production of the bond need not be required. The possession of the securities is an important circumstance where the payment is made to the agent or attorney; but it is by no means controlling when they are made to the mortgagee. In such a case a failure to produce the bond and mortgage is insufficient as a matter of law to put the mortgagor upon inquiry.¹⁶

Where a mortgagee turned over to his wife a mortgage and note

11 Crane v. Evans, 1 N. Y. St. Repr. 216; 24 W. Dig. 163, aff'g 2 How. N. S. 310.

12 Crane v. Gruenewald, 120 N. Y. 274; 24 N. E. 456.

13 Matter of Coster, 2 Johns. Ch. 503.

14 Assets Realization Co. v. Clark, 205 N. Y. 105; Van Keuren v. Corkins, 6 N. Y. Sup. (T. & C.) 355; 4

Hun, 120, aff'd 66 N. Y. 77; Harman v. Ellsworth, 64 N. Y. 159.

15 Brown v. Blydenburgh, 7 N. Y. (3 Seld.) 141; Emery v. Gordon, 33 N. J. Eq. 447.

16 See Assets Realization Co. v. Clark, 205 N. Y. 105; Van Keuren v. Corkins, 66 N. Y. 77, 80, aff'g 4 Hun, 129; Foster v. Beals, 21 N. Y. 247; *contra*, Clark v. Igelstrom, 51 How. Pr. 407.

in satisfaction of claims held by her against him, and afterward formally assigned the same without delivery to a third person, the mortgagor who made payment to the wife was protected.¹⁷

Possession of the bond may be necessary to a recovery upon the mortgage. Where a bond is recited in the mortgage, the non-production of the bond on the trial in an action to foreclose, is evidence of a discharge of the mortgage debt, and, if unexplained, is conclusive against plaintiff's right to recover.¹⁸ On the other hand mere possession by the mortgagor is not conclusive evidence of payment and the circumstances surrounding such possession may be shown.¹⁹

§ 380. **Where payment should be made.**—If no place is appointed, either in the bond or mortgage, at which the principal or interest is to be paid, the debtor is bound to seek the creditor, to make the payment, not the creditor to seek the debtor to receive payment. No demand is necessary before bringing suit.²⁰

But this rule is subject to the exception, that if the creditor is out of the State when payment is to be made, the debtor is not obliged to follow him, and readiness to pay within the State will, in that case, be as effectual as actual payment to save a forfeiture. It may, perhaps, be that, although a creditor is absent from the State when a payment is due, if he has a house therein, where he resides, it is the duty of the debtor to tender the money there, or otherwise his obligation is not discharged. However this may be, as a general rule no such duty rests upon a mortgagor, and he is not obliged to part with his money to a third person without satisfactory evidence of his authority. If the mortgagee desires that the interest should be paid to any agent of his within the State, he should notify the mortgagor that such agent is entitled to receive it, and, if he leaves the State without doing so, the mortgagor is not obliged to tender the money at his residence, and failure to do so will not operate to make a mortgage due under a default clause.²¹

So, where a mortgagee removed from the State and went to Europe, without informing the mortgagor who was authorized to

¹⁷ Harseig v. Brown, 34 Mich. 503.

¹⁸ Bergen v. Urbahn, 83 N. Y. 49.

¹⁹ Anderson v. Culver, 127 N. Y. 377; 28 N. E. 32.

²⁰ Harris v. Mulock, 9 How. Pr. 402; Smith v. Smith, 25 Wend. 405.

²¹ Hale v. Patton, 60 N. Y. 233. See also Tasker v. Bartlett, 5 Cush. (Mass.) 359.

receive the interest and installments as they became due; and the first information the mortgagor had of the authority of any person to act for the mortgagee, was the service of papers in an action to foreclose, whereupon he made a tender of the principal and interest to the attorney, which was refused; it was held that this was a sufficient tender, and that the lien of the mortgage was thereby extinguished.²²

§ 381. Where the discharge of a recorded mortgage is executed by a person other than the mortgagee, a subsequent incumbrancer is bound to inquire by what authority such person assumed to discharge it, and is chargeable with notice of all the facts which the reasonable prosecution of such inquiry would elicit. Thus, where a general guardian of infants, appointed by an order of the Court of Chancery, specially authorizing a release "upon receiving a bond and mortgage" upon other property, executed a release without receiving the bond and mortgage, it was held to be void even as to *bona fide* purchasers.²³

§ 382. Remedy against person unlawfully cancelling lien.—In the absence of notice of the assignment of the mortgage, the mortgagor may lawfully pay the money secured by it, to the mortgagee, or may negotiate with him for a release or cancellation of the lien.²⁴ But it does not follow that a mortgagee who has transferred the security may honestly deal with it. Such dealing, as between him and his assignee, is a fraud on his part, and he will hold the money received as a trustee, and will be liable for the damage occasioned by his release. The measure of damages in an action for unlawfully executing a release is not limited to the deficiency after an application of the remaining security, but is the value of the portion released, not exceeding the debt.²⁵

§ 383. Payment to an administrator of the mortgagee duly appointed after regular proof of death has been held to be valid, even as against the mortgagee himself, who was supposed to be

²² *Houbie v. Volkening*, 49 How. Pr. 169.

²³ *Swartwout v. Curtis*, 5 N. Y. (1 Seld.) 301; *The Farmers' Loan & Trust Co. v. Walworth*, 1 N. Y. (1 Comst.) 433; *Waterman v. Webster*, 33 Hun, 611.

²⁴ *Van Keuren v. Corkins*, 66 N.

Y. 77, aff'g 4 Hun, 129; 6 T. & C. 355; *Heerman v. Ellsworth*, 64 N. Y. 159; *Hetzell v. Barber*, 6 Hun, 534; *Wanzer v. Cary*, 12 Hun, 403.

²⁵ *Stebbins v. Howell*, 4 Abb. Ct. of App. Dec. 297; *Ferris v. Hendrickson*, 1 Edw. Ch. 132. See also *Fox v. Wray*, 56 Ind. 423.

dead when the letters of administration were issued;²⁶ but if such letters were issued by a clerk in the surrogate's office without due judicial inquiry into the fact of death, they are void, and a person paying on the faith of them will not be protected against the living creditor.²⁷ To bind a living man to be dead by force of a judgment, all proceedings leading up to that judgment must be entirely regular.

APPLICATION OF PAYMENTS.

§ 384. *Application by the parties.*—The payment by the mortgagor to the mortgagee of a sum of money will not operate to reduce the amount due on the mortgage until it has been actually applied toward such reduction.²⁸ The right to make such application rests in the first instance with the person making the payment,²⁹ and, if he makes no such application, it may be made by the mortgagee.³⁰

A part payment made after the entire sum has become due may be retained by the mortgage and applied to the reduction of the mortgage debt. It will not operate as an accord and satisfaction.³¹

A mortgagee is not bound to apply on the mortgage, money received from the mortgagor, if he has other occasions to use or apply it; nor would he have any right to apply it on the mortgage before its maturity.³²

This right of application continues in the mortgagor and mortgagee until some new right intervenes, but when a junior lien attaches on the property either by judgment or mortgage, the owner of such lien has the right to have any indebtedness which may exist from the mortgagee to the mortgagor applied in extinguishment of the mortgage debt; and this right of the junior incumbrancer is absolute, and in general is not subject to be de-

²⁶ *Roderigas v. East River Savings Inst'n*, 63 N. Y. 460; 20 Am. R. 555.

²⁷ *Roderigas v. East River Savings Inst'n*, 43 N. Y. Supr. (11 J. & S.) 217, *aff'd* 76 N. Y. 316; 32 Am. R. 309.

²⁸ *Simson v. Ingham*, 2 Barn. & C. 65; *Cary v. Bancroft*, 14 Pick. (Mass.) 315; *Doody v. Pierce*, 9 Allen (Mass.) 141.

²⁹ *N. Y. Ins. Co. v. Howard*, 2 Sand. Ch. 183; *Vick v. Smith*, 83 N.

C. 80; *Bean v. Brown*, 54 N. H. 395; *Libby v. Hopkins*, 104 U. S. 303.

³⁰ *Campbell v. Vedder*, 1 Abb. Dec. 295; 3 Keyes, 174; *Sheppard v. Steele*, 43 N. Y. 52, 60; *Feldman v. Beier*, 78 N. Y. 293; *Cremer v. Higginson*, 1 Mason, 338; *Mayor, etc., of Alexandria v. Patten*, 4 Cranch, 317.

³¹ *Macdonald v. Potter*, 57 Misc. R. 206; 107 N. Y. Sup. 915.

³² *Richardson v. Coddington*, 49 Mich. 1; 12 N. W. 886.

feated by the parties to the mortgage, unless there are equities in favor of the mortgagee, which should operate to defeat the application of the rule.³³

§ 385. **As between secured and unsecured claims.**—If one debt be a mortgage debt and the other a simple account, it has been said that, in the absence of an application by either party or of evidence showing a contrary intention or establishing a different equity, the law will apply the money to the mortgage debt in preference, on the ground that it will be more for the interest of the debtor to have this debt discharged.³⁴

But this rule will not be adhered to in special cases where equity requires that the application should be made on the unsecured debt.³⁵

Where a mortgage given by a principal to his factor to secure an existing debt, provided that it might be extended to future advances, and should remain as a continuing security up to a stipulated sum; and advances were made by the factor to an amount exceeding the stipulated sum secured by the mortgage, and consignments of goods were sent to the factor, the proceeds of which were credited to the principal in a general account, it was held that, in the absence of application by the parties, the credits were to be applied first to that part of the debt not secured by mortgage, and to the mortgage debt thereafter.³⁶

§ 386. **Where no specific application is made by the parties of payments upon a running account,** they will be applied in equity to the first items of indebtedness, although the creditor may hold security for the payment of those items and none for the balance.³⁷

Where a mortgage is given to secure a balance of an account, and, thereafter, other transactions are had between the parties, the question as to whether the mortgage is paid depends upon

33 Prouty v. Price, 50 Barb. 344; Roosevelt v. Bank of Niagara, Hopk. 579, aff'd 9 Cow. 409.

34 Pattison v. Hall, 9 Cow. 747, 765; Dows v. Morewood, 10 Barb. 183; Prouty v. Eaton, 41 Barb. 409. See also Johnson v. Anderson, 30 Ark. 745; Forstall v. Blanchard, 12 La. Ann. 1; Windsor v. Kennedy, 52 Miss. 164; Neal v. Allison, 50 Miss.

175; McLaughlin v. Green, 48 Miss. 205; Vick v. Smith, 83 N. C. 80.

35 Griswold v. Onondaga Co. Sav. Bk., 93 N. Y. 301, 306.

36 Johnson's Appeal, 37 Pa. St. 268.

37 Truscott v. King, 6 N. Y. (2 Seld.) 147; Crocker v. Whitney, 71 N. Y. 161.

the intention of the parties, and is to be disposed of as a question of fact upon all of the circumstances of the case.³⁸

A payment will be applied on a demand for which the person making it is personally bound in the first instance, rather than upon one for which he or his estate stands as surety.³⁹

Money received by the mortgagee from the sale of a portion of the mortgaged estate,⁴⁰ or as the price for a release of a portion of it,⁴¹ must be applied by him to a reduction of the mortgage debt in preference to an unsecured claim. But if several notes are secured by the same mortgage, the mortgagee may apply the proceeds of a portion of the estate to such notes as he sees fit, as, for instance, to one unsecured by indorsement rather than to one which is thus secured.⁴²

Payments made on the mortgage are first to be applied to any interest which may be due, and the balance is to be credited on principal.⁴³

Payment of a collateral security is ordinarily a payment on the principal debt.⁴⁴

DISCHARGE BY MERGER.

§ 387. When a mortgage will be discharged under the doctrine of merger.—When the rights of the mortgagee and of the owner of the equity of redemption become vested in the same person, the lien is said to be merged in the title, and thereby to become destroyed,⁴⁵ unless an intent to the contrary is shown.⁴⁶ On the same principle, where the person equitably bound to pay a mortgage and to relieve the land from its payment, becomes the owner by assignment of the mortgage debt, it becomes thereby

38 *Peck v. Minot*, 3 Abb. App. Dec. 465; 4 Robt. 323.

39 *Snyder v. Robinson*, 35 Ind. 311.

40 *Webster v. Singley*, 53 Ala. 208; 25 Am. R. 609.

41 *Hicks v. Bingham*, 11 Mass. 300.

42 *Matthews v. Switzler*, 46 Mo. 301.

43 *Davis v. Fargo*, Clarke Ch. 470; *Chase v. Box*, Freem. Ch. 261.

44 *Prouty v. Eaton*, 41 Barb. 409.

45 *Townsend v. Provident Realty Co.*, 110 App. Div. 226; 96 N. Y. Supp. 1091; *Hull v. Cronk*, 55 App. Div. 83; 67 N. Y. Supp. 54, appeal dismissed; 166 N. Y. 606; 59 N. E. 1123; *Gardner v. Astor*, 3 Johns. Ch. 53; 8 Am. Dec. 465; *Collins v. Torrey*, 7 Johns. 278.

46 *Lynch v. Pfeiffer*, 110 N. Y. 33; 17 N. E. 402.

Merger involves intent, *Betts v. Betts*, 9 App. Div. 210; 41 N. Y. Supp. 285.

satisfied and paid.⁴⁷ This is so, even if the assignment be taken in the name of a third person.⁴⁸

So, where a husband and wife executed a mortgage on the husband's land for his debt, and a mortgage on the wife's land as collateral to it; and the mortgagee bought the husband's equity of redemption in the land, it was held that the wife's land was discharged, the price allowed for the husband's land being greater than the mortgage debt.⁴⁹

So, also, a party holding a life estate in mortgaged premises is bound to pay the interest on the mortgage during the continuance of his estate, and if he becomes the assignee of the mortgage, the interest accruing while both titles are united in him cannot afterward be collected under the mortgage lien.⁵⁰

Again, where a senior mortgagee received a conveyance of the mortgaged premises and assumed the payment of a junior mortgage, his own mortgage was held to be merged and discharged, so that the junior mortgage took precedence.⁵¹

When the owner of an equity of redemption pays off the mortgage, and takes an assignment of it to himself, it becomes merged in the legal title and is extinguished, unless it appears that there is some beneficial interest in keeping it distinct.⁵²

And where the mortgaged land and the mortgage both vest in the same person, it has been held the mortgage debt cannot thereafter be enforced against the mortgagor,⁵³ though the land be at that time of less value than the amount of the debt.⁵⁴ This rule followed to its logical conclusion would seem to lead to injustice.

In case of a subsequent assignment of a merged mortgage,

47 *Mickles v. Townsend*, 18 N. Y. (4 Smith) 575; *Russell v. Pistor*, 7 N. Y. (3 Seld.) 171; *Hetzel v. Easterly* (No. 1) 96 App. Div. 517; 89 N. Y. Supp. 154; *Fairchild v. Lynch*, 46 Supr. (14 J. & S.) 1; *Putnam v. Collamore*, 120 Mass. 454; *Kilborn v. Robbins*, 8 Allen (Mass.) 466.

48 *Fitch v. Cotheal*, 2 Sandf. Ch. 29.

49 *Wheelwright v. Depeyster*, 4 Edw. 232; *Ward v. Price*, 12 N. J. Eq. 543.

50 *Sheldon v. Ferris*, 45 Barb. 124.

51 *Fowler v. Fay*, 62 Ill. 375; *Kneeland v. Moore*, 138 Mass. 198; *Wadsworth v. Williams*, 100 Mass. 126; *Carlton v. Jackson*, 121 Mass. 592; *McCabe v. Swap*, 14 Allen (Mass.) 188.

52 *Gardner v. Astor*, 3 Johns. Ch. 53; 8 Am. Dec. 465.

53 *Lilly v. Palmer*, 51 Ill. 331.

54 *Dickason v. Williams*, 129 Mass. 182; *Longfellow v. Moore*, 102 Ill. 289.

the assignee is held to acquire a lien, though it is inferior to that of a second mortgage not merged.⁵⁵

Where a sheriff on selling land upon execution announced that the sale was made subject to a prior lien, and the bidders so understood it, and the holder of the lien purchased, this was held to extinguish both his lien and his remedy on the note secured by it.⁵⁶ This is particularly so if the holder of the junior lien after purchasing, mortgages or conveys the property.⁵⁷

In this State an assignment of a mortgage may be compelled where payment is made by a person not equitably holden to make such payment, and an assignment is necessary for his protection.⁵⁸ If the person asking for such assignment is the mortgagor who has conveyed the property, or there is some intervening incumbrance, or there is any reason why the appearance of merger should be avoided, the assignment may be required to be made to a person nominated by him.⁵⁹

§ 388. The doctrine of merger as applied to mortgages is founded upon equitable principles, and is applied only where equity requires that it should be. Whether a transaction shall be held in legal effect to operate as a payment and discharge, which extinguishes the mortgage, or as an assignment, which preserves and keeps it on foot, does not so much depend upon the form of words used as upon the relation subsisting between the party advancing the money, and the party executing the transfer or release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the performance of which others have an interest, it is held to be a release and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such an assignment is held to be an extinguishment or assignment according to the intent of the parties, and their

⁵⁵ *Townsend v. Provident Realty Co.*, 110 App. Div. 226; 96 N. Y. Supp. 1091.

⁵⁶ *Biggins v. Brockman*, 63 Ill. 316; *Murphy v. Elliott*, 6 Blackf. (Ind.) 482; *Speer v. Whitfield*, 10 N. J. Eq. 109.

⁵⁷ *Thomas v. Simmons*, 103 Ind.

538; 2 N. E. 203; 3 N. E. 381; *Madaris v. Edwards*, 32 Kans. 284; 4 Pac. 313.

⁵⁸ *Pardee v. Van Auken*, 3 Barb. 534; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553.

⁵⁹ *Johnson v. Zink*, 52 Barb. 396, *aff'd* 51 N. Y. 333.

respective interests in the subject have a strong bearing on the question of intent.⁶⁰

The general rule is, that where the title to the land and the ownership of the mortgage debt become vested in the same person, the mortgage is thereby merged and extinguished; but if the owner of the legal and the equitable titles has an interest in keeping those titles distinct, as, for instance, where there is an intermediate incumbrance,⁶¹ he has a right so to keep them, and the mortgage will not be extinguished.⁶² So, too, if the mortgage be assigned to the owner of the equity of redemption, in order to keep it alive with a view to a subsequent assignment, no merger will take place. The merger of a mortgage in the fee will not take place unless the intent of the parties, or the equitable rights of innocent third persons, require that it shall merge.⁶³

There can be no merger unless the title of the mortgaged estate has voluntarily been accepted by the mortgagee.⁶⁴

§ 389. A merger will not be adjudged for the benefit of an intervening incumbrance, even where the mortgaged premises are conveyed by the mortgagor to the mortgagee for the express purpose of satisfying the mortgage debt, and avoiding the expenses of a foreclosure.⁶⁵

60 SHAW, C. J., in *Brown v. Lapham*, 3 Cush. (Mass.) 557; *Franklin v. Hayward*, 61 How. Pr. 43; *McGiven v. Wheelcock*, 7 Barb. 22.

61 *Sherow v. Livingston*, 22 App. Div. 530; 43 N. Y. Supp. 269; *Mulford v. Peterson*, 35 N. J. L. 127; *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Millspaugh v. McBride*, 7 Paige, 509; *McKinstry v. Merwin*, 3 Johns. Ch. 466. See also *Stantons v. Thompson*, 49 N. H. 272; *Besser v. Hawthorn*, 3 Oreg. 129.

62 *Lord v. Lane*, 8 Metc. (Mass.) 517.

63 *James v. Morey*, 2 Cow. 246; *Millspaugh v. McBride*, 7 Paige, 509; *Skeel v. Spraker*, 8 Paige, 182; *White v. Knapp*, 8 Paige, 173; *James v. Johnson*, 6 Johns. Ch. 417; *Spencer v. Ayrault*, 10 N. Y. (6 Seld.) 202; *Day v. Mooney*, 4 Hun, 134; *Clift v. White*, 12 N. Y. (2 Kern.) 519; *Mickles v. Townsend*, 18 N. Y. 582;

Champney v. Coope, 32 N. Y. 543, rev'g 34 Barb. 539; *Bascom v. Smith*, 34 N. Y. 320; *Sheldon v. Edwards*, 35 N. Y. 270; *Angel v. Boner*, 38 Barb. 425; *Day v. Mooney*, 4 Hun, 134; *Judd v. Seekins*, 62 N. Y. 266; *Rawiszer v. Hamilton*, 51 How. Pr. 297; *Smith v. Roberts*, 91 N. Y. 470; *Bostwick v. Frankfield*, 74 N. Y. 207; *Payne v. Wilson*, 74 N. Y. 348. See also *Bryar's Appeal*, 111 Pa. St. 81; 2 Atl. 344; *Moore v. Harrisburg Bank*, 8 Watts, 138.

64 *Andrus v. Vreeland*, 29 N. J. Eq. 394.

65 *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Millspaugh v. McBride*, 7 Paige, 509; *McKinstry v. Merwin*, 3 Johns. Ch. 466. See also *Cohn v. Hoffman*, 45 Ark. 376; *Brooks v. Rice*, 56 Cal. 428; *Lockwood v. Sturdevant*, 6 Conn. 387; *Hunt v. Hunt*, 14 Pick. (Mass.) 384; *Lord v. Lane*, 8 Metc. (Mass.) 517;

So, the assignee of a mortgage may, after acquiring the equity of redemption under a deed executed by the mortgagor, but not by his wife, hold a mortgage executed by both as a part of his title to protect himself against a claim of the wife to dower.⁶⁶

Where an infant had an inchoate right of dower in an equity of redemption, and joined with her husband in conveying the land, and afterward claimed dower, it was held that the prior mortgage had not become merged by an assignment thereof to the owner of the equity, and that the plaintiff must take dower subject to the mortgage.⁶⁷ And a mortgage of land attached since the making of the mortgage will not, on being assigned to a purchaser of the equity, merge in the equity so as to give the attaching creditor a preference.⁶⁸

When the union of the legal and equitable estates in the same person has taken place, and there is no equitable right to be preserved by keeping them distinct, the mortgage will be extinguished, and cannot thereafter be revived by the mortgagor for the purpose of overturning a lien subsequent to the date of the mortgage;⁶⁹ but, on the other hand, where the mortgaged premises are purchased by the mortgagee, and he cancels the mortgage as part of the purchase price, the mortgage will still be enforced in his favor as against the claims of judgment creditors who became such subsequent to the execution of the mortgage.⁷⁰

§ 390. Merger controlled by estoppel.—A person who has acquired both the mortgage lien and the title, is, until he has made a disposition of the property, and until some other person has acquired an interest, at perfect liberty to consider the mortgage merged or not, as may be most beneficial.⁷¹

The owner of land who treats a mortgage thereon which has been transferred to him as a valid instrument, and transfers it as such, is estopped from insisting as against the assignee or

Evans v. Kimball, 1 Allen (Mass.) 240; Stantons v. Thompson, 49 N. H. 272; Mulford v. Peterson, 35 N. J. L. 127; Bell v. Tenny, 29 Ohio St. 240; Besser v. Hawthorn, 3 Oreg. 129; Duffy v. McGuinness, 13 R. I. 595.

66 Strong v. Converse, 90 Mass. (8 Allen) 557; Snyder v. Snyder, 6 Mich. 470; New Jersey Ins. Co. v. Meeker, 40 N. J. L. 18.

67 De Lisle v. Herbs, 25 Hun, 485.

68 Grover v. Thatcher, 70 Mass. (4 Gray) 526.

69 Moore v. Hamilton, 48 Barb. 120.

70 Warner v. Blakeman, 36 Barb. 501, aff'd 4 Keyes, 487.

71 James v. Morey, 2 Cow. 246; Smith v. Roberts, 91 N. Y. 470, 476.

any one claiming under him that, in his hands, it has merged or disappeared in the fee;⁷² and a purchaser from such owner after the recording of the assignment by the latter, stands in no better position than his grantor.⁷³

On a like principle, a mortgagee who sells land upon which he holds a mortgage, for a full consideration, and represents it to be clear of incumbrance, will be estopped from thereafter enforcing the mortgage against the purchaser or his grantees.⁷⁴

§ 391. A merger can occur only where the entire property liable to pay the debt, and the whole debt, are both owned by the same person; and it cannot exist where even a portion of the property so liable is owned by any person other than the owner of the mortgage.⁷⁵ When a portion of the real estate upon which the mortgage is a lien is conveyed to the mortgagee, the question as to whether the mortgage, or any part of it, is merged or satisfied, will be one of intention. If the mortgagee on such purchase pays full value, without deduction for the mortgage or any part of it, and the real bargain is that the remainder of the estate in the hands of the grantor shall bear the whole debt, then the conveyance will operate as a release of the lien as to the property so conveyed, and the mortgage may still be enforced as to the remainder.⁷⁶ But if the contract of sale imposes upon the grantee the obligation of paying the whole or any specified portion of the mortgage debt, equity will enforce such contract, and to the extent that justice may require, there will be a merger.

Where the owner of a mortgage becomes devisee,⁷⁷ or heir,⁷⁸ as tenant in common of an undivided interest in the mortgaged land, the two estates do not become united so as to discharge any portion of the mortgage debt. So, where a tenant in common receives an assignment of a mortgage on the estate, he may hold and enforce it for the purpose of compelling contribution from

⁷² Goodwin v. Keney, 47 Conn. 486.

⁷³ Kellogg v. Ames, 41 N. Y. 259, rev'g 41 Barb. 218; Skeel v. Spraker, 8 Paige, 182; Powell v. Smith, 30 Mich. 451; Graves v. Rogers, 59 N. H. 452.

⁷⁴ Bulkley v. Hope, 1 Kay & J. 482.

⁷⁵ Skeel v. Spraker, 8 Paige, 182.

⁷⁶ Smith v. Roberts, 91 N. Y. 470, aff'g 62 How. Pr. 196; Clift v. White, 12 N. Y. (2 Kern.) 526; Klock v. Cronkhite, 1 Hill, 107.

⁷⁷ Clark v. Clark, 56 N. H. 105; Sahler v. Signer, 44 Barb. 606.

⁷⁸ Thebaud v. Hollister, 37 N. J. Eq. 402.

his co-tenant.⁷⁹ Neither can a merger happen where the mortgagee acquires merely a defeasible title, as by becoming a purchaser at a sale under a judgment, the judgment creditor still retaining a right to redeem.⁸⁰

Where there was a bequest of the income of a mortgage to the widow of the testator, and of the principal, after her death, to the mortgagor, it was held that the debt was not extinguished, but was kept alive for the purpose of paying the interest to the widow, and that she could maintain an action to foreclose the mortgage.⁸¹

§ 392. No merger unless the title and debt are in the same person at the same time.—An assignee of the mortgage, by the assignment, becomes the mortgagee, and the original mortgagee thereafter has no estate left in the land, and if he afterward acquires the interest left in the mortgagor, he does not thereby obtain an estate which merges that of the assignee.⁸²

So, where mortgaged real estate is sold by the mortgagor, subject to the mortgage, and subsequently the mortgage is acquired by the mortgagor's executors, the mortgage still remains a valid incumbrance, and can be enforced against the land in the hands of the mortgagor's grantee.⁸³

§ 393. No merger when conveyance is set aside.—Where a mortgagor, holding the equity of redemption in trust, wrongfully conveyed the mortgaged premises to the mortgagee, with notice of the trust, giving him new security for his debt, and the *cestui que trust* set the conveyance aside, the mortgage was held not to merge in the conveyance, but to stand for the security of the mortgagee.⁸⁴ So, where a conveyance was made by a mortgagor to a mortgagee to defraud other creditors, which was set aside by a decree at their instance, the mortgage was not lost, and there was no merger.⁸⁵

⁷⁹ *Barker v. Flood*, 103 Mass. 474; *King v. McVickar*, 3 Sandf. Ch. 192; *Casey v. Buttolph*, 12 Barb. 637.

⁸⁰ *Southworth v. Scofield*, 51 N. Y. 513.

⁸¹ *Hancock v. Hancock*, 22 N. Y. 568.

⁸² *Curtis v. Moore*, 152 N. Y. 159; 46 N. E. 168; 10 Misc. 341; 31 N. Y.

Supp. 19; *Pratt v. Bank of Bennington*, 10 Vt. 293; 33 Am. Dec. 201.

⁸³ *Stillman v. Stillman*, 21 N. J. Eq. 126.

⁸⁴ *Corwin v. Collett's Ex'rs*, 16 Ohio St. 289.

⁸⁵ *First National Bank v. Essex*, 84 Ind. 144.

§ 394. Purchaser cannot rely on merger shown by the public records.—The case of *Purdy v. Huntington* (42 N. Y. 334), is interesting as illustrating the danger to purchasers of relying upon a merger of the mortgage interest with the title as it appears upon the records. In that case, the defendant purchased the land from one who, from the records, appeared to be the owner both of the mortgage and of the title, for value and without notice of any defect in the title, but it happened that the mortgage was owned by a third person under an unrecorded assignment, whose claims were held to be valid. It is clear that the decision was correct outside of the recording acts. The court held that the conveyance, with full covenants of title to the land, did not amount to an assignment of the mortgage, and that if it did, since the conveyance was recorded among the deeds, it did not operate to protect the purchaser as an assignment of the mortgage.

So, in *Miller v. Lindsey* (19 Hun, 207), a mortgage was made without any accompanying bond, and containing no covenant to pay the debt. The mortgage was recorded, and was sold and assigned by the mortgagee, but the assignment was not recorded. The grantee of the property thereafter conveyed by warranty deed to plaintiff, who brought an action to have the mortgage declared cancelled. It was held on the authority of *Purdy v. Huntington* (*supra*) that the mortgage was not merged or satisfied, but was in full force. The case was distinguished from one where there was a payment of the mortgage by the transfer of other real estate than that mortgaged, where it was held satisfied in all respects as if paid in cash.⁸⁶

§ 395. Preventing merger by clause in conveyance or assignment.—Where the equity of redemption is conveyed to the mortgagee with an express written agreement between the parties that the deed shall not operate as a merger of the mortgage except at the election of the mortgagee, equity will preserve the estates distinct and give full force to the bargain.⁸⁷ A merger may therefore be prevented by a clause in the conveyance to the mortgagee or in the assignment of the mortgage.⁸⁸

⁸⁶ *Wanzer v. Cary*, 12 Hun, 403.

⁸⁸ *Bailey v. Richardson*, 9 Hare,

⁸⁷ *Spencer v. Ayrault*, 10 N. Y. 734.

(6 Seld.) 202.

§ 396. **No merger caused by marriage of mortgagor and mortgagee.**—It was a general rule of the common law that where a man married a woman to whom he was indebted, the debt was thereby released. Thus, if the husband, being the obligor, took the obligee to wife, the bond was discharged at law, and the unity of persons disabled the wife from suing the husband. In this State, the Code and the acts of 1848 and 1849 have completely swept away the common law rule which gave the husband rights in and control over the property of the wife, and now a wife may enforce a mortgage as against her husband.⁸⁹

§ 397. **When the taking of a higher security will extinguish an inferior one.**—The rule that security of a higher nature extinguishes inferior securities, will be found to apply to the state or condition of the debt itself, and means no more than this, that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose their vitality. It has never been applied to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone.⁹⁰ So, where a note secured by a mortgage on certain personal property was given, and subsequently a bond and warrant of attorney for the amount of the note was also given, upon which judgment was entered and execution was issued, it being agreed between the parties that judgment should be taken as collateral to the mortgage, this was held not to operate as an extinguishment or discharge of the mortgage lien.⁹¹

§ 398. **Debt remains though new obligation be given.**—The same rule was applied where a mortgagee of chattels surrendered the original note, and took a new note and new mortgage on the same property, and it was held that he did not thereby extinguish the lien of the prior mortgage.⁹² So, where the holder of a bond and

⁸⁹ *Power v. Lester*, 23 N. Y. 527, aff'g 17 How. Pr. 413.

See as to mortgages by or affecting married women, chapter XVI herein.

⁹⁰ Per *JOHNSON, J.*, in *Butler v. Miller*, 1 N. Y. (1 Comst.) 496, 500. See § 417.

⁹¹ *Butler v. Miller*, 1 N. Y. (1 Comst.) 496.

⁹² *Hill v. Beebe*, 13 N. Y. (3 Kern.) 556; *Gregory v. Thomas*, 20 Wend. 17.

mortgage of real estate paid taxes and assessments on the mortgaged premises, and took a fresh bond and mortgage on the same property for the amount of such payment from the grantee of the mortgagor, this was held not to extinguish his right to add the amount paid by him to the first mortgage and hold the mortgagor for the deficiency. The taking of the fresh bond and mortgage was not *per se* a discharge. It was not taking security of a higher nature for the same demand, so as to extinguish the former, but the superadding of the personal liability of the owner of the equity of redemption was rendering the one collateral to the other, and not substitutional.⁹³

A mortgage given as collateral to a promissory note will not extinguish it, although it contain a proviso against personal responsibility on the mortgage;⁹⁴ and, on the same principle, a sealed mortgage of a chattel is not an extinguishment of the debt.⁹⁵

§ 399. **New mortgage without bond may discharge debt.**—Whenever a mortgage under seal is taken as security for a pre-existing debt not evidenced by a sealed instrument, the mortgage is, in a sense, a higher security, but the taking of it will not discharge the debtor from his original obligation, unless that be the intention of the parties. But if the original indebtedness is intended to be discharged, and a mere mortgage is taken to secure the amount without any express covenant to pay the same, and no bond or separate instrument is given to secure such payment, the mortgagee will be without any remedy against the mortgagor personally. The form of such a transaction would not conclusively establish an intent to release the mortgagor, but it would operate as evidence of such an intent.⁹⁶

A mechanic's lien on real property is waived by taking a mortgage on the same property for the amount of the lien.⁹⁷

§ 400. **New obligation or security may discharge if so agreed.**—A promise to perform a promise which has already been made upon sufficient consideration, does not operate to release or extinguish the original obligation, and it is too well settled in this State to admit of a doubt, that the taking of a debtor's note does

⁹³ *Eagle Ins. Co. v. Pell*, 2 Edw. 631; *Young v. Guy*, 12 Hun, 325.

⁹⁴ *Ainslie v. Wilson*, 7 Cow. 662; *Phelps v. Johnson*, 8 Johns. 54.

⁹⁵ *Sterling v. Rogers*, 25 Wend. 658.

⁹⁶ *Hone v. Fisher*, 2 Barb. Ch. 559.

⁹⁷ *Trullinger v. Kolford*, 7 Or. 228; 33 Am. R. 708.

not merge or extinguish the demand for which it is taken, even though it be expressly agreed to take the note in satisfaction.⁹⁸ A reason for this rule is found in the fact that a promise to re-release the original obligation would in such a case be without consideration. If it is agreed to take the note of a third person, or the indorsement of a third person in payment of the original debt, or if any advantage is gained by the creditor on his promise to release the primary obligation, there is no reason to believe that such an agreement would be without force. So, where the negotiable promissory notes of a mortgagor, bearing interest, were given and received as payment of an installment of interest due upon the mortgage, this was held to be payment, though the notes were not paid.¹

§ 401. **No merger in a void security.**—A bond is a higher security than a note, because the law impresses upon it a more conclusive character, and a judgment is higher than either of them for the same reason. But, properly considered, neither the note, the bond, nor the record of judgment are *debts*. They are severally *evidences of debt*, and the *debt* itself exists as a legal proposition depending upon facts shown in whole or part by such evidence. If the creditor is armed with the better evidence, he is not allowed to use the poorer; and this is almost the entire extent of the doctrine. If, therefore, the new security or evidence is defectively executed, so as not to operate as evidence at all;² or if it is the evidence of a contract which is usurious, and is for that reason void, it cannot displace or extinguish the original debt.³ Upon the same reasoning, although a mortgage is extinguished by the entry of a judgment of foreclosure and sale, it can only be extinguished by a valid judgment, and it is of full force when the judgment has been set aside as irregular.⁴ So, the cancellation of the judgment without payment of the mortgage, as, for example, by consent of the parties, would not impair the validity of the mortgage, but would only operate to destroy an *evidence* of the validity

98 Cole v. Sackett, 1 Hill, 516; Waydell v. Luer, 5 Hill 448; Hawley v. Foote, 19 Wend. 516; Frisbie v. Larned, 21 Wend. 450, 452; Hill v. Beebe, 13 N. Y. (3 Kern.) 556. See also Richardson v. Wright, 58 Vt. 367.

1 Rice v. Dewey, 54 Barb. 455.

2 Burger v. Hughes, 5 Hun, 180.

3 Crippen v. Heermance, 9 Paige, 211; Patterson v. Birdsall, 64 N. Y. 294.

4 Stackpole v. Robbins, 47 Barb. 212. See Salmon v. Allen, 11 Hun, 29.

of the lien which the obtaining of the judgment had furnished.

§ 402. Payment of collateral security in general cancels debt.—

While the giving of a new or collateral security for a debt secured by a mortgage does not discharge the lien, the payment of such collateral security will always extinguish it, except in cases where the preservation of the lien is an equitable right of the person who makes the payment. Thus, where two persons executed a mortgage, and one of them afterward assumed the debt and gave other security for it, the payment of that security was held to satisfy the mortgage.⁵ The proper test in all cases, is as to whether the person who paid the debt is the one who ought equitably to pay it. If he is only secondarily liable, then he is entitled to be subrogated to the rights of the mortgagee for his own indemnity.⁶

If it shall appear by a matter of public record that a security taken as collateral to a mortgage debt has been paid, purchasers of the mortgaged estate have a right to rely upon this as a satisfaction and discharge of the mortgage. So, where a judgment was recovered on a bond secured by a mortgage, and an execution was issued thereon, upon which other lands were sold, and the execution was returned satisfied, and the judgment cancelled, a purchaser for value who took title while these facts appeared upon the records, and who went into possession, was held to have acquired a perfect title, and it was determined to be inadmissible to inquire, as against him, as to whether the proceedings in which the judgment had been obtained were regular.⁷

§ 403. Merger of mortgage in judgment of foreclosure.—A mortgage is merged in a judgment of foreclosure, in the sense that, after the rendition of such judgment, the creditor being furnished with a better and more efficacious security may not resort to the poorer and inferior one. But this rule cannot operate to benefit persons not bound by the judgment, and, as to them, the mortgage remains in full force.⁸ So, a mortgage is not merged by the entry

⁵ *McGiven v. Wheelock*, 7 Barb. 22.

⁶ *Russell v. Pistor*, 7 N. Y. (3 Seld.) 171; *Klock v. Cronkhite*, 1 Hill, 107; *Tice v. Annin*, 2 Johns. Ch. 125; *Barnes v. Mott*, 64 N. Y. 402; *Cole v. Malcolm*, 66 N. Y. 363.

⁷ *Driggs v. Simson*, 3 N. Y. Sup. (T. & C.) 786.

⁸ *Franklin v. Hayward*, 61 How. Pr. 43. See also *Evans Gas Light Co. v. State ex rel. Reitz*, 73 Ind. 219; 38 Am. R. 129.

of a judgment on it and a sale made under such judgment to the mortgagee, so as to benefit the holder of a second mortgage not made a party defendant to the foreclosure.⁹ And, since a valid mortgage can be merged only in a valid judgment, a proceeding for a foreclosure and sale of mortgaged premises which has been set aside as illegal and fraudulent, is no bar to a subsequent foreclosure of the same mortgage, the mortgage itself and its lien being unaffected by such proceeding.¹⁰

§ 404. Judgment does not merge cause of action as between defendants.—Where a principal and surety are sued upon an obligation securing a debt, as between the plaintiff and the defendants, the obligation becomes merged in the judgment; but it is not necessarily merged as between the defendants. The merger is not so complete that the courts may not look behind the judgment to see upon what it is founded, for the purpose of protecting equitable rights connected with the original relations of the parties; and the judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice.¹¹ The rule has been well formulated thus: “The merger of a cause of action has no effect upon the liabilities of the co-plaintiffs or the co-defendants between each other. Those liabilities are not in issue in the case, and, therefore, are not affected by the final determination of the action. In extinguishing a demand a judgment has no greater effect than mere payment. It leaves the liability of other parties to the defendant unaffected. A recovery upon a note against the maker and indorser does not so merge the note as to prevent the indorsers from paying the judgment, receiving the note, and maintaining an action upon it against the maker.”¹²

Upon this principle, where a judgment of foreclosure was entered, and a sale had thereunder to a person owning the equity of redemption, who was not equitably bound to pay the mortgage, but the sale was never carried out by the executing of a deed, for the reason that such defendant took an assignment of the bond, mort-

⁹ Parker v. Child, 25 N. J. Eq. 41. •

¹⁰ Stackpole v. Robbins, 47 Barb. 212.

¹¹ Clark v. Rowling, 3 N. Y. (3 Comst.) 216.

¹² Freeman on Judgments, § 227; Wadsworth v. Lyon, 93 N. Y. 201, 213; Kelsey v. Bradbury, 21 Barb. 531.

gage, and decree, it was held that the judgment did not preclude such defendant, as assignee of the bond, from bringing an action upon it against the maker, who was both legally and equitably the person who, under the circumstances of the case, ought to pay it.¹³

Where a bond and mortgage were assigned as security for a debt, and the assignee brought an action to foreclose, claiming only the amount due him, and obtained a judgment, this was held not to merge the mortgage so as to prevent the mortgagee from paying the amount due to his assignee, and bringing a new action in his own behalf.¹⁴

DISCHARGE BY RELEASE OF PART OF THE SECURITY.

§ 405. When a release of a portion of the security will cancel the mortgage *pro tanto*.—It is a principle of equity, that where mortgaged premises are subsequently sold to different purchasers in parcels, such parcels, upon a foreclosure of the mortgage, are to be sold in the inverse order of their alienation, according to the equitable rights of different purchasers, as between themselves, in reference to the payment of the mortgage, which is a lien upon the equity of redemption in all the parcels. And the same principle of equity is applicable to subsequent incumbrances, upon different portions of the mortgaged premises, either by mortgage or judgment.¹⁵

The release must be a valid one.¹⁶ It has also been determined that if the mortgagee, in such case, with full notice of the equitable rights of the subsequent purchasers or incumbrancers, as between themselves, releases a part of the mortgaged premises which in equity is primarily liable for the payment of his debt, he will not be permitted to enforce the lien of his mortgage against other portions of the premises, without first deducting the value of that part of the premises which has been released by him.¹⁷

¹³ *Wadsworth v. Lyon*, 93 N. Y. 201.

¹⁴ *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496.

¹⁵ *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 353; *Snyder v. Stafford*, 11 Paige, 71.

¹⁶ *Hamlin v. Klein*, 8 App. Div. 413.

¹⁷ *Stuyvesant v. Hall*, 2 Barb. Ch.

151; *Guion v. Knapp*, 6 Paige, 35; *Howard Ins. Co. v. Halsey*, 4 Sandf. 565, *aff'd* 8 N. Y. (4 Seld.) 271; *The Trustees of Union College v. Wheeler*, 61 N. Y. 88. See *Ridge of Brooklyn Realty Co. v. Offerman*, 149 App. Div. 878; 83 N. Y. Supp. 552, *Gibson v. Thomas*, 85 App. Div. 243. See also *Birnie v. Mann*, 29 Ark. 591; *Meacham v. Steele*, 93 Ill. 135; *Hawke v. Snyderaker*, 86 Ill. 197;

Upon the same principle, where payment of the mortgage debt is assumed by a purchaser, and the mortgagee, with notice of the facts, releases a part of the mortgaged land to the purchaser, and the remaining part proves insufficient, the mortgagee cannot look to the mortgagor for payment of the deficiency caused by the release.¹⁸ The mortgagor is entitled to credit for the value of the part released and is liable only for the balance.¹⁹

If the mortgagee has diminished the security of a subsequent purchaser without his consent by releasing the mortgagor from his personal liability, the land so purchased will be held to be fully discharged from the lien.²⁰ The release may be subject to the performance of a condition subsequent, upon breach of which the release becomes inoperative.²¹ A prior incumbrancer is not bound at his peril to look for subsequent liens when about to release a part of his security.²²

§ 406. The reason of this rule may be found in the fact that the owners of the property only secondarily liable for the payment of the mortgage debt stand as sureties, the property primarily liable being the principal fund. Among the equitable rights and privileges of a surety are the following: that the creditor shall first resort to the primary fund, where there are two, for the payment of his debt, so as to relieve as far as possible the property of the surety, and that the creditor shall do no act, without the express consent of the surety, to impair the benefit of a substitution to which the surety may be entitled. These are familiar rules in a court of equity,²³ and it follows that if a creditor knowingly acts in disregard of these principles, he, and not the surety, should suffer the evil consequences.

Stewart v. McMahon, 94 Ind. 389; Wolf v. Smith, 36 Iowa, 454; Douglass v. Bishop, 27 Iowa, 214; Clark v. Fountain, 135 Mass. 464; Benton v. Nicoll, 24 Minn. 221; Hill v. Howell, 36 N. J. Eq. 25; Loan Ass'n v. Beaghen, 27 N. J. Eq. 98; Mount v. Potts, 23 N. J. Eq. 188; Martin's Appeal, 97 Pa. St. 85.

¹⁸ Savings Bank v. Munson, 47 Conn. 390.

¹⁹ Bank v. Thayer, 136 Mass. 459;

Wing v. Hayford, 124 Mass. 249; Draper v. Mann, 117 Mass. 439.

²⁰ Coyle v. Davis, 20 Wis. 564.

²¹ Barnes v. Southfield Beach Co., 202 N. Y. 301; 95 N. E. 691.

²² Sherman v. Foster, 158 N. Y. 587; 53 N. E. 504.

²³ Wheelwright v. Depeyster, 4 Edw. 244; Cheesebrough v. Millard, 1 Johns. Ch. 409; Stevens v. Cooper, 1 Johns. Ch. 425; Hayes v. Ward, 4 Johns. Ch. 123; Eddy v. Traver, 6 Paige, 521.

§ 407. **The mortgagee is not prejudiced by release unless he has notice of the facts.**—The right to have the lands which have been sold by the mortgagor charged in the inverse order of their alienation, is not strictly a legal, but an equitable right, and is governed by those equitable principles upon which a court of equity protects the rights of sureties, or of those who are standing in the situation of sureties. And the conscience of the party who holds the incumbrance is not affected, unless he is informed of the existence of the facts upon which this equitable right depends, or he has a sufficient notice of the probable existence of the right to make it his duty to inquire for the purpose of ascertaining whether such equitable right does in fact exist. If, therefore, the prior purchasers are so negligent as to leave the holder of an incumbrance to deal with the mortgagor, or with a subsequent grantee of a portion of the premises, under the erroneous supposition that the lands conveyed to the prior purchasers still belong to the mortgagor, the mortgagee will not lose his lien by executing a release to one who happens to be a subsequent grantee. The principle that a creditor who has a lien on two funds may discharge the lien as to one without impairing his legal claim on the other, if he has no reason to suppose it will interfere with the equitable rights of any one, has been distinctly recognized.²⁴ To deprive a creditor of his legal claim against the property of a person standing in the situation of a surety, on the ground that such creditor has done an act which is inconsistent with the equitable rights of a surety, not only the fact of the suretyship must exist, but it must be known to the creditor at the time of the act complained of,²⁵ or he must have either actual or constructive notice of it.²⁶

§ 408. **What notice is sufficient.**—The recording of a subsequent conveyance of, or mortgage on, parcels of the premises is not notice to the prior mortgagee, and if such mortgagee releases a portion of

²⁴ *Cheesebrough v. Millard*, 1 Johns. Ch. 409. See *Gibson v. Thomas*, 180 N. Y. 483; 73 N. E. 484.

²⁵ Chancellor *WALWORTH*, in *Guion v. Knapp*, 6 Paige, 42, 43; *Niemcewicz v. Gahn*, 3 Paige, 614; *Patty v. Pease*, 8 Paige, 277.

²⁶ *Howard Ins. Co. v. Halsey*, 8 N. Y. (4 Seld.) 271; *Kendall v. Niebuhr*, 58 How. Pr. 156. See also

McLean v. Lafayette Bank, 3 McLean 588; *Watts v. Burnett*, 56 Ala. 340; *Washington v. Flint*, 43 Ark. 504; *Cooper v. Bigly*, 13 Mich. 463; *Vanorden v. Johnson*, 14 N. J. Eq. 376; *Blair v. Ward*, 10 N. J. Eq. 376; *McIlvain v. Assurance Co.*, 93 Pa. St. 30; *Sharck v. Shriner*, Pa. St. Nov. 20, 1882; 27 Alb. L. J. 336.

the premises without actual notice of such deed or mortgage, his lien upon the residue will not be impaired.²⁷ The recording of subsequent transfers or incumbrances may, however, be material, if it can be shown that the mortgagee had notice of facts and circumstances sufficient to put him on inquiry, for the public records furnish the information which a mortgagee, desiring to act fairly, would naturally seek.²⁸ If the mortgagee can be shown to have knowledge of the record of a conveyance, as if the release itself recites such record, he is put upon inquiry, and is bound by the knowledge which an examination of the records would furnish him.²⁹

It is enough to charge the mortgagee with notice if he has been informed, by letter or otherwise, of the names of junior purchasers from the mortgagor, and if their deeds are on record.³⁰

And if the mortgagee has employed an attorney in the transaction, before the delivery of the release, and such attorney has acquired knowledge of the contents of the conveyances, the knowledge of the attorney will be treated as that of his client.³¹

The actual occupancy of the purchasers from the mortgagor, by residence in dwellings erected on portions of the mortgaged premises, is constructive notice to the mortgagee, and he is chargeable with the consequences thereof, and cannot do anything in derogation of their rights or to their prejudice.³²

§ 409. The effect of a release by the mortgagee must depend upon the circumstances of the case.—If he has notice that by such an act he sacrifices the interest of a subsequent lien creditor, he will be

27 *Wheelwright v. Depeyster*, 4 Edw. 233; *Talmadge v. Wilgers*, 4 Edw. 239, n.; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419, *aff'd* *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Howard Ins. Co. v. Halsey*, 8 N. Y. (4 Seld.) 271. See also *Blair v. Ward*, 10 N. J. Eq. 119.

28 *Guion v. Knapp*, 6 Paige, 41, 42; *Howard Ins. Co. v. Halsey*, 4 Sandf. 565, *aff'd* 8 N. Y. (4 Seld.) 271.

29 *Howard Ins. Co. v. Halsey*, 8 N. Y. (4 Seld.) 271.

30 *Howard Ins. Co. v. Halsey*, 8 N. Y. (4 Seld.) 271; *Hall v. Edwards*, 43 Mich. 473; 5 N. W. 652;

Dewey v. Ingersoll, 42 Mich. 17; 3 N. W. 235; *James v. Brown*, 11 Mich. 25.

31 *Kendall v. Niebuhr*, 58 How. Pr. 156, 164; *Bank of the U. S. v. Davis*, 2 Hill, 451; *Ingalls v. Morgan*, 10 N. Y. 178, 184; *Dillon v. Anderson*, 43 N. Y. 231, 238; *Bank for Savings v. Frank*, 56 How. Pr. 403, 414. See also *The Distilled Spirits*, 11 Wall. (U. S.) 356.

32 *Phelan v. Brady*, 119 N. Y. 587; 23 N. E. 1109; *Trustees of Union College v. Wheeler*, 61 N. Y. 88, 98; *Brown v. Volkening*, 64 N. Y. 76. See also *Dewey v. Ingersoll*, 42 Mich. 17; 3 N. W. 235.

bound to withhold his hand, or, if he proceeds, will be responsible for the loss incurred. He may have this knowledge in the very creation of the mortgage. As if two or more severally seized of land join in a mortgage, they are all, *in equali jure*, entitled to contribution among themselves; and if the mortgagee should release the land of one from the mortgage, leaving the whole sum to be levied of the remaining lands, he would be doing an act of injustice of which he was fully cognizant. Thus it was so held when the mortgage was originally by one, and a purchaser of part from the mortgagor intervenes, and before releasing, that fact is known to the mortgagee.³³

It is not always that a release of a part of mortgaged premises given with knowledge of a prior conveyance of another part that remains unreleased, is held inequitable. It is not a technical discharge of that part; nor is it an equitable release or discharge, unless upon the principles of natural equity and justice, it ought to operate against the mortgagee giving the release.³⁴

§ 410. Where two parcels of land owned by different persons are equitably bound *pro rata* for the mortgage debt, and the mortgagee, with knowledge of the facts out of which this equity arises, releases one parcel, his security will be deemed diminished for the benefit of the other parcel, to the extent that the parcel released ought equitably to have contributed to its payment. So, where a mortgage covered two parcels of land and the equity of one was transferred to A, and the equity of the other to B; and the mortgagee released A's parcel from the mortgage, it was held that B, on redeeming, could not compel A to contribute, but that he was entitled to have an abatement of such a proportion of the sum due on the mortgage as the value of A's parcel bore at the time of the execution of the mortgage, to the value of both parcels.³⁵ And when, after the mortgaged premises had passed to several devisees, and the mortgagee released one devisee's portion, it was adjudged that the others were liable only for that share of the debt for which their portions would have been liable if no release had been made.³⁶

³³ Per STERRETT, J., in *Sharck v. Shriner*, Pa. St. Nov. 20, 1882; 27 Alb. L. J. 336. See *Ross v. Vernam*, 6 App. Div. 246; 39 N. Y. Supp. 1031.

³⁴ Per WALWORTH, Ch., in *Patty v. Pease*, 8 Paige, 277; *Kendall v.*

Woodruff, 87 N. Y. 1, 7. See also *Walls v. Baird*, 91 Ind. 429.

³⁵ *Parkman v. Welch*, 36 Mass. (19 Pick.) 231.

³⁶ *Gibson v. McCormick*, 10 Gill & J. (Md.) 65.

Where several parcels are justly bound for the payment of the debt, the mortgagee will incur no penalty for releasing one or more on receiving their fair quota of the amount due, and the balance of the debt will remain a valid charge on the remainder.³⁷

So, the mortgagee may properly release portions of the mortgaged property in conformity with the terms of the mortgage itself, if that instrument contains provisions requiring releases to be given on certain specified terms.³⁸

Where a mortgagor who gave no bond and is not personally liable for the mortgage debt, conveyed an undivided one-half of the mortgaged land to a corporation which assumed one-half of the mortgaged indebtedness, the release from the lien of the mortgage of the undivided moiety owned by the mortgagor, upon payment by him of one-half of the mortgage debt, does not discharge the interest conveyed to the corporation from the lien of the mortgage.³⁹

§ 411. It is only when the release is given in violation of equitable rights of third persons that it will operate to cancel or reduce the mortgage.⁴⁰

Between the parties a part may be released and the balance held,⁴¹ and there are cases where equity would approve a release. So, where one of two tenants in common has paid his share of a joint mortgage, and the other has mortgaged his share a second time, the former is equitably entitled to a discharge; and if it is given, this will not justify the later mortgagee to demand that the prior mortgage be postponed, or be held to be diminished in amount.⁴²

If the release is the equitable right of the person receiving it as against the portion of the property remaining, no deduction can be made from the mortgage debt because of it. So where, after the making of the mortgage, a portion was conveyed by the mortgagor for a full consideration and with warranty against the lien, the portion so conveyed may justly be released by the mortgagee without impairing his lien against the balance remaining

³⁷ *Barney v. Myers*, 28 Iowa, 472.

³⁸ *Kendall v. Niebuhr*, 58 How. Pr. 156, 165, *aff'd sub nom.* *Kendall v. Woodruff*, 87 N. Y. 1. See also *Hawke v. Snyder*, 86 Ill. 197; *Woodruff v. Stickle*, 28 N. J. Eq. 49.

³⁹ *Clinton v. Buffalo Land Se-*

curity Co., 55 App. Div. 440; 66 N. Y. Supp. 862.

⁴⁰ *Murray v. Fox*, 104 N. Y. 382; 10 N. E. 864.

⁴¹ *Coutant v. Seross*, 3 Barb. 128.

⁴² *Southworth v. Parker*, 41 Mich. 198; 1 N. W. 944.

in the hands of the mortgagor and his subsequent grantees and mortgagees.⁴³

So, where the mortgagee released in pursuance of an agreement contemporaneous with the mortgage, and under which it was made, it was held that such release did not affect the lien of the mortgage as to the parcels not released.⁴⁴

§ 412. In every case the mortgage will only be affected to the extent of the value of the property released,⁴⁵ and the owners of property not released cannot be suffered to escape payment of the fair proportion of the mortgage debt, which they would equitably have been obligated to pay if the release had not been executed.⁴⁶

It will be remembered that the release to a subsequent purchaser is not a technical discharge of the lands previously conveyed, from the lien of the incumbrance. So far as the release relates to the original parties to the mortgage, each and every part of the mortgaged premises is bound for the payment of the whole debt, and a release of one portion does not in any manner affect the lien upon the residue.⁴⁷

A release or discharge of one portion of the mortgaged premises does not operate as an equitable release or discharge of other portions, unless upon the principles of natural equity and justice it ought thus to operate against the party making the release to the subsequent grantee. So, where the entire value of the property released is credited upon the mortgage, no injury can come to any one, and no other property is affected.⁴⁸

If the mortgage was not an actual lien on the portion attempted to be released by reason of a lack of title in the mortgagor, no injury could be done by the release, and the owners of the remaining property could derive no advantage from it.⁴⁹

⁴³ Lyman v. Lyman, 32 Vt. 79.

⁴⁴ Kendall v. Niebuhr, 58 How. Pr. 156, *aff'd sub nom.* Kendall v. Woodruff, 87 N. Y. 1.

⁴⁵ Guion v. Knapp, 6 Paige, 35; Stuyvesant v. Hall, 2 Barb. Ch. 151; Frost v. Koon, 30 N. Y. 428; Dunn v. Parsons, 40 Hun, 77. See also Williams v. Wilson, 124 Mass. 257;

Hill v. Howell, 36 N. J. Eq. 25; Loan Ass'n v. Beaghen, 27 N. J. Eq. 98.

⁴⁶ Stevens v. Cooper, 1 Johns. Ch. 425.

⁴⁷ Coutant v. Servoss, 3 Barb. 128.

⁴⁸ Patty v. Pease, 8 Paige, 277.

⁴⁹ Taylor v. Short, 27 Iowa, 361; 1 Am. R. 280.

CHANGES IN THE FORM OF THE DEBT.

§ 413. Lien not commonly affected by changes in form of debt.—

As a general rule the mere change in the form of the debt does not satisfy a mortgage given to secure it, unless it is intended so to operate. The lien of the debt attaches to the mortgaged property, and the lien can, as between the parties, be destroyed only by the payment or discharge of the debt, or by a release of the mortgage. Mere change of the form of the evidence of the debt in nowise affects the lien. A renewal of the note, its reduction to a judgment, or other change not intended to operate as a discharge of the lien, still leaves it, as between the parties, in full vigor.⁵⁰

§ 414. Court will look at real nature of the transaction.—

In cases of this kind the court will always look to the real nature of the transaction, and will not consider a mortgage discharged by the mere change, or even the destruction of another security for the same debt, if it was not the intention of the parties to destroy the lien of the mortgage. In the case of *Hardwick v. Mynd* (1 Anst. 111), the court of Exchequer decided that the taking of a bond from the mortgagor for the arrears of interest, which bond was never paid, was not a discharge of the lien of the mortgage for such interest, although a receipt was actually indorsed upon the mortgage for the interest. So, in the case of *Davis v. Maynard* (19 Mass. 242), where the mortgage was given to secure payment of a sum of money due on a promissory note, and the mortgagee afterward accepted a recognizance for the sum due, and left the mortgage with the justice before whom the recognizance was acknowledged, who delivered it to the mortgagor, the Supreme Court of Massachusetts held that the lien of the mortgage was not thereby discharged. And in the case of *Dunham v. Dey* (15 Johns. 555), the Court of Errors in this State decided that where a mortgage is given to secure the payment of a promissory note, the subsequent renewal of the note is not to be consid-

⁵⁰ Per WALKER, J., in *Flower v. Ch. 65; Bank of Utica v. Finch, 3 Elwood, 66 Ill. 438; Dibble v. Barb. Ch. 293; Rogers v. The Richardson, 171 N. Y. 131; 63 N. E. Traders' Ins. Co., 6 Paige, 583; 829; Dunham v. Dey, 15 Johns, 554; Reeder v. Nay, 95 Ind. 164. Brinckerhoff v. Lansing, 4 Johns.*

ered an extinguishment of the original debt, so as to discharge the lien of the mortgage.⁵¹

Where the mortgagor sold the land to a third person, and, by a contract of novation, the mortgagee delivered up the mortgage notes to the mortgagor and accepted the notes of the purchaser for the same indebtedness the mortgage was held to stand as security for the new notes.⁵²

Where an unauthorized alteration was made in a note secured by mortgage, it was held that this rendered the note void, but did not affect the validity of the debt for which the note had been given, and the mortgage lien was enforced.⁵³

§ 415. New obligations or securities.—It is well settled in this State that the taking of a debtor's note does not merge or extinguish the demand for which it is taken,⁵⁴ except where there is a specific statement to the contrary.⁵⁵ If the demand is in the form of a note and that is secured by a mortgage, the mortgage is an incident of the debt. But it is an incident of the debt itself and not of the note which is evidence of it. Accurately speaking, a note is not a debt at all, any more than any other mere promise. Unless founded on a consideration, it is good for nothing between the original parties. Since taking a substantial note does not affect the debt, it cannot affect the security.⁵⁶

In the absence of a special agreement that a note of the debtor shall operate as full satisfaction for interest or principal on a bond secured by a mortgage, the mortgagee is not precluded from collecting the same,⁵⁷ except as against a surety, on the principal of an extension of the term of credit.⁵⁸ The giving of a receipt in full or even the indorsement of the amount as a payment upon

51 Per WALWORTH, Ch., in *Rogers v. The Traders' Ins. Co.*, 6 Paige, 583. See also *Pond v. Clark*, 14 Conn. 334.

52 *Foster v. Paine*, 63 Iowa, 85; *Sloan v. Rice*, 41 Iowa, 465; *Packard v. Kingman*, 11 Iowa, 219; *Watkins v. Hill*, 8 Pick. (Mass.) 522; *Pomroy v. Rice*, 16 Pick. (Mass.) 22.

53 *Gillette v. Smith*, 18 Hun, 10.

54 *Gregory v. Thomas*, 20 Wend. 17; *Waydell v. Luer*, 5 Hill, 448; *Cole v. Sackett*, 1 Hill, 516.

55 *Fitch v. McDowell*, 145 N. Y. 498; 40 N. E. 205.

56 *Hill v. Beebe*, 13 N. Y. 556, 562; *Jagger Iron Co. v. Walker*, 76 N. Y. 521, aff'g 43 N. Y. Supr. (11 J. & S.) 275. See also *Lippold v. Held*, 58 Mo. 213; *Hutchinson v. Swartweller*, 31 N. J. Eq. 205.

57 *Cole v. Sackett*, 1 Hill, 516; *Hill v. Beebe*, 13 N. Y. 556; *Frisbie v. Larned*, 21 Wend. 450, 452; *Waydell v. Luer*, 5 Hill, 448.

58 *Brown v. Mason*, 55 App. Div. 395; 66 N. Y. Supp. 917.

the bond, will not establish an agreement to take the note absolutely in payment of the original debt.⁵⁹

But an indorsement of a receipt for an installment of principal made upon a bond in consideration of a promissory note for the express purpose of enabling the mortgagee to sell the note and mortgage to raise money, will be treated as a payment on account of the mortgage and not as a mere change of security.⁶⁰

A second mortgage for the same debt will not, in the absence of express agreement, be treated as a discharge of a prior mortgage, but as collateral to it.⁶¹

§ 416. Agreement to take note in payment must be founded on new consideration.—No presumption will be indulged of an agreement to accept a new obligation or security in satisfaction of an old one. The presumption will always be that the new promise or security is a collateral to the old one. And, unless there be some new consideration moving between the parties, an agreement that a fresh promise shall be taken as full performance of a broken one, is void for the reason that it is without consideration. When this reason does not apply, the rule no longer prevails. If any new or additional security or other benefit is obtained by the creditor, or any detriment is sustained by the debtor, the agreement will be enforced. So, if notes bearing interest are given for an installment of interest due upon a mortgage, upon an agreement that they shall be in full payment, they will be so treated.⁶² Or the notes of a third person given and received as payment will discharge the original debt.⁶³

§ 417. Rule as to merger in securities of a higher nature.—If a bond is given for a note secured by mortgage, or if a judgment is obtained for the debt, the mortgage still remains until payment. The rule that a security of a higher nature extinguishes inferior

⁵⁹ *Feldman v. Beier*, 78 N. Y. 293; *Jagger Iron Co. v. Walker*, 76 N. Y. 521, aff'g 43 N. Y. Supr. (11 J. & S.) 275; *Putnam v. Lewis*, 8 Johns. 389; *Buswell v. Pioneer*, 37 N. Y. 312; *Muldon v. Whitlock*, 1 Cow. 290. See also *Megargel's Adm'r v. Megargel*, 105 Pa. St. 475.

⁶⁰ *Fowler v. Bush*, 38 Mass. (21 Pick.) 230.

⁶¹ *Gregory v. Thomas*, 20 Wend.

17; *Hill v. Beebe*, 13 N. Y. 556. See also *Swift v. Kraemer*, 13 Cal. 526; *Pouder v. Ritzinger*, 102 Ind. 571; 1 N. W. 44; *Walters v. Walters*, 73 Ind. 425; *Packard v. Kingman*, 11 Iowa, 219; *Burns v. Thayer*, 101 Mass. 426.

⁶² *Rice v. Dewey*, 54 Barb. 455. But see *Tylee v. Yates*, 3 Barb. 222.

⁶³ *Walker v. Mebane*, 90 N. C. 259.

securities, applies only to the state or condition of the debt itself, and means no more than this, that when an account is settled by a note, a note changed for a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced, lose their vitality. It has never been applied to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone.⁶⁴

DISCHARGE BY EXTENDING TIME FOR PAYMENT OF MORTGAGE DEBT.

§ 418. Where the property of one person is pledged to pay the debt of another, the owner of the property is the surety of the debtor. If, therefore, the mortgagee, without the consent of the owner of the property, makes a valid and binding agreement giving time to the principal debtor, the mortgaged premises will thereby be released and discharged from the lien of the mortgage.⁶⁵

The courts will not enter into the question of what injury the surety sustained. He is not liable upon the new or changed agreement at all.⁶⁶ If there is a want of consideration the agreement will not so operate.⁶⁷ This rule applies in favor of a wife, where her lands are pledged as security for the payment of her husband's debt.⁶⁸

In order to be available to the surety, the contract of extension must be binding and without his consent, and the mere taking of further obligations payable in the future, the right to proceed upon the collateral being expressly reserved, does not operate to discharge the mortgaged property.⁶⁹

⁶⁴ Per JOHNSON, J., in *Butler v. Miller*, 1 N. Y. (1 Comst.) 496, overruling 1 Denio, 407.

⁶⁵ *Smith v. Townsend*, 25 N. Y. 479; *Merill v. Reiners*, 14 Misc. R. 583; 36 N. Y. Supp. 634; *Gahn v. Niemcewicz*, 11 Wend. 312; *Niemcewicz v. Gahn*, 3 Paige, 614. See §§ 225 to 232.

⁶⁶ *Merill v. Reiners*, 14 Misc. 583; 36 N. Y. Supp. 634.

⁶⁷ *Metropolitan Life Ins. Co. v. Stimson*, 28 App. Div. 544; 51 N. Y. Supp. 226.

⁶⁸ *The Bank of Albion v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479.

⁶⁹ *National Bank of Newburgh v. Bigler*, 83 N. Y. 51, 66. See further as to effect of extending time, *ante*, § 225.

DISCHARGE BY ESTOPPEL.

§ 419. If the mortgagee should represent to a person intending to purchase the mortgaged premises that the mortgage had been paid, and such person should purchase, relying up such statement, the mortgagee would not, on the plainest principles of justice, be allowed thereafter to enforce his claims. So the mortgagee, by holding out a third person as being authorized to act for him in making bargains in relation to the mortgage, may be bound by estoppel by the acts of his apparent agent, and the mortgage may be satisfied and discharged even without actual payment.⁷⁰

Where a mortgagee was present at an auction sale of the mortgaged land, and it was announced by the auctioneer that the title was perfect and clear and unincumbered, and he failed to make any correction of said announcement, and the purchaser bought under the impression that he was getting an unincumbered title, and took a deed, and paid his money, the mortgagee was held to be estopped from claiming under his mortgage, although the mortgage was recorded at the time of the sale.⁷¹

Where the grantee of a mortgagor, being about to sell the mortgaged premises, procured the mortgagee to execute to the purchaser a bond conditioned that the said mortgagee would save the purchaser harmless from all costs and damages in consequence of any previous incumbrance upon the premises, it was held that the effect of this was to release the land from the incumbrance.⁷² A mortgagee is also held to be estopped from enforcing his mortgage against a portion of the premises where he has agreed to release such part from the lien of his mortgage and the party with whom the agreement was made has, after payment by him of the consideration agreed upon, made valuable improvements upon such portion.⁷³

DISCHARGE BY TENDER OF PAYMENT.

§ 420. Rule at common law.—By the ancient common law, a mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. On fail-

⁷⁰ Curtiss v. Tripp, Clarke, 318.

⁷² Proctor v. Thrall, 22 Vt. 262.

⁷¹ Markham v. O'Connor, 52 Ga. 183.

⁷³ Hazard v. Wilson, 22 Misc. R. 397; 50 N. Y. Supp. 280.

ure to perform that condition, the grant was absolute, and neither tender nor payment made afterward, would have the effect to revest the title.⁷⁴ The specified time of payment was called the law day, because after default, the legal rights of the mortgagor were gone.⁷⁵ A legal tender at the day appointed by the mortgage for the payment of the money, divested the estate of the mortgagee, even though payment were refused.⁷⁶

§ 421. Rule in this State.—In this State the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it. It is always permissible for the mortgagor to redeem by paying the amount due at any time before foreclosure; acceptance of payment of the amount due will discharge the incumbrance on the land, and tender and refusal are equivalent to performance.⁷⁷

The Real Property Law now expressly⁷⁸ establishes a statutory proceeding to procure the cancellation of mortgages upon petition, where the mortgagee has refused or neglected to accept a tender.⁷⁹ Money paid into court to perfect a defense of tender by the defendant belongs to the plaintiff, who may withdraw it from the custody of the court.⁸⁰

§ 422. A valid tender can be made at any time after the debt is due, and the tender of the amount due upon a mortgage, will discharge the lien.⁸¹ This is to be taken with the reservation that

⁷⁴ *Himmelman v. Fitzpatrick*, 50 Cal. 650; *Crain v. McGoon*, 86 Ill. 431; 29 Am. R. 37; *Powell v. Mitchell*, 68 Me. 21.

⁷⁵ *Comstock*, Ch. J., in *Kortright v. Cady*, 21 N. Y. 355.

⁷⁶ *Kortright v. Cady*, 21 N. Y. 343.

⁷⁷ *Nelson v. Loder*, 132 N. Y. 288; 30 N. E. 369; *Kemble v. Wallis*, 10 Wend. 374.

⁷⁸ § 333, as added by the Laws of 1911, Ch. 574.

⁷⁹ *Matter of Black*, 150 App. Div. 532.

⁸⁰ *Bieber v. Goldberg*, 120 App. Div. 457; 104 N. Y. Supp. 1080.

⁸¹ *Kortright v. Cady*, 21 N. Y. 343, rev'g s. c. *sub nom.* *Kortright*

v. Blunt, 23 Barb. 490; *Jackson v. Crafts*, 18 Johns. 110; *Edwards v. The Farmers' Fire Ins. & Loan Co.*, 21 Wend. 467; and s. c. *aff'd* 26 Wend. 541; *Arnot v. Post*, 6 Hill, 65, rev'd on other grounds, 2 Den. 344; *Graham v. Linden*, 50 N. Y. 547; *Green v. Fry*, 93 N. Y. 353. The same rule in *Michigan*. *Potts v. Plaisted*, 30 Mich. 149; *Van Huse v. Kanoner*, 13 Mich. 303. And also in *Missouri*. *Thornton v. Nat. Exchange Bank*, 71 Mo. 221; *Olmstead v. Tarsney*, 69 Mo. 396. And in *Indiana*. *McClellan v. Coffin*, 93 Ind. 456. *Contra*, *Matthews v. Lindsay*, 20 Fla. 962; *Crain v. McGoon*, 86 Ill. 433.

the debt or duty remains, and that the rejected tender at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential, or accessory responsibilities and incidents of his contract, but without releasing his prior debt. The tender extinguishes the lien and saves interest and costs, but the debt remains. The creditor by refusing to accept does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities.⁸² Since the tender and refusal do not extinguish the debt, but only defeat a particular remedy, it is not necessary that the tender should be kept good, or that the money should be brought into court.⁸³

§ 423. **The tender must be kept good to sustain action for affirmative relief.**—But even if a sufficient tender is made out, no action for affirmative relief and extinguishment of the mortgage can be maintained without keeping the tender good. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that can equitably be claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he must have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt, it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in law, and could not be enforced, even in equity, does not entitle a party to come into a court of equity and have it decreed to be surrendered or extinguished without paying the amount equitably owing thereon. Even securities void for usury would not be cancelled by a court of equity without payment of the debt,

⁸² Kortright v. Cady, 21 N. Y. 343; Hunter v. Le Conte, 6 Cow. 728; Coit v. Houston, 3 Johns. Cas. 243.

⁸³ Werner v. Tuch, 127 N. Y. 217; 27 N. E. 845; Kortright v. Cady, 21 N. Y. 343; Jackson v. Crafts, 18 Johns. 110; Edwards v. Farmers'

Fire Ins. & Loan Co., 21 Wend. 467, and aff'd 26 Wend. 541; Arnot v. Post, 6 Hill, 65, rev'd on other grounds, 2 Den. 344; Schieck v. Donohue, 77 App. Div. 321; 79 N. Y. Supp. 233, appeal dismissed; 173 N. Y. 638; 66 N. E. 1116.

with legal interest, until by statute it was otherwise provided.⁸⁴ The complaint should also contain an allegation of tender.⁸⁵

§ 424. **What tender is sufficient.**—The tender should be of the full amount due upon the mortgage, and it does not affect the question whether the person owning the legal title to the mortgage holds it in his own right or as trustee for some other person. In any event, to discharge the lien, the tender must be for the whole amount due upon the mortgage,⁸⁶ and it must also be unconditional,⁸⁷ except that the execution of a satisfaction of the mortgage may be required.⁸⁸

The holder of the mortgage is entitled to a reasonable time to examine his papers and compute the amount due. He is not bound under penalty, and at the hazard of losing his entire debt, to carry at all times in his head the precise sum due on any particular day. The proof must be full, clear, and satisfactory that the tender was made in good faith, and was understood by the holder to be a present, absolute, and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other condition or contingency. If the amount tendered be sufficient, the lien will be discharged whether it be accepted or not, and that without the execution of any paper.⁸⁹

A tender, with a demand for an assignment to the person paying, does not affect the lien.⁹⁰

Where the mortgagor said, in making a tender: "I will pay you this money if you will first transfer the mortgage and note to a third person," it was held that the mortgagee's rights were not affected by a refusal to accept.⁹¹

⁸⁴ Per RAPALLO, J., in *Tuthill v. Morris*, 81 N. Y. 94, 100; *Nelson v. Loder*, 132 N. Y. 288; 30 N. E. 369; *Werner v. Tuch*, 127 N. Y. 217; 27 N. E. 845; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; 23 N. E. 482; *McNeil v. Sun & Evening Sun Bldg. Ass'n*, 75 App. Div. 290; 78 N. Y. Supp. 90.

⁸⁵ *Bodenstein v. Saul*, 132 App. Div. 628; 117 N. Y. Supp. 349.

⁸⁶ *Graham v. Linden*, 50 N. Y. 547.

⁸⁷ *Roosevelt v. Bull's Head Bank*,

45 Barb. 579; *Roosevelt v. The N. Y. & Harlem R. R. Co.*, 30 How. Pr. 230; 45 Barb. 554; *Cashman v. Martin*, 50 How. Pr. 337.

⁸⁸ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; 23 N. E. 482.

⁸⁹ *Potts v. Plaisted*, 30 Mich. 149.

⁹⁰ *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Day v. Strong*, 29 Hun, 505. Compare *Cleveland v. Rothwell*, 54 App. Div. 14; 66 N. Y. Supp. 241.

⁹¹ *Ferguson v. Wagner*, 41 Ind. 450.

After an action has been commenced on a mortgage, a tender of an amount to discharge it should include costs,⁹² and if refused the pleadings should allege, in order to prevent a judgment against the defendants, either a payment of the money into court or an offer to pay.⁹³

An offer by the owner of mortgaged premises to pay the amount claimed to be due on a mortgage, under an order permitting it to be paid without prejudice to any of the mortgagee's rights and without in any manner attempting to adjudicate upon the question of the sufficiency of the tender, where the amount offered was not paid into court until more than three weeks after the trial, is an insufficient tender to support an action for the cancellation of the mortgage.⁹⁴

A delivery of money tendered by the mortgagor to his attorney, and the special deposit thereof in a trust company, subject at all times to the mortgagee's demand, until paid into court, is a good tender, and interest thereon will not be allowed to the mortgagee.⁹⁵

§ 425. **To whom tender may be made.**—The tender may be made to any person who is authorized to receive it. So, although a mortgage may have been assigned, still, if no notice of such assignment has been given to the mortgagor, he may lawfully continue to treat with the mortgagee as the owner;⁹⁶ and a tender to the mortgagee, even after the assignment, would be valid, and would be as effectual to extinguish the lien of the mortgage as an actual payment.⁹⁷

§ 426. **Mortgagee must accept a proper tender, without imposing conditions.**—If the tender be properly made, the mortgagee has no right to impose conditions upon which alone he will accept it; as, for instance, that another debt be also paid, and a sale made after a valid tender had been refused on such a pretense, would be void.⁹⁸

§ 427. **Where a mortgage is given conditioned for the support of the mortgagee, or of the payment to him of a stipulated weekly**

92 Marshall v. Wing, 50 Me. 62.

93 Osterman v. Goldstein, 32 Misc. R. 676; 66 N. Y. Supp. 506.

94 Weill v. Lippman, 55 Misc. R. 443; 105 N. Y. Supp. 516.

95 Heal v. Richmond County Sav-

ings Bank, 127 App. Div. 428; 111 N. Y. Supp. 602.

96 Trustees of Union College v. Wheeler, 61 N. Y. 88.

97 Hetzell v. Barber, 6 Hun, 534.

98 Burnet v. Denniston, 5 Johns. Ch. 35.

or monthly allowance, the refusal of the mortgagee to accept the support or the payment of the specified sum, will operate to waive the condition, and to discharge the lien of the mortgage.¹

§ 428. Mortgagee may rely on decisions of the highest courts.

—In *Harris v. Jex* (66 Barb. 232; aff'd 55 N. Y. 421), the defendant was a grantee of premises subject to certain mortgages executed prior to the legal tender act. After the decision of the Supreme Court of the United States holding that act void as to antecedent contracts,² and before the reversal of that decision,³ the defendant tendered payment of the mortgages in legal tender notes, which was refused. It was urged by the defendant that this operated to discharge the lien of the mortgages, but it was held, that the plaintiff had a right to rely on the decision of the highest court in the land, and that the tender, being insufficient, according to the law of the land, as then declared, did not discharge the lien of the mortgage.

§ 429. Tender must be clearly proved.—In view of the serious consequences resulting from the refusal of such a tender, the proof should be very clear that it was fairly made, and deliberately and intentionally refused by the mortgagee or some one duly authorized by him, and that sufficient opportunity was afforded to ascertain the amount due. At all events, it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender.⁴

§ 430. Who may make a tender sufficient to discharge the lien.

—It has been debated as to whether the tender which will discharge the lien of the mortgage may be made by any person other than one personally obligated for the payment of the mortgage debt. In *Kortright v. Cady* (21 N. Y. 343), the tender was made by a grantee of the mortgaged premises, and the tender was held to be equivalent to payment, so far as its effect upon the mortgage as a lien was concerned; but it does not appear whether the grantee had or had not made the debt his own by assuming it.

¹ *Morrison v. Morrison*, 4 Hun, 410; *Young v. Hunter*, 6 N. Y. (2 Seld.) 204; *Holmes v. Holmes*, 9 N. Y. (5 Seld.) 527; *Carman v. Pultz*, 21 N. Y. (7 Smith) 547.

² *Hepburn v. Griswold*, 2 Wall. (U. S.) 605.

³ *Knox v. Lee*, 12 Wall. (U. S.) 457.

⁴ Per RAPALLO, J., in *Tuthill v. Morris*, 81 N. Y. 94, 99.

The reasoning of the court is, however, based largely upon the theory that the debt was that of the person who offered to pay it. In *Harris v. Jex* (66 Barb. 232), the question was raised, and it was there held by the General Term, in the first department, that a grantee who had received merely the equity of redemption, without obligating himself personally for the payment of the debt, could not discharge the incumbrance without actual payment. It was thought that, in such a case, the right of the grantee was limited to a privilege to redeem from the lien, and that such redemption could not be effected by a mere offer to redeem. It was argued that a tender could not be made by a mere stranger to a contract, so as to oblige the creditor to accept it, and it was determined to be unreasonable to allow the grantee to discharge the land, which was in his hands the fund upon which the debt was primarily chargeable, by any act which would continue the debt in full force against the mortgagor personally. This decision came before the Court of Appeals for review, but that court expressly declined to pass upon the question, and the judgment was affirmed upon other grounds.⁵ In a later case the doctrine has been repudiated.⁶

§ 431. (*Continued.*)—In *Dings v. Parshall* (7 Hun, 522), a junior mortgagee who was a defendant in an action to foreclose the prior incumbrance, made an offer after the entry of a judgment of foreclosure and sale, to pay all moneys due upon it, and requested an assignment; this was refused, the money was placed in a bank for the owner of the judgment and there left, and an action was commenced to compel the assignment asked for, with an injunction. The relief was granted, and it was said by MULLIN, P. J., that “no distinction is perceived as to the effect of a tender, between that of a mortgagor to a mortgagee, and of a subsequent incumbrancer to the same party to redeem. In each case the effect is to discharge the lien on the mortgaged premises, and if tender discharges the lien in one case, it ought to have the same effect in the other.” It will be noticed that the same effect was not given to the tender of the junior incumbrancer, for the tender was kept good, and there is no intimation in the case that it was intended to discharge the lien of the prior mortgage.

⁵ *Harris v. Jex*, 55 N. Y. 421.

70 N. Y. 553; *Day v. Strong*, 29 Hun,

⁶ *Frost v. Yonkers Savings Bank*, 505.

Actual payment by the person asking to redeem would not have had that effect. If a mortgage debt is paid by a person who stands in the position of surety for it, either because of his collateral personal obligation, or because of his ownership of a subordinate interest in the property, the debt and lien are not thereby cancelled. They remain in full force, but they are thereafter equitably the property of the surety, and may be enforced by him without any formal assignment.⁷ When a surety redeems he does not satisfy the mortgage, but he becomes the equitable purchaser of it, and an offer or tender to redeem is an offer to purchase. The rights of the surety are equitable, and it is hard to perceive any just principle upon which he would acquire any rights in the mortgage without keeping his tender good, a thing which the owner of the property would not be obliged to do. So, also, if such surety be released, or if his junior lien be satisfied, and if his tender be not kept good, the owner of the estate upon which the mortgage is a charge, could not avail himself of a tender which was not made or intended for his benefit, and which, if accepted, would have operated only to transfer the lien and to change the ownership of the obligation.

§ 432. (*Continued.*)—In *Bloomingdale v. Barnard* (7 Hun, 459), and in *Frost v. Yonkers Savings Bank* (8 Hun, 26), the right of a junior incumbrancer to destroy any of the rights of a prior mortgagee, or even to delay his remedies by a mere offer to pay, coupled with a demand for an assignment, was distinctly denied, and it was held that the claim to an assignment depended upon the special circumstances of each case, and that it would not be granted except when it was necessary for the protection of equitable rights.

§ 433. **Junior lien may not discharge by making a tender.**—In *Frost v. Yonkers Savings Bank* (70 N. Y. 553), the Court of Appeals declared that the owner of the land subject to a mortgage, commonly called the owner of the equity of redemption, has the right always to pay and satisfy a mortgage past due. And it matters not whether he is personally liable to pay the debt secured by the mortgage. The right to discharge his land from the incumbrance is incident to the ownership, and when he makes

⁷ *Ellsworth v. Lockwood*, 42 N. Y. 89.

a lawful tender he destroys the lien.⁸ But a junior incumbrancer may not occupy the same position as the owner of the land. There is certainly not always the same reason for allowing him to discharge the incumbrance, and, if he has such a right, it can only be exercised by an absolute tender of payment, which, if received, will discharge the debt and incumbrance. A tender with a demand for a transfer of a security, does not satisfy these requirements. Such a tender may give a party a footing in equity to compel the transfer desired if he is otherwise entitled to it, but it does not operate to discharge the lien.⁹

A party having no interest in the mortgaged premises or in the tender made, has no right to make a tender in his own behalf.¹⁰

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME.

§ 434. When a mortgage is presumed to be discharged from lapse of time.—It is a well-settled rule, both at law and in equity, that a mortgage is not evidence of a subsisting title, if the mortgagee has not entered, and there has been no interest paid or demanded for twenty years. These facts authorize and require presumption of payment.¹¹ Such conclusive presumption does not arise at any earlier time than twenty years after the last payment of principal or interest;¹² and the mortgagee will not lose his right by lapse of time where there has been a payment of interest, or a promise sufficient to take the case out of the statutory limit, which promise as the law now stands, must be in writing,¹³ or where the mortgagee is lawfully in possession after default,¹⁴ or where the statute

⁸ Citing *Kortright v. Cady*, 21 N. Y. 343; *Stoddard v. Hart*, 23 N. Y. 560; *Hartley v. Tatham*, 1 Keyes, 222.

⁹ *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Day v. Strong*, 29 Hun, 505.

¹⁰ *Maher v. Newbauer*, 32 Cal. 168.

¹¹ *Martin v. Stoddard*, 127 N. Y. 61; 27 N. E. 285; *Katz v. Kaiser*, 10 App. Div. 137, aff'd 154 N. Y. 294; *Ouvrier v. Mahon*, 117 App. Div. 749; 102 N. Y. Supp. 981; *Forbes v. Reynard*, 113 App. Div. 306; 98 N. Y. Supp. 710; *Keese v. Dewey*, 111 App. Div. 16; 97 N. Y. Supp. 519; *Bough-*

ton v. Hardy, 46 App. Div. 353; 61 N. Y. Supp. 574; *Giles v. Baremore*, 5 Johns. Ch. 545; *Dunham v. Minard*, 4 Paige, 441; *Borst v. Boyd*, 3 Sandf. Ch. 501; Code of Civ. Proc., § 381; 2 R. S. 301, § 48.

¹² *Redmond v. Hughes*, 151 App. Div. 99; *Peck v. Mallams*, 10 N. Y. (6 Seld.) 509. See also *Boon v. Pierpont*, 28 N. J. Eq. 7.

¹³ Code of Civ. Proc., § 395. See *Clute v. Clute*, 190 N. Y. 439; 90 N. E. 439; *Decker v. Zeluff*, 23 App. Div. 107; 48 N. Y. Supp. 385.

¹⁴ *Becker v. McCrea*, 149 App. Div. 211.

of limitations has been prevented from running by statutory disabilities.

If an action is commenced to foreclose and a judgment is entered, the lien is still liable to be defeated by the same presumption of payment founded upon lapse of time. If the mortgage stands alone without payment or proceedings to enforce it for twenty years the presumption of payment accrues. If by virtue of foreclosure a new security has been taken, the same policy will, under the same circumstances, raise the same presumption.¹⁵ Upon this principle it has been held that where there has been a foreclosure sale, not followed by a conveyance to the purchaser, or any recognition of the mortgage by the mortgage debtor, it will be presumed after the lapse of twenty years that the land had been redeemed from such sale.¹⁶

Where a surety paying the debt of the principal becomes subrogated to the rights of the creditor in a mortgage given by the principal debtor to secure notes, his action to foreclose the mortgage for his reimbursement is limited to six years, even when the mortgage contains an express covenant to pay the debt.¹⁷ The statute never runs against a contractor while he is in full enjoyment of his rights under the contract.¹⁸

§ 435. **The statute controls.**—The statute of limitations in this State differs essentially from the statute of James I. and from the statutes of limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence courts of equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases courts of equity are said to act merely by analogy to the statutes and not in obedience to them.¹⁹ But in this State “the distinction between actions at law and suits in equity and the forms of those actions and suits have been abolished,”²⁰ and the statute controls all actions whether heretofore denominated legal or equitable. The statute is peremptory and provides as follows: “The following actions must be

¹⁵ Per DANFORTH, J., in *Barnard v. Onderdonk*, 98 N. Y. 158, 166.

¹⁶ *Reynolds v. Dishon*, 3 Bradw. (Ill.) 173.

¹⁷ *Arbogast v. Hays*, 98 Ind. 26.

¹⁸ *Alden v. Barnard*, 15 Misc. R. 512; 37 N. Y. Supp. 1069.

¹⁹ *Lord v. Morris*, 18 Cal. 482.

²⁰ Code of Civ. Pro., § 3339.

Pleading of statute. *Nickell v. Tracy*, 184 N. Y. 386; 77 N. E. 391, rev'g 100 App. Div. 80; 91 N. Y. Supp. 287.

commenced within the following periods after the cause of action has accrued. Within twenty years, an action upon a sealed instrument," etc.²¹ An action upon a mortgage to enforce its lien is as much barred by this statute as an action on a bond to recover a judgment for money damages, and no help can be given by the court to the plaintiff unless facts can be shown to bring his case within the exceptions which the statute itself prescribes. In this respect the rule here is different from those States proceeding upon a different principle.²² No question of mere presumption of payment can control, for presumptions may be rebutted, but the court must refuse to enforce the lien after twenty years whether payment has been made or not.

§ 436. Delay in foreclosing for less than statutory period.—While no conclusive presumption of payment arises in less than the time prescribed by the statute of limitations, the fact that the mortgagee has neglected to assert his rights for any considerable period will be of weight, with other circumstances, as an evidence that payment has been made. In an early case, where no steps had been taken to put the mortgage in force, nor had any demand been made under it for nineteen years previous to the trial, it was said that the jury would have been well warranted to have presumed it satisfied.²³

§ 437. Payment made by mortgagor after granting mortgaged estate.—The mortgage will continue to be valid so long as the debt which it secures is not barred by the statute, and anything which will prevent the statute from running against the debt, will also prevent the remedy on the security from being destroyed by lapse of time. This rule may operate curiously where the mortgaged estate has been acquired by some person other than the one who is personally obligated for the payment of the debt. Thus, in the case of *Hughes v. Edwards* (9 Wheat, 490), the Supreme Court of the United States held that purchasers from the mortgagor who had either actual notice of the mortgage at the time of their purchases, or had constructive notice by means of the registry, were bound by a previous acknowledgment of the person under whom

²¹ Code of Civ. Pro., §§ 380, 381.

²² In *Phibrook v. Clark*, 77 Me. 176; 32 Alb. L. J. 179, a mortgage was enforced after twenty years because the mortgagor was the mother

of the mortgagee, and he had refrained from asking for interest or enforcing the mortgage on that account.

²³ *Jackson v. Pratt*, 10 Johns, 381.

they claimed, of the existence of the indebtedness within twenty years. In such a case the owner of the property is said to sit in the seat of his grantor, and he is bound by his previous recognition of the mortgage as a subsisting lien upon the premises within twenty years.²⁴ Not only will the grantee of the mortgaged premises be bound by the acts of the mortgagor or other person under whom he claims, anterior to the conveyance, but he may also be bound by acts subsequent to the vesting of his rights; and it has been held that a payment or new promise made by the mortgagor or other person liable to pay the debt, after the person so liable has transferred the property, will keep the debt and the security alive as against the estate.²⁵ The payment must be made by a party liable or his authorized agent.²⁶

A payment of interest by a tenant for life will keep the mortgage alive as against the persons entitled to the mortgaged estate in remainder.²⁷ But payment by a grantee of one parcel of the mortgaged lands will not arrest the operation of the statute in favor of the grantee of another parcel who did not assume payment of the mortgage debt or make or authorize any payments thereon.²⁸ So a payment by heirs of the mortgagor who have inherited a part of the premises, will not arrest the running of the statute as

²⁴ Heyer v. Pruyn, 7 Paige, 465.

²⁵ Mack v. Anderson, 165 N. Y. 529; 59 N. E. 289; N. Y. Life Ins. & Trust Co. v. Covert, 6 Abb. N. S. 154, rev'g 29 Barb. 435; 3 Abb. App. Dec. 250; Barrett v. Prentiss, 57 Vt. 297. But see *contra*, Pike v. Goodnow, 12 Allen (Mass.) 472; Schmucker v. Sibert, 18 Kans. 104; 26 Am. R. 765. Where three persons executed their joint and several mortgage on land to secure their joint and several promissory note to the mortgagee, and one of them left the State, and the note afterward became barred by the statute of limitations as to the two who remained in the State, it was held that the lien of the mortgage was also barred as to their interest in the land, and that it could only be enforced against the interest of the one as to whom the note was not barred. Low v. Allen, 26 Cal. 143. A renewal of the note after the same

is barred by the statute of limitations operates as a renewal of the mortgage secured thereby only as between the original parties thereto, and does not affect the rights of third parties to the property accruing after execution of the mortgage, but prior to the renewal and while the debt was barred. Cason v. Chambers, 62 Tex. 305. Regular payment of interest by grantee of equity of redemption does not prevent the running of the statute of limitations against the liability of the grantor on the obligation. Trustees of Almshouse v. Smith, 52 Conn. 434; Butler v. Price, 115 Mass. 578.

²⁶ Knapp v. Crane, 14 App. Div. 120; 43 N. Y. Supp. 513.

²⁷ Roddam v. Morley, 1 Des. & Jo. 1.

²⁸ Mack v. Anderson, 165 N. Y. 529; 59 N. E. 289.

against the lien of the mortgage upon another part of the premises which were conveyed by the mortgagor in his life time to a third person for full value who assumed no duty regarding the mortgage and was under no obligation to pay the mortgage debt.²⁹ Nor will a payment by a dowress made to the mortgagee, one of her three children who have inherited the property, without the knowledge or authority of the other two, be effective as against them to prevent the running of the statute.³⁰

§ 438. Mortgage under seal not barred until twenty years, though debt be barred in six.—The statute of limitations does not affect the rights of parties, except as it takes away their remedies;³¹ it does not assume to declare a debt satisfied or paid after a certain space of time, but it only enacts that an action must be commenced within that time, or the courts will not thereafter enforce the demand. If, therefore, a simple contract debt, that is to say, one evidenced in such a way that the statute will prevent an action from being brought upon it after the expiration of six years, is secured by a mortgage under seal, the remedy upon the mortgage by foreclosure will remain for twenty years, though the remedy upon the personal liability of the debtor will be gone at the end of six. Thus, for example, a mortgage under seal to secure a promissory note, may be enforced after the debt has been barred by the statute, and at any time within twenty years.³² Upon the same principle, in an action to recover possession of a pledge, given to secure a debt against which the statute of limitations had run at the time of the commencement of the action, it was held that although the creditor had, from lapse of time, lost his remedy

²⁹ *Murdock v. Waterman*, 145 N. Y. 55; 39 N. E. 829.

³⁰ *Nickell v. Tracy*, 100 App. Div. 80; 91 N. Y. Supp. 287. Reversed on other grounds, 184 N. Y. 386; 77 N. E. 391.

³¹ *Waltermire v. Westover*, 14 N. Y. (4 Kern.) 16.

³² *Hulbert v. Clark*, 128 N. Y. 295; 28 N. E. 638; *Gillette v. Smith*, 18 Hun, 10; *Pratt v. Huggins*, 29 Barb. 277; *Heyer v. Pruyn*, 7 Paige, 465; *Borst v. Corey*, 15 N. Y. (1 Smith) 510; *Thayer v. Mann*, 19 Pick. 537; *Baldwin v. Norton*, 2 Conn. 163;

Spears v. Hartley, 3 Esp. 81; *Toplis v. Baker*, 2 Cox, 123. See *Jackson v. Sackett*, 7 Wend. 94; *Powell v. Smith*, 30 Mich. 451; *Ætna Life Ins. Co. v. Baker*, 84 Ind. 301; *Ballou v. Taylor*, 14 R. I. 277; *Thayer v. Mann*, 19 Pick. 535; *Crooker v. Holmes*, 55 Me. 195; 20 Am. R. 687; *Nichols v. Briggs*, 18 S. Car. 474; *Capehart v. Dettrick*, 91 N. C. 344. And if the mortgage be given to secure a note, a personal obligation may be enforced on a covenant to pay contained in the mortgage after the note is outlawed. *Earnshaw v. Stewart*, 64 Ind. 513.

against the debtor personally, he had not lost his remedy against the pledge.³³ Payment is one thing, a mere presumption of payment quite another. The test principle of the whole matter is simply this: the statute of limitations only bars the remedy, and if the creditor has any available security he may enforce it.³⁴

The presumption of payment from lapse of time is available as a shield, but not as a weapon of attack or as a ground for affirmative relief, and an action to cancel a mortgage cannot be sustained on the mere ground of lapse of time and without proof of actual payment.³⁵

State insolvent laws, like statutes of limitations, affect the remedies of creditors and do not operate to cancel debts, and for this reason the lien of a mortgage remains after the discharge of the mortgagor under a State statute.³⁶

§ 439. The rights of the mortgagor, like those of the mortgagee, may also be barred by lapse of time, and a grant to the mortgagee may be inferred from continued possession and enjoyment by him for twenty years, under certain circumstances, but this presumption will be rebutted if the mortgagee commences proceedings to foreclose either by advertisement or by action, and such proceedings will revive the right of redemption.³⁷

§ 440. Possession by a mortgagor of the bond and mortgage is presumptive evidence of payment,³⁸ especially when they are retained by him for many years, and are found among his papers at the time of his death.³⁹ On the other hand a mortgagee's possession raises an inference that the debt is valid and unpaid.⁴⁰

DISCHARGE OF MORTGAGES UPON THE RECORD.

§ 441. Statute.—It is provided by statute that a mortgage registered or recorded must be discharged upon the record thereof, by the recording officer, when there is presented to him the certificate

³³ Jones v. Merchants' Bank of Albany, 4 Robt. 221.

³⁴ See article, 14 Alb. L. J. 209.

³⁵ Allen v. Everly, 24 Ohio St. 97.

³⁶ Heyer v. Pruyn, 7 Paige, 465, 469.

³⁷ Jackson v. Slater, 5 Wend. 295;

Calkins v. Calkins, 3 Barb. 305; Calkins v. Isbell, 20 N. Y. 147.

³⁸ Braman v. Bingham, 26 N. Y. 483; Garlock v. Goertner, 1 Wend. 198.

³⁹ Levy v. Merrill, 52 How. Pr. 360.

⁴⁰ Fitzmahoney v. Caulfield, 25 App. Div. 119; 49 N. Y. Supp. 196.

signed by the mortgagee, his personal representative or assignee, and acknowledged or proved and certified in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge and the certificates of its acknowledgment or proof, must be recorded and filed; and a reference must be made to the book and page containing such record in the minute of the discharge of such mortgage, made by the officer upon the record thereof. After such discharge has been recorded the recording officer shall make and deliver to the person in whose interest such discharge of mortgage is executed and recorded, his certificate setting forth the names of the mortgagor and mortgagee, the liber and page at which, the time when, such mortgage was recorded, and the date on which said mortgage was satisfied and discharged.⁴¹ It is provided by the Real Property Law⁴² that in counties wholly embraced in a city of the first class, no mortgage shall be discharged of record, unless in addition to the certificate provided and required by the preceding section, there shall be presented to the recording officer for cancellation the original mortgage, or a certified copy of an order made and entered as hereinafter provided. The said officer shall, at the time of the discharge of the said mortgage, cancel said original mortgage by effacing the signatures thereto, without obliterating the same, and shall file the same in his office, and keep the same so filed for the term of ten years. This remedy applies only to cases where the original mortgage has been lost, mutilated or destroyed and not where the mortgagee willfully neglects or refuses to produce it. In the latter case the proper remedy is prescribed in section 333 of the Real Property Law, as added by chapter 574 of the Laws of 1911.⁴³ The proceedings by which such an order may be obtained and the grounds upon which it may be granted are fully set forth in the statute.⁴⁴ As in all statutory proceedings there must be strict compliance with the law. Where the recording officer opposes a motion for such an order in the belief it is his duty to do so, he will not be charged with the costs of an appeal.⁴⁵ A clerk may be compelled to satisfy a mortgage

⁴¹ Real Prop. Law, § 321.

⁴² § 322, as amended by the Laws of 1912, Ch. 254.

⁴³ Matter of Black, 150 App. Div. 532.

⁴⁴ Real Prop. Law, § 322.

⁴⁵ Matter of Leckie, 131 App. Div. 816, 116 N. Y. Supp. 32.

upon the record by mandamus, where he has refused to accept a satisfaction piece duly executed in accordance with the statute.⁴⁶

§ 442. Certificate of satisfaction is within the recording acts.—This is a simple mode of reconveying or releasing the land from the lien of the mortgage. The “satisfaction piece” is a “conveyance” under the recording act; for by it an interest in real estate is aliened and the title of real estate is affected in law and in equity. It operates to transfer back to the mortgagor the mortgage interest held by the mortgagee.⁴⁷

While the record of a certificate of satisfaction of a mortgage, executed by its apparent record owner, is a protection to a purchaser who pays value on the faith of it,⁴⁸ it is not so to one whose lien was acquired while the mortgage was in full force upon the record as a lien. As to such person, a certificate executed by the mortgagee after he has parted with the mortgage is of no value, though recorded.⁴⁹ An acknowledgment of receipt of payment in a satisfaction of a mortgage is *prima facie* evidence that the mortgage has been paid and it must be affirmatively shown that the acknowledgment is untrue in order to rebut the presumption.⁵⁰ Where a mortgagor, upon payment of the mortgage, presents a drawn satisfaction piece, and twenty-five cents, the legal fee for taking acknowledgments, the mortgagee is legally bound to execute the satisfaction piece upon request and to deliver the same, together with the bond and mortgage to the mortgagor, and he may not refuse to deliver the documents unless the mortgagor pays him a fee for preparing his own satisfaction piece.⁵¹

§ 443. Other means of evidencing discharge.—The statutory method of releasing the lien of a mortgage is not the only permissible or legal means of accomplishing this result, and a quitclaim conveyance from the mortgagee to the owner of the equity of redemption is commonly made when the object is to release a part of the mortgaged premises.⁵² A writing on the back of the

⁴⁶ *Matter of Wadsworth*, 27 Misc. R. 264.

⁴⁷ *Bacon v. Van Schoonhoven*, 19 Hun, 158.

⁴⁸ *Ely v. Scofield*, 35 Barb. 330; *Holt v. Baker*, 58 N. H. 276.

⁴⁹ *Roberts v. Halstead*, 9 Pa. St. 32.

⁵⁰ *Von Slooten v. Wheeler*, 140 N. Y. 624; 35 N. E. 583.

⁵¹ *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165; *Kralder v. Hillman*, 57 Misc. R. 209.

⁵² *Bacon v. Van Schoonhoven*, 19 Hun, 158. See also *Woodbury v. Aikin*, 13 Ill. 639; *Waters v. Waters*, 20 Iowa, 363; *Mason v. Beach*, 55 Wis. 607; 13 N. W. 884; *Mabie v. Hatinger*, 48 Mich. 341; 12 N. W. 198.

mortgage may accomplish the release,⁵³ and a bond of indemnity may operate in the same way.⁵⁴ A release in writing, but not under seal, of the land covered by the mortgage, though perhaps not good at law, is valid in equity;⁵⁵ and even an unwritten agreement to satisfy a mortgage for a good consideration is a sufficient defense against a foreclosure of it.⁵⁶

A release under seal from the mortgagee to the mortgagor, whereby for value received and in consideration of one dollar he released the mortgagor from all indebtedness, "whether on book account, note, or any other way," was held to discharge a mortgage to secure a promissory note.⁵⁷ But a release under seal of moneys due on a bond secured by a mortgage, "and also in full of all debts, demands, executions, and accounts of whatsoever nature," has been held insufficient to justify a discharge of the mortgage lien, there being other evidence that such was not the intention of the parties.⁵⁸

A receipt for the debt would, if uncontradicted, operate to extinguish the mortgage, but would be open to explanation.

A quitclaim deed by a mortgagee of the premises covered by his mortgage may operate as an assignment, or as a release, according as the grantee may elect and equity may require.⁵⁹

§ 444. The record of discharge is no more valuable than the certificate of satisfaction, and a worthless certificate does not gain any thing of validity by being engrossed by a recording clerk and noted upon the margin of the instrument.⁶⁰ Thus a forgery is a nullity at all times; and a certificate of discharge, executed by a person not duly authorized to execute it, is no protection even for a *bona fide* purchaser, though it be recorded and duly certified by the recording officer.⁶¹

In the absence of proof of any act on the mortgagee's part mis-

⁵³ *Waters v. Waters*, 20 Iowa, 363; *Allard v. Lane*, 18 Me. 9.

⁵⁴ *Archambau v. Green*, 10 Minn. 520.

⁵⁵ *Headly v. Gormdry*, 41 Barb. 279; *Wallis v. Long*, 16 Ala. 738.

⁵⁶ *Griswold v. Griswold*, 7 Lans. 72, aff'd 52 N. Y. 631.

⁵⁷ *Van Bokkelen v. Taylor*, 62 N. Y. 105.

⁵⁸ *Jackson v. Stackhouse*, 1 Cow. 122.

⁵⁹ *Thayer v. McGee*, 20 Mich. 195.

⁶⁰ *Harris v. Cook*, 28 N. J. Eq. 345; *Mechanics' Building Association v. Ferguson*, 29 La. Ann. 548.

⁶¹ *Swarthout v. Curtis*, 5 N. Y. (1 Seld.) 301; *Farmers' Loan & Trust Co. v. Walworth*, 1 N. Y. (1 Comst.) 433. An action will lie to set aside the satisfaction of a mortgage obtained by deceit. *Weaver v. Edwards*, 39 Hun, 233.

leading the purchaser, the fact that the mortgage has been erroneously canceled of record by the register is no defense to its foreclosure, even if the purchaser has paid full value for the premises in good faith and relying on the record.⁶²

§ 445. **Who may execute certificate of satisfaction.**—This statute does not mean that all of the mortgagees, or their personal representatives, must execute and acknowledge the certificate of satisfaction in order to authorize the officer in whose custody the record of the mortgage shall be, to record it, and discharge the mortgage on the record. Such certificate is sufficient if executed and acknowledged by any person or persons authorized to receive payment of the mortgage; as, for instance, a mortgage may be canceled by any one of the executors of a mortgagee,⁶³ but not by one of three trustees⁶⁴ nor by a trustee in contravention to the terms of his trust.⁶⁵

If a mortgage is discharged upon the record by a person who appears by the record to be the owner of it, even though it has actually been assigned, it will operate to cancel the mortgage as against subsequent purchasers and mortgagees in good faith and without notice, but as to all other persons the validity of the mortgage will not be impaired.⁶⁶

Where a discharge of a recorded mortgage is executed by a person other than the mortgagee, as by a guardian of an infant, a subsequent purchaser is bound to inquire by what authority such person assumed to discharge it, and he is chargeable with notice of all the facts which the reasonable prosecution of such inquiry would elicit. Where, therefore, a guardian for infants was directed to give a bond previous to satisfying a mortgage, and he failed to give the bond and executed the certificate of satisfaction which was recorded, it was held that such discharge did not protect subsequent *bona fide* incumbrancers against the claims of the infants by virtue of their mortgage.⁶⁷

§ 446. **Discharge by officer of limited powers.**—Where moneys deposited with a special officer, as a clerk of the Court of

⁶² *Brown v. Henry*, 106 Penna. St. 262; *Lancaster v. Smith*, 17 P. F. Smith (Pa.) 427.

⁶³ *People v. Keyser*, 28 N. Y. 226; *Stuyvesant v. Hall*, 2 Barb. Ch. 151.

⁶⁴ *Vohmann v. Michel*, 109 App. Div. 659.

⁶⁵ *McPherson v. Rollins*, 107 N. Y. 316; *Kirsch v. Tozier*, 143 N. Y. 390.

⁶⁶ *Ely v. Scofield*, 35 Barb. 330.

⁶⁷ *Swarthout v. Curtis*, 5 N. Y. (1 Seld.) 301.

Chancery, have been invested under special directions of the court, in a mortgage payable to such officer in his official capacity, such clerk has no power to discharge the mortgage without the order of the court; and if he do execute such a discharge without actual payment, and without the order of the court, it is void even as against *bona fide* purchasers of property.⁶⁸

§ 447. Right of person paying mortgage to certificate of satisfaction.—It is a matter of serious importance to the owner of mortgaged premises that upon payment of the mortgage debt he should be furnished with a document which will cancel the apparent lien of record. He is, in equity and fairness, entitled to a proper voucher. But, until recently, there was no summary way in which a delivery of a certificate of satisfaction could be enforced. The remedy of the mortgagor, in case a certificate of satisfaction was refused, was to pay the debt in the sight of witnesses, and then to bring an action to cancel the mortgage and compel the execution of a satisfaction piece.⁶⁹

Where the mortgage is in the form of an absolute deed, with a parol defeasance, the grantee may, on payment of the debt, and in an action brought for that purpose, be required to execute a reconveyance.⁷⁰

A person demanding a certificate of satisfaction of a mortgage, should prepare the instrument and present it to the mortgagee, at the same time offering to pay the expenses of execution,⁷¹ that is to say twenty-five cents, that being the "fees allowed by law for taking the acknowledgment of a deed."

§ 448. Actions to discharge mortgages.—It is in the power of a court of equity either to cancel a mortgage shown to be discharged or paid, or to revive a mortgage where the cancellation of

⁶⁸ Farmers' Loan & Trust Co. v. Walworth, 1 N. Y. (1 Comst.) 433. Mortgages to the People of this State may be discharged of record upon the treasurer's receipt, countersigned by the comptroller, setting forth that the whole sum due on such mortgage has been paid. State Finance Law, § 31, 1 R. S. 175, §§ 36, 37.

⁶⁹ Beach v. Cooke, 28 N. Y. 508; Barnes v. Camack, 1 Barb. 392; Sutherland v. Rose, 47 Barb. 144; Beecher

v. Ackerman, 1 Abb. N. S. 141; Sherwood v. Wilson, 2 Sweeny, 684. See also Verges v. Giboney, 47 Mo. 171. But for present statutory proceeding see Real Prop. Law, § 333. See also Forms 69 to 72, in Appendix of Forms.

⁷⁰ Sherwood v. Wilson, 2 Sweeney, 684. See also Kenton v. Vandergrift, 42 Pa. St. 339.

⁷¹ Pettengill v. Mather, 16 Abb. 399. Real Prop. Law, § 333.

it has been obtained by fraud and the equitable rights of the parties require such relief.⁷² An action to cancel a mortgage may also be brought by the mortgagor if it be usurious, or if the parties differ as to the amount owing upon it, and the plaintiff may in one action ask to have a mortgage discharged because it is paid, and also to be allowed to redeem if it be not fully paid.⁷³

A county court has jurisdiction of an action to compel the satisfaction of a mortgage, and for damages for a wrongful refusal of the mortgagee to execute a certificate of satisfaction.⁷⁴

§ 449. Who may bring action to discharge mortgage.—An action to cancel a mortgage or other lien cannot be maintained by a person who has no interest in or lien upon the land affected by it. Even though the plaintiff has warranted the title against the lien,⁷⁵ or has conveyed the land with a covenant with his grantee to procure the lien to be discharged,⁷⁶ this will not furnish a proper basis for the action.

But where a plaintiff had conveyed the lands covered by a mortgage, and the purchaser had withheld an amount of the purchase money sufficient to pay the amount unpaid upon the mortgage, and the same was deposited in a trust company to abide the event of a proceeding to procure a satisfaction of the mortgage and to pay whatever might be found due thereon, the action was held properly brought by him.⁷⁷

The inchoate title of a purchaser of lands on execution after the expiration of the time for redemption by the judgment debtor, is such an interest and title as entitles the purchaser to maintain an action for the cancellation of instruments or incumbrances which, within the doctrine of courts of equity, are clouds upon the title.⁷⁸ And, in respect to paid judgments and mortgages, it is well settled that the court may grant relief by compelling their satisfaction of record where they are continued as apparent liens for inequitable purposes.⁷⁹

72 *Barnes v. Camaack*, 1 Barb. 392.

73 *Beach v. Cooke*, 28 N. Y. 508;
Sutherland v. Rose, 47 Barb. 144;
Beecher v. Ackerman, 1 Abb. N. S. 141.

74 *Mosher v. Campbell*, 30 Hun, 230.

75 *Bissell v. Kellogg*, 60 Barb. 617.

76 *Townsend v. Goellet*, 11 Abb. Pr. 187.

77 *Levy v. Merrill*, 14 Hun, 145.

78 *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

79 *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; 1 Story's Eq. § 703; *Radcliff v. Rowley*, 2 Barb. Ch. 23; *Shaw v. Dwight*, 27 N. Y. 244.

§ 450. Action for damages for refusal to execute discharge.—

The statutes of many of the States require a mortgagee, on full payment being made or tendered to him, to furnish a proper voucher or release sufficient to remove the apparent lien from the record under a specific penalty to be recovered by action. No such remedy can be had in this State, but an equitable action will lie to compel satisfaction and for actual damages sustained by an unreasonable refusal to execute a proper certificate of satisfaction.⁸⁰

Even where a statutory penalty is attached to a refusal to execute a proper discharge, this penalty will not be enforced where the mortgagee honestly believes that his claim is not satisfied and refuses on that ground.⁸¹

It has been said that damages can be recovered for a wrongful refusal to execute a proper document to remove the apparent lien of a mortgage from the record; but it is by no means well established what the proper measure of damages would be in such an action. Such damages only can be recovered as are the necessary and legitimate results of the wrongful refusal, and a judgment rendered against a mortgagee, whose mortgage was in the form of an absolute conveyance with a parol defeasance, for the difference between the amount of the loans and the interest thereon from the time of making the same and the time when the defendant refused to reconvey, and the market value of the land at the latter time, and the counsel fees incurred by the plaintiff in an equity suit brought against the defendant and others, was reversed as altogether unauthorized.⁸² It was also said to be doubtful as to whether any action for damages could be sustained after the plaintiff had pursued his equitable remedy to judgment.⁸³

§ 451. Effect of discharging lien upon the debt.—The executing of a certificate of satisfaction and the discharge of the mortgage upon the record does not, of itself, discharge the debt, but only the security.⁸⁴ And a release of part of the mortgaged premises does not, in the absence of equities of third persons, impair the

⁸⁰ Mosher v. Campbell, 30 Hun, 230.

⁸¹ Huxford v. Eslow, 53 Mich. 179; 18 N. W. 630.

⁸² Marvin v. Prentice, 94 N. Y. 295.

⁸³ Marvin v. Prentice, 94 N. Y. 295.

⁸⁴ Sherwood v. Dunbar, 6 Cal. 53.

debt or reduce the amount of the lien on the other property.⁸⁵

A release made by the holder of a first mortgage, solely for the purpose of giving priority to a second mortgage, will not prevent the foreclosure of the mortgage as against the mortgagor.⁸⁶

§ 452. Special proceedings to discharge mortgages of record in certain cases.—It will sometimes happen that a mortgage will be allowed to remain uncanceled upon the record, though the debt which it has been made to secure has been paid. In order to provide for such cases, it has been enacted that “the mortgagor, his heirs or any person having any interest in any lands described in any mortgage of real estate in this State, which is recorded in this State, or mentioned in a deed recorded in this State, and which, from the lapse of time, is prescribed to be paid, or in any moneys into which said lands have been converted under a decree of a court of competent jurisdiction, and which are held in place of such lands to answer such mortgage, may present his petition to the supreme court in the county where the mortgaged premises are situated or to the county court of such county, asking that such mortgage may be discharged of record. Such petition shall be verified; it shall describe the mortgage, and when and where recorded, or if such mortgage is not recorded that the same may be adjudged to have been paid and to be no longer a lien upon the lands therein described, and shall allege that such mortgage is paid; that the mortgagee has, or, if there be more than one mortgagee that all of them have been dead for more than five years; or if such mortgage has been assigned by an instrument in writing for that purpose executed and acknowledged, so as to entitle the same to be recorded, and such instrument of assignment has been recorded in the office of the clerk of the county where the mortgaged premises, or some portion thereof, is situated, and the assignee or assignees of said mortgage have been dead for more than five years, such petition shall state the facts, and no statement respecting the mortgagee or mortgagees or the names and places of residence of their heirs shall be required; or if such mortgagee be a corporation or association, that such corporation or association has ceased to exist and do business as

⁸⁵ Edgington, Adm'r, v. Hefner, 81 Ill. 341.

⁸⁶ Wood v. Wood, 61 Iowa, 256; 16 N. W. 132.

such for more than five years; the time and place of his or their death, and place of residence at the time of his or their death; whether or not letters testamentary or of administration have been taken out, or, if said mortgagee or mortgagees, or assignee or assignees at the time of his or their death resided out of this State, whether or not letters testamentary or of administration have been taken out in the county where such mortgaged premises are situated; or if such mortgagee be a corporation or association then the names of one or more of the receivers, if any were appointed, or if the person who has the care of the closing up of the business of such corporation or association, and that such mortgage has not been assigned or transferred, and if such mortgage has been assigned, state to whom and the facts in regard to same. Provided, however, that if such mortgage has been duly assigned, by indorsement thereof or otherwise, but not acknowledged so as to entitle the same to be recorded, then it shall be competent for the court, at any time within the period aforesaid, upon proof that all the matters hereinbefore required to be stated in said petition are true, and that the assignee of such mortgage if living, or his personal representative if dead, has been paid the amount due thereon, to make an order that such mortgage be discharged of record. Provided, further, that in case of a mortgage which was recorded or adjudged to have been paid and no longer a lien, more than fifty years prior to the presentation of such petition, if the petitioner is unable with reasonable diligence to ascertain the facts herein required to be stated in the petition, other than the fact of payment, the petition may set forth the best knowledge and information of the petitioner in respect thereto and what efforts have been made to ascertain such facts, and if the court shall be satisfied that the petitioner has made reasonable effort to ascertain such facts, and that the same cannot be ascertained with reasonable diligence, it may then, in its discretion, proceed upon said petition as hereinafter provided.”⁸⁷

§ 453. (*Continued.*)—“The court, upon the presentation of such petition, shall make an order requiring all persons interested to show cause at a certain time and place, why such mortgage should not be discharged of record. The names of the mortgagor, mort-

gagee, and assignee, if any, the date of the mortgage and where recorded, and the town or city in which the mortgaged premises are situate, shall be specified in the order. The order shall be published in such newspaper or newspapers, and for such time as the court shall direct. The court may also direct the order to be personally served upon such persons as it shall designate. The court may issue commissions to take the testimony of witnesses, and may refer it to a referee to take and report proofs of the facts stated in the petition. The certificate of the proper surrogate or surrogates, whether or not letters testamentary or of administration have been issued, shall be evidence of the fact; and the certificate of the clerk of the county or counties in which the mortgaged premises have been situate since the date of the said mortgage, shall be evidence of the assignment of such mortgage, or of a notice of the pendency of an action to foreclose such mortgage, and of such other matters as may be therein stated; or if a notice of the pendency of an action to foreclose such mortgage has been filed, then his certificate that such mortgage has never been foreclosed, unless the allegation of payment shall be denied, and evidence be given tending to rebut the presumption of payment, arising from lapse of time, such lapse of time shall be sufficient evidence of payment. Upon being satisfied that the matters alleged in the petition are true, the court may make an order that the mortgage be discharged of record. The county clerk, upon being furnished with a certified copy of such order and paid the fees allowed by law for discharging mortgages, shall record said order and discharge the mortgage of record.”⁸⁸

§ 454. This statute was designed to remove an incumbrance which has been paid, and an allegation of payment must be explicitly made in the petition. The object of the statute seems to have been to relieve mortgagors and those claiming under them in a summary way from an incumbrance which, as stated in the first section of the act, from the lapse of time, is presumed to be paid, if it have in fact been paid, but satisfaction of which cannot be obtained without a formal proceeding therefor in a court of equity, in consequence of the death of the mortgagee, and of the fact that no letters testamentary or of administration have

been granted in this State.⁸⁹ The fact of payment must be distinctly alleged and proven, and it is not sufficient to show that the mortgage is so old that the statute of limitations would be a good defense if a foreclosure were to be attempted upon it.⁹⁰

SETTING ASIDE AND CANCELLING THE DISCHARGE OF A MORTGAGE.

§ 455. Certificate of satisfaction cancelled for fraud or mistake.—

A court of equity will set aside a cancellation of a mortgage upon satisfactory proof that it was procured by fraud, or executed by mistake, provided it can be done without prejudice to any rights acquired upon the faith of such cancellation.⁹¹

If it be established that a certificate of satisfaction was executed through fraud or mistake, it should be declared void, and, as between the parties to it, the mortgage will continue a valid lien upon the premises. Those who acquire subsequent titles or liens stand in no better condition than the mortgagor, unless they are *bona fide* purchasers or incumbrancers for value and without notice, in which case they will be protected.⁹²

But if the fraud by which the certificate is obtained amounts to a felony, it is utterly void as to all persons. By felony, in this connection, those acts are intended which constitute felonies at common law, and not statutory felonies; and a discharge obtained by false pretenses merely will be valid to protect a *bona fide* purchaser.⁹³ A court of equity has no jurisdiction on petition to restore the lien of a mortgage which is alleged to have been satisfied by ignorance and mistake, for the testimony in equity cases must be taken in like manner as in law.⁹⁴ Nor has the Municipal Court of the city of New York jurisdiction to set

⁸⁹ BRADY, J., in the matter of Townsend, 4 Hun, 31; 6 N. Y. Sup. (T. & C.) 227.

⁹⁰ The matter of Townsend, 4 Hun, 31, 6. N. Y. Sup. (T. & S.) 227. See Forms 64 to 68, in the Appendix of Forms.

⁹¹ Perry v. Fries, 90 App. Div. 484; 85 N. Y. Supp. 1064; Barnes v. Camack, 1 Barb. 392. See also Russell v. Miner, 42 Cal. 475; Mallett v. Page, 8 Ind. 364; Ellis v. Lindley, 37 Iowa 334; Cobb v. Dyer, 69 Me. 494;

Stover v. Wood, 26 N. J. Eq. 417; Hampton v. Nicholson, 23 N. J. Eq. 423; Dubois v. Schoffer, 23 N. J. Eq. 401; Dudley v. Bergen, 23 N. J. Eq. 397; Hollenbeck v. Shoyer, 16 Wis. 499; Compare Chew v. Chew, 23 N. J. Eq. 471.

⁹² Fassett v. Smith, 23 N. Y. 252.

⁹³ Fassett v. Smith, 23 N. Y. 252.

⁹⁴ Constitution of New York, Art. 6, § 3; Matter of Coss, 144 App. Div. 832; 129 N. Y. Supp. 425.

aside a satisfaction on the ground of a mutual mistake of fact.⁹⁵ On the other hand where a mortgagee exacts a larger amount than he is entitled to for a satisfaction piece, the mortgagor can recover in an action for moneys had and received whether the improper exaction resulted from mistake, coercion, misrepresentation or fraud.⁹⁶

§ 456. A release can only be operative where it is duly delivered, and, upon this principle, where a mortgagee executed a release of one of two parcels of land covered by the mortgage and sent it to a third party to deliver to the mortgagor, provided his said mortgage was a first lien on the remaining parcel, and the mortgagor knew of the condition; but because of mistake as to the facts the agent delivered the release, and the mortgage proved not to be a first lien as provided, it was held that the delivery did not bind the mortgagee.⁹⁷

Where a release of a mortgage was executed by the mortgagee, and sent to an agent to be delivered on payment of the balance due on the mortgage, and a subsequent purchaser procured the same to be surrendered to him upon his promise to pay in a few weeks, which he neglected to do, it was held that the release was inoperative.⁹⁸

It has even been said that an innocent purchaser would not be protected by the record of a certificate of satisfaction not duly delivered.⁹⁹

§ 457. Reinstating mortgage so as to protect against junior liens. —Where a mortgagee took a part of the property in satisfaction of his mortgage, in ignorance of subsequent mortgages which had been fraudulently concealed, an action was sustained to set aside the satisfaction piece.¹

Again, a purchaser of property who paid a mortgage, and caused it to be satisfied in ignorance of a subsequent judgment, was held entitled to have the mortgage revived for his protection.²

⁹⁵ Earle v. Rafalovitz, 145 App. Div. 537; 129 N. Y. Supp. 870.

⁹⁶ Lawatsch v. Cooney, 20 App. Div. 470; 47 N. Y. Supp. 54. See Roberts v. Ellwood, 116 N. Y. 651; 22 N. E. 453.

⁹⁷ Rose v. Rose, 20 W. Dig. 334.

⁹⁸ Hale v. Morgan, 68 Ill. 244.

⁹⁹ Stanley v. Valentine, 79 Ill. 544.

¹ Lambert v. Leland, 2 Sweeny, 218; State v. Newark, 25 N. J. 197; Gunn v. Barry, 15 Wall, 610; Columbia Bank v. Jacobs, 10 Mich. 349; Bennett v. Nichols, 12 Mich. 22; French v. Stone, 6 Cent. L. J.

² Barnes v. Mott, 64 N. Y. 397, 401. See also Wilson v. Kimball, 27 N. H. 300; Hutchinson v. Swartsweller, 31 N. J. Eq. 205.

Where a mortgagee, for the purpose of extending the time of payment, took new notes secured by a new mortgage on the same land, giving up the old notes and entering satisfaction of the old mortgage, in ignorance of the fact that the mortgagor had, only a day or two before, given another mortgage to a third person, which was on record at the time, it was held that in equity his lien on the land was not subordinate to the intervening mortgage, and his lien was reinstated.³

Where a mortgagee discharged his mortgage on certain lands in consideration of a conveyance of a portion of them, which he understood to be unincumbered, but on which, in fact, an attachment had been levied since the mortgage had been given, it was held that the discharge should be set aside.⁴

§ 458. Where a valid lien is discharged in consideration of an invalid one.—Where a usurious mortgage was given in consideration for the cancellation of two valid securities and the new mortgage was adjudged void for the usury, the court, in an action brought for that purpose, set aside the certificates of satisfaction of the two prior mortgages, and declared them valid and subsisting liens upon the land.⁵

Upon a similar principle a lender who paid a mortgage and procured it to be discharged, relying upon a mortgage which was void for lack of power in the mortgagor to execute it, was subrogated to the paid mortgage, and the cancellation of it was set aside for his protection.⁶

A satisfaction executed on the faith of a check or note which is not paid may be cancelled and the mortgage reinstated and enforced.⁷

§ 459. Satisfaction on the record set aside.—Where a mortgage security is paid by a surety or other person having equitable rights as a surety, by reason of subsequent interest in the mortgaged property, the person making such payment becomes

³ *Campbell v. Trotter*, 100 Ill. 281; *Bruse v. Nelson*, 35 Iowa, 157.

⁴ *French v. De Bow*, 38 Mich. 708; *Michigan Panelling Co. v. Parvell*, 38 Mich. 475; *Columbia Bank v. Jacobs*, 10 Mich. 349; *Shaver v. Williams*, 87 Ill. 469; 18 Am. L. Reg. (N. S.) 132.

⁵ *Underhill v. Crennan*, 25 Hun, 569; *Paterson v. Birdsall*, 64 N. Y. 294, aff'g 6 Hun, 632.

⁶ *Gans v. Thieme*, 93 N. Y. 225. See also *Gilbert v. Gilbert*, 39 Iowa, 657; *Lockwood v. Marsh*, 3 Nev. 138; *Tradesmen's Association v. Thompson*, 32 N. J. Eq. 133.

⁷ *Middlesex v. Thomas*, 20 N. J. Eq. 391; *Hollenbeck v. Shoyer*, 16 Wis. 499.

entitled to enforce the mortgage under the equitable doctrine of "subrogation."⁸ Such right is never allowed to be defeated as against persons not *bona fide* purchasers because a formal discharge was executed. The cases on this doctrine are numerous and are collated in another part of this work.⁹

§ 460. Who may resist the reinstatement of a cancelled mortgage.

—Upon payment of a mortgage it becomes *pinctus officio* and, although the satisfaction is not recorded, it is not thereafter competent for the mortgagor and mortgagee, or either of them, to revive its effect as a lien as against third persons, such as grantees, who have acted in reliance thereon.¹⁰

So a discharge of a mortgage upon the record, though obtained by false and fraudulent representations, will be a complete protection to a purchaser for value and without notice, as to whom the record will no longer be notice of its existence.¹¹ But a mere judgment creditor of the mortgagor has no equity that will enable him to resist the reinstatement and enforcement of the mortgage,¹² though a purchaser under the judgment has been said to stand in a better position.¹³

A person who has parted with value and taken a deed or mortgage upon land is protected against a mortgage then discharged of record, because such is the provision of the recording act,¹⁴ and for no other reason. The cancelled mortgage, though it may still be valid, having been stricken from the record, stands as an unrecorded mortgage, and the rights of the parties are to be measured as if it had never been recorded. An unrecorded mortgage has priority over a subsequent judgment recovered against the mortgagor, and therefore a discharge fraudulently obtained may be cancelled, though the effect of such cancellation is to divest the lien of a judgment recovered for a meritorious consideration, even in reliance upon the discharge. So, a junior mortgagee who grants indulgence to the mortgagor in reliance upon a

⁸ See § 468; title, Subrogation.

⁹ §§ 468, 480. See also Robinson v. Leavitt, 7 N. H. 95; Rigney v. Lovejoy, 13 N. H. 252; Wilson v. Kimball, 27 N. H. 300; Kinsley v. Davis, 1883, Feb. (Me.); 27 Alb. L. J. 473; Wheeler v. Willard, 44 Vt. 640.

¹⁰ Bogert v. Bliss, 13 Misc. R. 72; 34 N. Y. Supp. 147.

¹¹ Fassett v. Smith, 23 N. Y. 252; Viele v. Judson, 15 Hun, 328. See also Turner v. Flinn, 72 Ala. 532; Etzler v. Evans, 61 Ind. 56; Hedden v. Cowell, 37 N. J. Eq. 89.

¹² Stanley v. Valentine, 79 Ill. 544.

¹³ Vannice v. Bergen, 16 Iowa, 555.

¹⁴ 436, 1 R. S. 756, § 1.

discharge of the prior mortgage and thereby largely increases his lien, may not resist a cancellation of the discharge if the facts render such cancellation equitable as between the original parties to it. The mere delay and granting of indulgence does not render the junior mortgagee a *bona fide* purchaser within the meaning of the recording act.¹⁵

A grantee of mortgaged premises whose conveyance recites that the property is subject to a mortgage, has no equity to resist the cancellation of it upon the record, if he has not paid it and such cancellation was made under a mistake of fact.¹⁶

Where a note and mortgage was assigned as collateral security, and thereafter, either by fraud or mistake, the mortgagee caused it to be marked satisfied upon the record, it was still treated as a valid and subsisting mortgage in favor of the assignee against a subsequent mortgagee with notice.¹⁷ If the assignment had not been recorded and no notice of it could have been shown, the rule would have been otherwise.¹⁸

§ 461. The law protects only the vigilant.—Where by a mutual agreement the mortgagor was to procure money from a third party and pay off the mortgage, which the mortgagee was to release, and the lender was to have a new mortgage, and all three parties met in the register's office to carry out the transaction, which was so far carried out as to have the release of the old mortgage and the new mortgage both delivered, and the money was given to the mortgagor, who suddenly fled with it, it was held that the release could not be set aside, and that the loss must fall upon the prior mortgagee, who had parted with the release before getting the custody of the money.¹⁹

Upon a similar principle, where, through failure of the assignee of a mortgage to record his assignment, the way was opened for a fraudulent satisfaction of the mortgage by the assignor, and the mortgagor, acting in good faith, paid the amount due to the assignor, the assignee was without remedy under the mortgage.²⁰

¹⁵ Weaver v. Edwards, 39 Hun, 233.

¹⁶ Cobb v. Dyer, 69 Me. 494.

¹⁷ Gibson v. Milne, 1 Nev. 526; Clift v. Nay, 105 Ind. 355; Burton v. Reagan, 75 Ind. 77; Anderson v. Hubble, 93 Ind. 570; 47 Am. R. 394.

¹⁸ Daws v. Craig, 62 Iowa, 515;

17 N. W. 778; Bank, etc., v. Anderson, 14 Iowa, 544.

¹⁹ Robbins v. Todman, 28 Kans. 491.

²⁰ Daws v. Craig, 62 Iowa, 515; 17 N. W. 778; Bank, etc., v. Anderson, 14 Iowa, 544.

§ 462. **Action for damage for unauthorized discharge.**—Where a person not entitled to receive the money due upon a mortgage, having assigned it, still appears of record to be its owner, a certificate of discharge executed by him will be a protection to a *bona fide* purchaser, but he will be liable to an action for damages by the true owner if such discharge was unauthorized. In such an action the measure of damages will be the value of the part of the security released, not exceeding the amount of the debt secured.²¹

In an action by the assignee of a note secured by mortgage against the assignor, to recover damages for the alleged unlawful act of the defendant in satisfying such mortgage while the note remained unpaid, the complaint should allege the value of the security, which will be the measure of damages.²²

REISSUE OF PAID MORTGAGE.

§ 463. **Mortgage absolutely cancelled by payment of debt.**—A mortgage executed to secure a specific debt ceases to have any force after the payment of that debt, and cannot be revived to secure a new obligation, even as between the parties, without a new grant.²³ The written evidence of one contract cannot be used as the evidence of another and a different contract and when the original object for which the mortgage was given has been fully accomplished and satisfied, it cannot be revived and kept on foot by a parol agreement subsequent to its creation, for other objects than those agreed upon at the time of its execution. The debt is the principal thing and the mortgage a mere incident. The first is the substance, the latter its shadow. When the first is destroyed by payment the latter vanishes. It cannot become the incident to another principal nor the shadow of another substance.²⁴

²¹ Stebbins v. Howell, 4 Abb. App. Dec. 297.

²² Fox v. Wray, 56 Ind. 423.

²³ Stoddard v. Hart, 23 N. Y. 556; Hubbard v. Blakeslee, 8 Hun, 603; Bank of Utica v. Finch, 3 Barb. Ch. 293; James v. Morey, 2 Cow. 246, 292; Townsend v. Empire Stone Dressing Co., 6 Duer, 208. See also Merrill v. Chase, 85 Mass. (3 Allen) 339; Nosler v. Haynes, 2 Nev. 53; Thomas' Appeal, 30 Pa. St. 378.

²⁴ Per SHANKLAND, J., in Mead v.

York, 6 N. Y. (2 Seld.) 449. See also Johnson v. Anderson, 30 Ark. 745; Darst v. Gale, 83 Ill. 136; Peckham v. Haddock, 36 Ill. 38; Spencer v. Fredendall, 15 Wis. 660. A new delivery of a paid mortgage has been held to make a new mortgage of it. Underhill v. Atwater, 22 N. J. Eq. 16. And a brief memorandum under seal indorsed on an old mortgage would doubtless create a new lien. Chateau v. Thompson, 2 Ohio St. 114.

§ 464. A mortgage made at its inception to secure future advances, or for a general balance of account arising on a series of transactions, stands on a different footing. As between the parties there may be times when the security could not be enforced for any sum, and thereafter it could grow and diminish in value according to the varying condition of the account. But all of this would be in accordance with the contract made at the time of the creation of the lien, and the wide latitude for the admission of parol proof to demonstrate the real nature of the contract, has heretofore been considered in treating of mortgages for future advances.²⁵ Where the defeasance is by parol and the mortgage is in the form of a conveyance absolute on its face, the security may be peculiarly elastic, and it has even been said, that in the absence of proof, the presumption would be that new credits or new advances were given or made by the creditor on the faith of the security in his hands.²⁶ If this be so, it is because of a presumed contract made at the time of the original grant, for even in the case of a mortgage with a mere parol defeasance, something more than a subsequent parol agreement is necessary to enlarge the lien.²⁷

§ 465. Debt must be actually satisfied.—But in order that a mortgage shall cease to have force, the debt must actually be paid and satisfied, and we have already seen that this is frequently a question depending on niceties of intention and of fact, and that the mere circumstance that the debtor delivers money or property to his creditor is not always controlling.²⁸

Although a mortgage may be without force as between the parties because of payment, this will not be allowed to defeat the claims of a purchaser of the securities on the faith of its apparent validity, if the sale is made with the approval and concurrence of the mortgagor.²⁹ In such a case the mortgagor will

²⁵ *Ante*, §§ 205 to 209.

²⁶ *James v. Johnson*, 6 Johns. Ch. 417, 429; *Jarvis v. Rogers*, 15 Mass. 389; *Contra*, *Ex parte Hooper*, 19 Ves. 477.

²⁷ *Walker v. Snediker*, Hoff. Ch. 145; *Johnson v. Anderson*, 30 Ark. 745.

²⁸ *Ante*, §§ 359 to 365; *Peck v. Minot*, 3 Abb. App. Dec. 465; *Bockes*

v. Hathorn, 20 Hun, 503; *Toll v. Hiller*, 11 Paige, 228; *Hubbell v. Blakeslee*, 71 N. Y. 63, 70; *Coles v. Appleby*, 87 N. Y. 114; *Champney v. Cooper*, 32 N. Y. 543.

²⁹ *Purser v. Anderson*, 4 Edw. Ch. 17. See also *Underhill v. Atwater*, 22 N. J. Eq. 16; *Jordan v. Forlong*, 19 Ohio St. 89.

be estopped from alleging that the mortgage is satisfied. This principle has also been declared where a purchaser of land who had paid notes secured by mortgage, obtained a loan on such notes by representing them to be valid.³⁰

§ 466. **Reissued mortgage sustained to do equity.**—Equitable principles have sometimes successfully been invoked in aid of an attempt to hold a mortgage for a debt created subsequent to the creation of the lien, and a court of equity will not grant affirmative relief against such a mortgage, except upon condition of doing equity.³¹ So, where an agreement to revive the lien of a paid mortgage to secure a new debt was held to be inoperative on the ground that a new instrument under seal was legally necessary, justice has been done by giving effect to the contract by holding that it operated as an equitable mortgage.³²

§ 467. **Junior titles and liens always protected.**—However the rule may be as between the parties primarily obligated to pay the mortgage debt, and those entitled to demand such payment, it is entirely clear that a mortgage which has once been cancelled by payment cannot afterward be revived to the prejudice of persons whose rights have vested prior to such attempted revival.³³ And the case will not be altered by the circumstance that no receipt for such payment is given.³⁴

SUBROGATION.

§ 468. **General principles upon which subrogation is allowed.**—It is a general principle controlling in courts of equity that where a surety, or one in the position of a surety, pays the debt of his principal, he is entitled to be put in the place of the creditor, as to all the means which the creditor possessed, to enforce payment against the principal.³⁵ Chancellor KENT said, in

³⁰ *International Bank v. Bowen*, 80 Ill. 541.

³¹ *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62; *Merrill v. Chase*, 85 Mass. (3 Allen) 339.

³² *Peckham v. Haddock*, 36 Ill. 38.

³³ *Marvin v. Vedder*, 5 Cow. 671; *Purser v. Anderson*, 4 Edw. Ch. 17; *McGIVEN v. Wheelock*, 7 Barb. 22; *Mead v. York*, 6 N. Y. 449; *Warner v. Blakeman*, 36 Barb. 501; *Kellogg*

v. Ames, 41 Barb. 218; *Champney v. Coope*, 32 N. Y. 543, rev'g 34 Barb. 539. See also *York Co. Savings Bank v. Roberts*, 70 Me. 384; *Swope v. Leffingwell*, 4 Mo. App. 525; *Bowman v. Manter*, 33 N. H. 530; *Jones v. Brogan*, 29 N. J. Eq. 139; *Gardner v. James*, 7 R. I. 396.

³⁴ *Large v. Van Doren*, 14 N. J. Eq. 2.

³⁵ *Pease v. Egan*, 131 N. Y. 262;

Hayes v. Ward (4 Johns. Ch. 130): "This doctrine does not belong merely to the civil law system. It is equally a settled principle in the English chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor; the right of the surety stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution from another."

This right of subrogation, as it is called, does not depend upon any assignment, but rests upon principles of equity and fairness. In another part of this work the right to an evidence of transfer on payment being made is considered.³⁶ The present topic touches the rights of parties in the absence of any formal assignment.

The doctrine of subrogation is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is steadily kept in view.³⁷

The right to be subrogated on payment is not identical with the right of redemption.³⁸ No person has a right to redeem from a mortgage except the mortgagor and those who have derived some interest in or lien upon the mortgaged premises under him; ³⁹ but the right to pay and be subrogated belongs to every surety.

The doctrine of subrogation or substitution, at first applied in behalf of those who were bound by the original security with the principal debtor, has been greatly extended; and the principle, modified to meet the circumstances as they have arisen, has been applied in favor of volunteers intervening subsequent to the origi-

30 N. E. 102; *Wadsworth v. Lyon*, 93 N. Y. 201, 212; *Champney v. Coope*, 34 Barb. 539; 32 N. Y. 543; *Lewis v. Palmer*, 28 N. Y. 271; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Clason v. Morris*, 10 Johns. 524; *Wilkes v. Harper*, 2 Barb. Ch. 338; *Mathews v. Aiken*, 1 N. Y. (1 Comst.) 595. See also *Hodgson v. Shaw*, 3 Myl. & K. 183; *Edgerly v. Emerson*, 3 Foster (N. J.) 555; *Story's Eq. Jur.* § 499.

³⁶ Chap. XVII, tit. Redemption.

³⁷ Per FINCH, J., in *Acer v. Hotchkiss*, 97 N. Y. 395, 402; *Drake v. Paige*, 127 N. Y. 562; 28 N. E. 407.

³⁸ *Ellsworth v. Lockwood*, 42 N. Y. 89.

³⁹ *Story's Eq. Jur.* § 1023; *Grant v. Duane*, 9 Johns. 612; *Sampson v. Conolly*, 115 App. Div. 364; 100 N. Y. Supp. 806. See also *Porter v. Read*, 19 Me. 363; *McDougald v. Capron*, 7 Gray (Mass.) 278; *Boarman v. Catlett*, 13 Sm. & M. (Miss.) 149; *Lomax v. Bird*, 1 Vt. 182.

nal obligation and as between different classes of sureties, and in the marshalling of assets, and prescribing the order in which property and funds shall be subjected to the discharge of different classes of obligations, and as between different classes of creditors, so as to do substantial justice and equity in each case.⁴⁰

Where the payee of a promissory note transferred it by indorsement, and the maker thereafter secured the debt by a mortgage to the indorser, and the payee was afterward compelled to pay the note, he was held entitled to enforce the mortgage for his indemnity.⁴¹

§ 469. Volunteer or meddler is not protected by subrogation.—

A mere stranger who voluntarily pays money due on a mortgage, and fails to take an assignment of it, but allows it to be cancelled and discharged, cannot afterward come into equity, and in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated and himself subrogated to the rights of the mortgagee.⁴²

A stranger or volunteer within the meaning of this doctrine is one who in no event resulting from the existing state of affairs can become liable for the debt and whose property is not charged with the payment thereof and cannot be sold therefor.⁴³

A stranger to a mortgage debt has a right to bargain for its purchase and to take an assignment which will vest in him all of the rights of the mortgagee,⁴⁴ but a court of equity will not lend its aid to enforce a claim of a mere volunteer to pay off a mortgage on the lands of another, neither will it subrogate such a volunteer to the rights of a mortgagee under a mortgage thus paid,⁴⁵ or taxes thus paid.⁴⁶

In order that a person shall be excluded from the benefit of a

⁴⁰ Per ALLEN, J., in *Barnes v. Mott*, 64 N. Y. 397, 402; *Story's Eq. Jur.* §§ 633, 635, 636; *Ingalls v. Morgan*, 10 N. Y. (6 Seld.) 179; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285; *Graham v. Dickinson*, 3 Barb. Ch. 169; *Bank of United States v. Winston*, 2 Brock. 252.

⁴¹ *O'Hara v. Haas*, 56 Miss. 374; *Ottman v. Moak*, 3 Sand. Ch. 431; *Drew v. Lockett*, 32 Beavan, 499.

⁴² *Perkins v. Hall*, 105 N. Y. 539; 12 N. E. 48; *Acer v. Hotchkiss*, 97 N. Y. 395; *Keller v. Lee*, 66 App. Div.

184; 72 N. Y. Supp. 948; *Union Bank v. Schneider*, 70 Misc. R. 377; 128 N. Y. Supp. 878; *Guy v. Du Uprey*, 16 Cal. 195; *Wolff v. Walter*, 56 Mo. 292.

⁴³ *Blydenburgh v. Seabury*, 104 App. Div. 141; 93 N. Y. Supp. 330.

⁴⁴ *Lovejoy v. Vose*, 73 Me. 46.

⁴⁵ *Smith v. Austin*, 9 Mich. 465.

⁴⁶ *Koehler v. Hughes*, 148 N. Y. 507, aff'g 73 Hun, 167; 25 N. Y. Supp. 1061 which aff'd 4 Misc. R. 236; 24 N. Y. Supp. 760.

right to subrogation, he must be in truth a mere volunteer and meddler in an affair that does not concern him, since the rule appears to be to grant the right to every one else whose equitable rights appear to require it. All persons bound as sureties for the debt, or holding junior liens on the property, or holding an interest in the property as dowress or tenant by the courtesy⁴⁷ or tenant in common⁴⁸ or the like, are protected by subrogation. And even a third person may be subrogated to the right of a lienor if he pays such lien at the request of a person personally obligated for its payment, or who is the owner of the estate upon which it is a charge.⁴⁹ So, where one advances to another money to pay a lien on the latter's property and he is to receive a security for his loan, and the security given is for any cause void, the lender will be subrogated by a court of equity to the rights of the paid lienor, and may enforce them as far as necessary to make good his debt where no prior equities have intervened.⁵⁰

A third person may also have a mortgage which has been paid by him revived for his benefit, when fraud, accident, or mistake make it equitable that this should be done.⁵¹

§ 470. For the purpose of being entitled to subrogation every person is a surety who is compelled to pay a debt not his own, either because of a contract or because it was necessary to do so to preserve some junior lien or interest in property upon which such debt was a charge. The contract out of which the relation of surety arises need not of necessity be between the creditor and the surety. A person may be treated for some purposes in equity as a surety who, as between himself and his creditor, is the principal debtor; as, for instance, when a third person has, for a valuable consideration received from the debtor, assumed the debt and made it his own. This is the case where a mortgage

47 *Durante v. Eannoco*, 65 App. Div. 435; 72 N. Y. Supp. 1048; *Bonhoff v. Wichorst*, 57 Misc. R. 456; 108 N. Y. Supp. 437; *Gatewood v. Gatewood*, 75 Va. 407.

48 *Simonson v. Lauck*, 105 App. Div. 82; 93 N. Y. Supp. 965; *Hoover v. Hoover*, 21 App. Div. 565; 48 N. Y. Supp. 395.

49 *Wolff v. Walter*, 56 Mo. 292.

50 *Gans v. Thieme*, 93 N. Y. 225; *Johnson v. Parmely*, 14 Hun, 398. See also *Russell v. Mixer*, 42 Cal. 475; *Reagan v. Hadley*, 57 Ind. 509; *Reed v. King*, 23 Iowa, 500; *Bruce v. Bonney*, 12 Gray (Mass.) 107; *Stover v. Wood*, 26 N. J. Eq. 417.

51 *Chase v. Peck*, 21 N. Y. 581; *Hatch v. Morris*, 3 Edw. Ch. 313. See also *Moore v. Thomas*, 1 Or. 201.

debt is assumed by a grantee of the mortgagor.⁵² So, too, where a mortgagor conveys the equity of redemption, though the purchaser makes no personal covenant to pay the mortgage debt. In such a case the mortgaged premises become the primary fund for the payment of the debt, and if the mortgagor pays the debt to protect himself from an action on the bond, he will be entitled to be substituted to the mortgage security as it originally existed, with the right to proceed immediately against the land for his indemnity.⁵³

This, however, is not the rule where the grantee assumes the payment of a mortgage, subsequently pays the amount due thereon and, by agreement with the holder, keeps it alive by assignment to a third person as security for an indebtedness due from such grantee.⁵⁴ Carrying out the theory the owner of an equity of redemption whose property is the primary fund for the payment of mortgages, which he has not personally assumed, is not entitled to subrogation as to payments made by him on such mortgages.⁵⁵

The contrary would doubtless be held if such owner had purchased for full value; for then, not the land, but the mortgagor would be ultimately liable, and upon paying the mortgage debt the owner of the premises would be subrogated to the rights of the mortgagee on the bond.

A purchaser cannot be subrogated to the benefit of an incumbrance which he has agreed to pay,⁵⁶ except for the purpose of protecting him against the inequitable claims of persons having no rights in his covenant.

After an action has been commenced for the foreclosure of a mortgage and the summons has been served on the parties primarily liable for the mortgage debt, a party having an interest suf-

⁵² *Wager v. Link*, 150 N. Y. 549; 44 N. E. 1103; *Keller v. Lee*, 66 App. Div. 184; 72 N. Y. Supp. 948; *Union Bank v. Schneider*, 70 Misc. R. 377; 128 N. Y. Supp. 878; *Stebbins v. Hall*, 29 Barb. 524; *Russell v. Pistor*, 7 N. Y. 171; *Flagg v. Munger*, 9 N. Y. 483; *Hartley v. Harrison*, 24 N. Y. 170. See also *Shinn v. Shinn*, 61 Ill. 477; *Risk v. Hoffman*, 99 Ind. 137.

⁵³ *Howard v. Robbins*, 170 N. Y. 498; 63 N. E. 530; *Calvo v. Davies*,

73 N. Y. 211; *Tice v. Annin*, 2 Johns. Ch. 125; *Vanderkemp v. Shelton*, 11 Paige, 28; *Marsh v. Pike*, 10 Paige, 595; *Cox v. Wheeler*, 7 Paige, 248. See also *Wood v. Smith*, 51 Iowa, 156; *Baker v. Terrell*, 8 Minn. 195; *Hansell v. Lutz*, 20 Pa. St. 284.

⁵⁴ *Union Bank v. Schneider*, 70 Misc. R. 377; 128 N. Y. Supp. 878.

⁵⁵ *Schreyer v. Saunders*, 39 App. Div. 8; 56 N. Y. Supp. 921.

⁵⁶ *Birke v. Abbott*, 103 Ind. 1; *Coulton v. Jackson*, 121 Mass. 592.

ficient to found a right to subrogation who has not yet been served with process cannot, by tendering the mortgage debt without the costs of the suit, become entitled to an assignment of the bond and mortgage.⁵⁷

§ 471. Even where there is only a colorable obligation to pay in protecting an estate supposed to exist, the right of subrogation will arise. Thus where a purchaser at a foreclosure sale, supposing he had acquired a perfect title, paid a valid prior mortgage, and the sale was set aside because of irregularities, it was held that the purchaser was entitled to be subrogated to the rights of the holder of the lien which he had discharged.⁵⁸

So, where an executor assumed to convey real estate of his testator, and the purchaser, in reliance on the title thus obtained, discharged a valid mortgage; and a child born after the date of the will, and not provided for therein, brought ejectment to recover the land, the title of the heir was sustained, but the right of the purchaser to be subrogated to the lien which he had paid was carefully preserved in the judgment.⁵⁹

The equitable doctrine of subrogation is also applied where a party is compelled to pay the debt of a third person to protect his own rights or to save his own property. Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between parties. Whenever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor.⁶⁰

§ 472. The right of a junior incumbrancer to be subrogated in the place of a senior incumbrancer upon payment of the lien of the latter, rests upon the principle that justice and equity require that he should be entitled to the rights and securities of the senior incumbrancer. He is bound to pay the demand of the senior incumbrancer, and, upon so doing, it is but equitable and just that he should be allowed to control the lien which stands in the way of obtaining the amount of his debt.⁶¹

57 *Kadin v. Samuels*, 55 Misc. R. 442; 106 N. Y. Supp. 559.

58 *Muir v. Berkshire*, 52 Ind. 149.

59 *Smith v. Robertson*, 89 N. Y. 555.

60 *Cole v. Malcolm*, 66 N. Y.

363, 366; *Miller v. Winchell*, 70 N. Y. 437; *Cottrell's Appeal*, 23 Pa. 294; *Lidderdale's Ex'rs v. Robinson's Adm'r*, 2 Brockenbough, 159.

61 Per MILLER, J., in *Clark v. Mackin*, 95 N. Y. 346, 351; *Twomb-*

So, a third mortgagee who pays a first mortgage upon the premises in ignorance of an intervening incumbrance is entitled to be subrogated to the rights attaching to the first mortgage.⁶² But the holder of a second and third mortgage who has foreclosed the former will not be compelled to assign the judgment to a fourth mortgagee upon mere payment of its amount but will also be required to agree, in writing, to pay to the prior mortgagee the amount of the third mortgage with interest and costs, when the right to collect it shall have been established.⁶³ And a second mortgagee who, in order to protect his own security, pays interest on a first mortgage, or costs on a foreclosure thereof, may "tack" the sums so advanced to his own security. But he is not entitled to an assignment of any part of the first mortgage, for if he were to become an owner in common with the first mortgagee, the latter's security would be impaired.⁶⁴

One who levies on the equity of redemption of a mortgagor, and pays off mortgages to which his levy is subject, becomes by such payment the assignee in equity of the mortgages, and is entitled to all the rights of the mortgagees in the premises.⁶⁵

A mortgagee of personal property who purchases a claim secured by a prior attachment lien on the property, acquires an equitable lien as against attachments levied subsequently to the mortgage for the moneys thus expended, though the statutory lien of the prior attachment may have been technically extinguished by the enforcement of the mortgage.⁶⁶

Where a mortgagee was compelled, for his own security, to satisfy an execution against the mortgagor on a prior judgment, he was held entitled to retain out of the proceeds of the sale the amount advanced with interest.⁶⁷

Where a person advanced money on mortgage to take up a prior mortgage on the faith of a memorandum on the docket of a judgment, to the effect that it was "secured on appeal," and such

ley v. Cassidy, 82 N. Y. 155; Cole v. Malcolm, 66 N. Y. 363; Frost v. Yonkers Sav. Bank, 70 N. Y. 553; Dings v. Parshall, 7 Hun, 522. See also Land Co. v. Peck, 112 Ill. 408; Weld v. Sabin, 20 N. H. 533; 51 Am. Dec. 240.

⁶² Lanier v. Stiles, 25 Misc. R. 59; 54 N. Y. Supp. 424.

⁶³ Mayer v. Moore, 29 Misc. R. 475; 61 N. Y. Supp. 940.

⁶⁴ Magilton v. Holbert, 52 Hun. 444.

⁶⁵ Lucking v. Wesson, 25 Mich. 443; Warren v. Warren, 30 Vt. 530

⁶⁶ Armstrong v. McAlpin, 18 Ohio St. 184.

⁶⁷ Silver Lake Bank v. North, 4 Johns. Ch. 370.

memorandum was void by reason of a want of notice of application for the order, the person advancing the money was held entitled to be subrogated to the rights of the holder of the discharged mortgage.⁶⁸

The owner of real estate upon which there are two mortgages, who pays money on the prior lien in ignorance of the junior incumbrance, will be subrogated as to the amounts so paid for his indemnity.⁶⁹

Payment of a mortgage by a person having an interest to protect operates as an assignment whenever justice requires it.⁷⁰

Where a second mortgagee pays the first mortgage, the law will presume an assent by the prior lienor to the use of all securities in his hands in order to produce his reimbursement, where equity requires that to be done.⁷¹ And when a purchaser of property pays off a prior incumbrance, and an attempt is made to subject the property in his hands to still other and subordinate incumbrances existing at the time of his purchase, it has been held that a court of equity will substitute him to the rights of those whose incumbrances he has paid off.⁷² This principle has been applied to the case of a fraudulent purchaser of a debtor's property who paid off an incumbrance upon it while he held the title.⁷³ It was there said that it was entirely equitable that the defendant should be substituted in the place of the creditor whose debts he had paid; although the conveyance was void as to creditors, it was valid between the parties, and the debts were paid as a consideration in part for the conveyance.⁷⁴

A person who believes himself to be the owner of real estate

68 *Green v. Milbank*, 3 Abb. N. C. 138.

69 *Simpson v. Del Hoyo*, 94 N. Y. 189; *Barnes v. Mott*, 64 N. Y. 397; 21 Am. R. 625; *Green v. Milbank*, 3 Abb. N. C. 138; *Snelling v. McIntyre*, 6 Abb. N. C. 469. See also *Matzen v. Schaeffer*, 65 Cal. 81; 3 Pac. 92.

70 *Arnold v. Green*, 116 N. Y. 566; 23 N. E. 1; *Stewart v. Smith*, 29 Misc. R. 235; 60 N. Y. Supp. 329. See also *Ramsey v. Daniels*, 1 Mackey (D. C.) 16; *Robinson v. Leavitt*, 7 N. H. 73, 100; *Rigney v. Lovejoy*, 13 N. H. 247; *Moore v. Beasom*, 44 N.

H. 215; *Stantons v. Thompson*, 49 N. H. 272; *Bacon v. Goodnow*, 59 N. H. 415.

71 *Cowley v. Shelby*, 71 Ala. 122; *Downer v. Fox*, 5 Wash. Ver. 388.

72 *Clute v. Emmerich*, 99 N. Y. 342, aff'd 26 Hun, 10. See also *Peet v. Beers*, 4 Ind. 46; *Fisher v. Johnson*, 5 Ind. 492; *Planters' Bank v. Dodson*, 9 Sm. & M. (Miss.) 527.

73 *Robinson v. Stewart*, 10 N. Y. 189.

74 Per DANIELS, J., in *Clute v. Emmerich*, 26 Hun, 10, 15, aff'd 99 N. Y. 342.

or who has an incumbrance upon it, who pays taxes or assessments,⁷⁵ or rent,⁷⁶ or other charges or liens in protection of his title or lien, can claim a right to be reimbursed for such payments as against a real owner or a prior lienor. Though a junior mortgage may by a proper tender become entitled to an assignment of a prior mortgage to protect his own, he will not be entitled to bind the senior mortgagee as to the amount due and must accept an assignment without recourse to him and without covenants express or implied.⁷⁷

§ 473. **Lender of money to be used in paying prior lien.**—It is true that a volunteer cannot acquire either an equitable lien or the right to subrogation;⁷⁸ but one who, at the request of another, advances his money to redeem or even to pay off a security in which the other has an interest, or to the discharge of which he is bound, is not of that character, and in the absence of an express agreement, one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced. But the doctrine of substitution may be applied, although there is no contract, express or implied. It is said to rest “on the basis of mere equity and benevolence,”⁷⁹ and is resorted to for the purpose of doing justice between the parties.⁸⁰ So, where a mortgage was made by an executrix on real estate already incumbered by a previous mortgage, for the purpose of paying the prior lien and of securing a lower rate of interest, and this was carried out, the paid mortgage being cancelled and discharged; and the executrix did not possess lawful power to execute the mortgage, it was held that the person advancing the money upon it was entitled, as against those taking the title of the premises, to have the satisfaction piece cancelled, and to be subrogated to the lien of the original

⁷⁵ *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. R. 163; *Miner v. Beekman*, 50 N. Y. 337; *Dunlop v. James*, 70 App. Div. 71; 39 N. Y. Supp. 978; *Clute v. Emmerich*, 26 Hun, 10; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Burr v. Veeder*, 3 Wend 412; *Rapelye v. Prince*, 4 Hill, 119. See also *Leitzbach v. Jackman*, 28 Kan. 524; *Walton v. Hollywood*, 47 Mich. 385; 11 N. W. 209; *Johnson v. Payne*, 11 Neb. 269; 9 N. W. 81;

Southard v. Dorrington, 10 Neb. 119, 122; 2 N. W. 935.

⁷⁶ *Robinson v. Ryan*, 25 N. Y. 320.

⁷⁷ *Boocock v. Wood*, 128 App. Div. 645; 113 N. Y. Supp. 46.

⁷⁸ *Sanford v. McLean*, 3 Paige, 122; *Wilkes v. Harper*, 1 N. Y. (1 Comst.) 586; 2 Barb. Ch. 338.

⁷⁹ *Cheesebrough v. Millard*, 1 Johns. Ch. 409; 1 Story's Eq. Jur. § 493.

⁸⁰ Per DANFORTH, J., in *Gans v. Thieme*, 93 N. Y. 225, 232.

mortgage.⁸¹ And where money was loaned on the security of a mortgage supposed by the lender to be valid, but in fact the mortgage was forged and void, and the loan was made for the purpose of paying off a prior valid mortgage, the lender, or his assignee, was held entitled to subrogation to the rights of the prior mortgagee, there being no intervening rights.⁸² And for money advanced for necessities and to pay off an incumbrance on his real estate for a person mentally incompetent to contract, the party making the advances is entitled to a charge against his estate and to be subrogated to the benefit of the incumbrance which he has discharged.⁸³ So executors may, where there is not enough in the estate to pay a mortgage which has become due, and any deficiency would have to be met out of the estate personally, invoke the jurisdiction of the court to compel an assignment to them personally upon payment by them personally of the amount due.⁸⁴

So, where a person loaning money took a deed of trust as security, and applied a portion of the money so loaned towards the discharge of a prior incumbrance embraced in his deed of trust, it was held that he was entitled in equity to be subrogated to the rights of the prior lien holder in respect to his security, although there was a formal release of the prior incumbrance, so as to protect him against the intervening lien of a judgment.⁸⁵

Where a mortgagee cancelled a mortgage made by the ancestor and accepted a new security executed by the heir, he was held entitled to a revivor of the earlier lien as against the claims of general creditors of the estate.⁸⁶

But the mere fact that borrowed money was used to pay off a mortgage or other lien upon land will not give the lender a right to be subrogated to the lien.⁸⁷

81 *Gans v. Thieme*, 93 N. Y. 225. See also *Gilbert v. Gilbert*, 39 Iowa, 657; *Tradesmen's Association v. Thompson*, 32 N. J. Eq. 133; *Insurance Co. v. Marshall*, 32 N. J. Eq. 103; *Lockwood v. Marsh*, 3 Nev. 138. *Contra*, *Banta v. Garmo*, 1 Sand. Ch. 383; *Garwood v. Adm'rs of Eldridge*, 1 Green's Ch. (N. J.) 145; *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274; *Watson v. Wilcox*, 39 Wis. 643.

82 *Gilbert v. Gilbert*, 39 Iowa, 657; *Evertson v. Central Bank*, 33 Kan. 352.

83 *Coleman v. Fraser*, 3 Ky. 300.

84 *Mabbett v. Mabbett*, 29 App. Div. 609; 51 N. Y. Supp. 529. See *Bayles v. Husted*, 40 Hun, 376; *Platt v. Brick*, 35 Hun, 121.

85 *Tyrrell v. Ward*, 102 Ill. 29; *Gaskill v. Wales*, 36 N. J. Eq. 527.

86 *Hyde v. Tanner*, 1 Barb. 76.

87 *Kitchell v. Mudgett*, 37 Mich.

§ 474. **Usurer not protected by subrogation.**—A person paying off a mortgage in pursuance of an usurious contract between himself and the mortgagor has no equitable right of subrogation.⁸⁸ Where the holder of a junior mortgage, in pursuance of a usurious contract with the owner of the equity of redemption, himself paid the prior lien, which, together with the junior mortgage, were thereupon cancelled of record, and a new security taken to include both mortgages and a bonus of \$1,000 in addition, this latter security was adjudged void, but it was held that the satisfied junior mortgage was thereupon revived and that the junior mortgagee also had a right to be subrogated to the prior lien. He had a right to pay and be subrogated by virtue of his junior lien, and this right was not destroyed by the usury.⁸⁹

But where a loan of money on usurious terms was made by a person having no junior lien to protect, for the purpose of paying a prior valid mortgage, which was discharged and a new mortgage was taken, no right of subrogation was held to exist, for the reason that the payment was not made by the mortgagee, but the loan was made to the mortgagor, who used the money thus obtained to make the payment. In the case previously cited⁹⁰ the right to subrogation had its foundation in the payment made by the junior incumbrancer, and the fact that he made it pursuant to a usurious bargain, was not a necessary part of the transaction; but where the usurious loan was made to the mortgagor, who made the payment, all of the rights of the mortgagee had to be traced through the illegal contract, and depended upon and fell with it.⁹¹

§ 475. **Subrogation may be awarded to compel contribution.**—Where tenants in common mortgage their lands for their joint debt, each is a surety of the other to the extent of the portion of the debt which the other ought to pay; and if one pays the entire debt he will be subrogated to the rights of the creditor to

81; *Van Winkle v. Williams*, 38 N. J. Eq. 105; *Gaskill v. Wales*, 36 N. J. Eq. 527; *Smith v. Neilson*, 13 Lea (Tenn.) 461. See *Sommers v. Schrader*, 59 App. Div. 340; 69 N. Y. Supp. 866.

88 *Perkins v. Hall*, 105 N. Y. 539; 12 N. E. 48.

89 *Patterson v. Birdsall*, 64 N. Y. 294; 21 Am. R. 609, aff'g 6 Hun, 632.

90 *Patterson v. Birdsall*, 64 N. Y. 294; 21 Am. R. 609, aff'g 6 Hun, 632.

91 *Baldwin v. Moffitt*, 94 N. Y. 82, aff'g 26 Hun, 209.

the extent necessary to compel contribution from his co-tenant.⁹²

If a mortgage is brought in by one of several co-tenants of the mortgaged premises for a sum less than the amount due thereon, such purchaser has a right to exact contributions from his co-tenants for the amount he has actually paid to redeem the mortgage, but he cannot enforce the mortgage against the premises for the full amount due thereon.⁹³

So, where a mortgagee obtained a judgment of foreclosure and one of several purchasers from the mortgagor paid the judgment, it was held that equity would work a subrogation of such purchaser to the rights of the mortgagee, so far as might be necessary to enable the former to compel contribution from persons liable thereto.⁹⁴

And a mortgagee who has been compelled to pay an existing incumbrance, as well on the lands mortgaged to him as on other lands, may enforce the lien to compel the owner of such other lands to pay his proportion of the incumbrance.⁹⁵

A person who owns a portion of mortgaged premises which, as between himself and other owners of other portions, is not primarily bound for the payment of the mortgage debt, may, upon paying the debt, enforce the lien against the other parcels which ought equitably to bear the burden.⁹⁶

A surety on one of seven bonds secured by a mortgage, on paying the bond on which he was obligated was held entitled to a proportionate part of the mortgage.⁹⁷

And it has been decided that the holder of a judgment junior to a mortgage, given by one of three makers of notes to secure their payment, which has been foreclosed, is entitled to be subrogated to the right of action on the notes in order to enable him to enforce the mortgagor's right of contribution against the other makers.⁹⁸

§ 476. Subrogation may also be decreed to remedy a mistake.— Upon this principle a person who purchases real estate which is

⁹² *Fletcher v. Chase*, 16 N. H. 39; *McLoughlin v. Curts*, 27 Wis. 644.

⁹³ *Peck v. Peck*, 110 N. Y. 64; 17 N. E. 383.

⁹⁴ *Matteson v. Thomas*, 41 Ill. 110.

⁹⁵ *Lyman v. Little*, 15 Vt. 576.

⁹⁶ *Rardin v. Walpole*, 38 Ind. 146; *Laylin v. Knox*, 41 Mich. 40; 1 N. W. 913.

⁹⁷ *Lynch v. Hancock*, 14 S. C. 66.

⁹⁸ *Union Bank v. Conroy*, 42 App. Div. 577; 59 N. Y. Supp. 631.

subject to a mortgage and a judgment lien, and who pays the mortgage and causes it to be satisfied and discharged upon the record without any knowledge of the judgment, is entitled to be subrogated to the mortgage as against the judgment creditor.¹ So, also, where a purchaser at an administrator's sale, without notice of any defect in the proceedings, which were really without validity, paid the purchase money, which was used in paying a valid mortgage on the land, it was held that he was subrogated to such mortgage, which was to be treated as in full force for his benefit and protection.²

§ 477. **Preventing an inequitable claim for dower.**—Where a mortgage upon lands, executed by a husband and wife, was created to pay off a prior mortgage upon the premises, executed by the mortgagor before his marriage, it afterward appearing that the wife, at the time she executed the last mortgage, was an infant, but that the fact of such infancy was not disclosed, it was held that the person taking the mortgage was entitled to be subrogated to the rights of the mortgagee under the first mortgage, and to have the same revived and enforced for his benefit, as against the claim of the wife of the mortgagor for dower.³

So, where an unmarried man executed a mortgage and subsequently married, and then executed a new mortgage to persons who paid off the first mortgage on its being released, the release of the old mortgage and the executing of the new being on the same day, it was held that the transaction was, in legal effect, an assignment of the first mortgage in consideration of the money advanced by the second mortgagees; not the creating of a new incumbrance, but a changing of the form of the old.⁴

In a similar case, however, differing only in the circumstance that the mortgagor falsely represented to the mortgagee that he was not married, and his wife, who was living apart from him, did not sign the new mortgage, the right of subrogation to the discharged security was refused, it being stated that the wife was "innocent."⁵

Where the purchaser of the equity of redemption, who is under

1 Ayres v. Adams, 82 Ind. 109.

4 Swift v. Kraemer, 13 Cal. 526.

2 Blodgett v. Hitt, 29 Wis. 169.

5 Westfall v. Hintze, 7 Abb. N. C.

3 Snelling v. McIntyre, 6 Abb. N. 236.

C. 469; Runyan v. Stewart, 12 Barb. 537.

no personal liability to pay the mortgage debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee has the right to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower is bound to allow her due proportion of the mortgage debt.⁶

§ 478. **Surety subrogated to security given to co-surety.**—A mortgage given by the principal debtor to one surety for his indemnity inures to the benefit of a co-surety, and the mortgagee cannot apply the money realized thereon to any debt other than that specified in the mortgage to the prejudice of his co-surety.⁷

But a surety is not entitled to the benefit of a mortgage given to indemnify his co-surety after the co-sureties' loss had been adjusted by each of the sureties paying one-half of the demand.⁸

A mortgage given by the wife of the principal debtor upon her separate estate, for the exclusive use and benefit of one of her husband's sureties, does not inure to the benefit of his co-sureties.⁹

§ 479. **Subrogation of creditor to collateral securities held by sureties.**—A principal creditor has also been held to be authorized to lay hold upon all collateral securities given by the principal debtor for the discharge of the debt. Upon this principle, when the maker of a note executes a mortgage on his property to indemnify his accommodation indorsers on the note, the holders of the note will be entitled to the benefit of the mortgage, and may in equity subject the mortgaged property to the satisfaction of his debt,¹⁰ and this right cannot be defeated by a release of the mortgage executed by the mortgagee.¹¹

⁶ *Everson v. McMullen*, 113 N. Y. 293; 21 N. E. 52.

⁷ *Steele v. Mealing*, 24 Ala. 285.

⁸ *Hall v. Cashman*, 16 N. H. 462.

⁹ *Leggett v. McClelland*, 39 Ohio St. 624.

¹⁰ *McMullin's Adm'r v. Neal*, 60 Ala. 552; *Loehr v. Colburn*, 92 Ind. 24; *New Bedford Institution v. Fair-*

haven Bank, 91 Mass. (9 Allen) 175; *Dick v. Maury*, 17 Miss. 448; *Demott v. Stockton Paper Ware Mfg. Co.*, 32 N. J. Eq. 124; *Ijames v. Gaither*, 93 N. C. 358.

¹¹ *Loehr v. Colburn*, 92 Ind. 24; *Mitchell v. Smock*, 94 Ind. 108; *Dick v. Maury*, 17 Miss. 448.

If, however, the owner of the note has proved it against the several estates of the maker and indorser in bankruptcy, and by his vote has secured the discharge of the indorser, he cannot compel an assignment of the mortgage to himself.¹²

Where a mortgage was assigned by a principal debtor to a trustee for the protection of his surety, with authority to collect the amount due on the mortgage and pay the debt from the proceeds, on default of payment the creditor was held to be entitled to the security.¹³

So, the payee of a promissory note who transfers it by indorsement, and afterward, on failure of payment by the maker, is compelled to take it up, is entitled to enforce a mortgage executed by the maker to the indorser, while he held the note, to secure it.¹⁴

A surety on appeal from a judgment recovered upon a note secured by a mortgage, when compelled to pay the judgment, is entitled to be subrogated to all the rights of the mortgagee under the mortgage.¹⁵

In order that the creditor may claim subrogation to a security, it must appear that it was given by the person primarily obligated to pay the debt. No such subrogation can take place so as to give the creditor a claim upon a mortgage given by one of two sureties on his own real estate to his co-surety to protect him from loss by reason of having become surety for the principal.¹⁶

§ 480. Pleadings to assert right of subrogation.—Where an action is brought to foreclose a mortgage, and a defendant who pays the debt desires to obtain a legal assignment in aid of his equitable claim to subrogation, no special averments need be made in his answer, and the relief may be granted to him upon a motion made in the action.¹⁷ But if a mortgagee has paid a prior lien and desires to tack it with his own, he must set out the facts upon which he relies in his complaint.¹⁸

¹² *New Bedford Institution v. Fairhaven Bank*, 91 Mass. (9 Allen) 175.

¹³ *Callum v. Branch Bank of Mobile*, 23 Ala. 770.

¹⁴ *O'Hara v Haas*, 46 Miss. 374.

¹⁵ *Pence v. Armstrong*, 95 Ind. 191; *Vert v. Voss*, 74 Ind. 565.

¹⁶ *Hampton v. Phipps*, 108 U. S.

(1 Davis) 260; *Seward v. Huntington*, 94 N. Y. 104, rev'g 26 Hun, 216.

¹⁷ *Twombly v. Cassidy*, 82 N. Y. 155. See *Cole v. Malcolm*, 66 N. Y. 363; *Pulitzer v. National Life Ass'n*, 24 Misc. R. 18; 53 N. Y. Supp. 94.

¹⁸ *Emigrant Ind. Sav. Bank v. Clute*, 33 Hun, 82; *Aldrich v. Willis*, 55 Cal. 81.

The reason for this rule is found in the fact that in a mere action of foreclosure, a title acquired prior to the execution of the mortgage can neither be contested nor defeated.¹⁹

19 *Emigrant Ind. Sav. Bank v. Clute*, 33 Hun, 82.

CHAPTER XII

THE RECORDING AND TAXING ACTS.

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§ 481. Statute.—It is provided by statute that a conveyance of real property, within the State, on being duly acknowledged by the person executing the same, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. And it is further provided that "every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same property, or any portion thereof, whose conveyance is first duly recorded."² It is further provided that the term "real property" as used in the act shall include lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years. The term "purchaser" is to be construed to embrace every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate. The term

² Real Prop. Law, § 291; Real Prop. Law of 1896, § 241; 1 R. S. 756, § 1.

“conveyance” is to be construed to include every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. The term “recording officer” means the county clerk of the county, except in the counties of New York, Kings or Westchester, where it means the register of the county.³

Whenever a sheriff or referee sells mortgaged premises under a decree or order, or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage and any assignment thereof in the office of the clerk, unless such mortgage and assignments have been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the filing of such mortgage and assignments, and the time of filing. But this rule shall not extend to any case where the mortgage or assignments appear, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.⁴ Where the property involved does not lie within the State, our recording acts have no application.⁵

§ 482. Instruments within the statute.—The statute applies to mortgages, whether they be of freehold or of leasehold estates,⁶ and written agreements which create equitable incumbrances in the nature of mortgages may be recorded, and the record will be

³ Real Prop. Law, § 290; Real Prop. Law of 1896, § 240.

⁴ Rule 63.

⁵ Owens v. Evans, 134 N. Y. 514; 31 N. E. 999.

⁶ Johnson v. Stagg, 2 Johns. 510; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603.

notice to subsequent purchasers.⁷ So the estate of a purchaser in possession of lands under a parol contract of sale may be mortgaged, and such mortgage may be recorded, and will be notice to subsequent purchasers and incumbrancers.⁸

A mortgage of a lease for less than three years is a chattel mortgage, and must be filed in conformity with the provisions of law governing such securities;⁹ but if the lease is for more than three years, it must be recorded just as if it were a mortgage on a fee,¹⁰ and need not be recorded as a chattel mortgage.¹¹ A mortgage of such a lease, if the lease and mortgage are duly recorded, will be protected against a subsequent mortgage of the fee.¹²

A "satisfaction piece" of a mortgage under our statutes,¹³ is a simple instrument for reconveying or releasing the land from the lien of the mortgage. It is a "conveyance" under the recording act; for by it an interest in real estate is aliened, and the title to real estate is affected in law and in equity.¹⁴ A certificate of satisfaction properly recorded is therefore a protection to a *bona fide* purchaser of the property, even though the mortgage has been transferred by an unrecorded assignment.¹⁵

So, a release of part of a mortgage security is a "conveyance" of real estate under the recording act, and the record of it is constructive notice to subsequent purchasers.¹⁶

An assignment of a bond and mortgage is a "conveyance" and

⁷ Parkist v. Alexander, 1 Johns. Ch. 394; Hunt v. Johnson, 19 N. Y. (5 Smith) 279.

⁸ Tefft v. Munson, 63 Barb. 31; Johnson v. Stagg, 2 Johns. 509; Stoddard v. Whiting, 46 N. Y. 627; Tarbell v. West, 86 N. Y. 280. See also United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Edwards v. McKernan, 55 Mich. 520; 22 N. W. 20; Wilder v. Brooks, 10 Minn. 50; Neligh v. Michenor, 3 Stock. 539; Bellas v. McCarty, 10 Watts (Pa.) 13. *Contra*, Grimstone v. Carter, 3 Paige, 421; Farmers' Loan & Trust Co. v. Maltly, 8 Paige, 361; Crane v. Turner, 7 Hun, 357, *aff'd* 67 N. Y. 437.

⁹ Deane v. Hutchinson, 40 N. J. Eq. 83.

¹⁰ Real Prop. Law, § 290, 1 R. S. 762, § 36; Gaylord v. Cincinnati Ger-

man Building Ass'n, 2 Cin. 163; Johnson v. Stagg, 2 Johns. 510; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603. See also Decker v. Clarke, 11 C. E. Green (N. J.) 163; Spielman v. Kliet, 36 N. J. Eq. 199.

¹¹ State Trust Co. v. Casino Co., 18 Misc. R. 327; 41 N. Y. Supp. 327.

¹² Spielman v. Kliet, 36 N. J. Eq. 199.

¹³ Real Prop. Law, §§ 321, 322; 1 R. S. 761, §§ 28, 29.

¹⁴ Bacon v. Van Schoonhoven, 19 Hun, 158, *aff'd* 87 N. Y. 446.

¹⁵ Cornog v. Fuller, 30 Iowa, 211; Bowling v. Cook, 39 Iowa, 200; Swartz's Ex'r v. List, 13 Ohio St. 419; Henderson v. Pilgrim, 22 Texas, 464.

¹⁶ Mutual Life Ins. Co. v. Wilcox, 55 How. Pr. 43; St. John v. Spaulding, 1 T. & C. 493.

is notice to subsequent purchasers of the same security.¹⁷ If properly acknowledged and recorded¹⁸ though it is not notice to the mortgagor or his legal representatives.¹⁹

§ 483. Mortgages of interests in decedents estates must be recorded.—It is provided that “Every conveyance, assignment, or other transfer of, and every mortgage or other charge upon the interest, or any part thereof, of any person in the estate of a decedent which is situated within this State, shall be in writing and shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded. Any such instrument may also be recorded as hereinafter provided; and if not so recorded, it is void against any subsequent purchaser or mortgagee of the same interest or any part thereof, in good faith and for a valuable consideration, whose conveyance or mortgage is first duly recorded. If such interest is entirely in the personal property of the decedent, the conveyance or mortgage shall be recorded in the office of the surrogate issuing letters testamentary or letters of administration upon the said decedent’s estate or if no such letters have been issued, then in the office of the surrogate having jurisdiction to issue the same. If such interest is in both the personal and the real property of a decedent the conveyance or mortgage shall be recorded in the office of the said surrogate and also in the office of the county clerk. Such a conveyance or mortgage when so recorded, shall be indexed under the name of the decedent in a book to be kept for that purpose by each recording officer. The person presenting any such instrument for record shall pay to the clerk of the surrogate’s court a fee of ten cents for each folio.”²⁰

§ 484. What instruments gain nothing from being recorded.—A power of attorney to assign a mortgage,²¹ and a power to collect a mortgage and to execute satisfaction,²² are neither of them within the recording acts, and their record will not operate as notice. So, too, an agreement between two mortgagees fixing the

¹⁷ Westbrook v. Gleason, 79 N. Y. 23; Purdy v. Huntington, 42 N. Y. 334.

¹⁸ Armstrong v. Combs, 15 App. Div. 246; 44 N. Y. 171.

¹⁹ Van Keuren v. Corkins, 66 N. Y. 77, aff’g 4 Hun, 129; Mueller v.

Goerlitz, 53 Misc. R. 53; 103 N. Y. Supp. 1037.

²⁰ Real Prop. Law, § 274; Personal Prop. Law, § 32.

²¹ Williams v. Birbeck, Hoff. 359.

²² Jackson v. Richards, 6 Cow. 617.

priority of their several mortgages, is not entitled to record, and if recorded, will be inoperative as to subsequent purchasers.²³ Nor is a contract by which a building contractor agrees to take a second mortgage on the premises in lieu of final payment, an instrument which is required to be recorded.²⁴

A covenant to assume and pay a mortgage debt is not a conveyance of real estate, and does not come within the recording act, and putting it upon record does not give constructive notice to any one.²⁵ So, also, the recording acts have no application to a covenant contained in a mortgage by the terms of which the mortgagor agrees to keep the property insured for the benefit of the mortgagee, and notice of such a covenant must depend upon proof independent of its provisions. It does not contemplate that such a covenant in a mortgage shall be more effective from the fact that such mortgage is placed on the record or that the recording makes it an incumbrance upon the mortgaged property. The object of the recording acts was to protect subsequent purchasers and incumbrancers against previous unrecorded instruments, and not against a covenant relating to the policy of insurance upon buildings upon the premises. Instruments which affect the land and the title are entitled to record, and not such as relate to collateral matters.²⁶

It is not necessary to record an extension or renewal of a mortgage in order to charge purchasers with notice, the original mortgage being unsatisfied of record, even though the statute of limitations has run since such record.²⁷

A mortgage of land containing a provision by which the mortgagors pledge the "rents, issues, and profits" of the premises, though duly recorded, is not notice to a purchaser of the rents due or to grow due of the special lien upon them. The obligation of a tenant to pay rent is a chose in action and not real estate.²⁸

A mortgage given by a corporation to secure its bonds and which has been recorded in all counties in which its real estate is sit-

²³ Gillig v. Maass, 28 N. Y. 191; Crane v. Turner, 67 N. Y. 437; Bank for Savings v. Frank, 56 How. Pr. 403.

²⁴ Davidson v. Fox, 65 App. Div. 262; 73 N. Y. Supp. 533.

²⁵ Judson v. Dada, 79 N. Y. 373; Mead v. Parker, 29 Hun, 62.

²⁶ Per MILLER, J., in Dunlop v. Avery, 89 N. Y. 592, 598.

²⁷ Plant v. Shryock, 62 Miss. 821; Benson v. Stewart, 30 Miss. 49; Green v. Supervisors, 58 Miss. 337.

²⁸ Riley v. Sexton, 32 Hun, 245; Wood v. Lester, 29 Barb. 145.

uated need not be filed or refiled as a chattel mortgage in order to preserve its lien on the personalty.²⁹

§ 485. Where two mortgages are taken and recorded simultaneously, the recording acts have no application, and their priority must be determined by equitable rules.³⁰ In such a case a court of equity will recognize and enforce an agreement or understanding as to priority,³¹ and the same rule will apply if one mortgage is accidentally recorded a short time before the other.³²

In *Greene v. Deal* (64 N. Y. 220),³³ the Court of Appeals held that the recording acts did not apply as between two mortgages both given for part of the purchase money of the same property, and that fact appearing upon their face, and both bearing the same date, but one of which was recorded a few hours before the other. The recording act declares that a conveyance not recorded shall be void as against any subsequent purchaser whose conveyance shall be first duly recorded, but it does not assume to control the rights of parties under instruments both of which were executed and delivered at the same time.

Where a mortgage and judgment were entered of record the same day; the mortgage which was not for purchase money being first entered, but there was nothing on the record to show the precise time of the entry of either, it was held that they were of equal lien.³⁴ This was under a statute making the lien of a mortgage as against a judgment depend on priority of record.

Priority of record will not give preference to one mortgage over another given at the same time to the same person.³⁵

Where a vendee of real estate gives a purchase-money mortgage to the vendor for a portion of the purchase price, and gives a third party a purchase-money mortgage for a portion of the purchase price advanced by said third party, an agreement that the two mortgages should be recorded at the same time does not as a mat-

²⁹ *Guaranty Trust Co. v. Troy Steel Co.*, 33 Misc. R. 484; 88 N. Y. Supp. 915. See *Chemung Canal Bank v. Payne*, 164 N. Y. 252; 58 N. E. 101.

³⁰ *Granger v. Crouch*, 86 N. Y. 494; *Stafford v. Van Rensselaer*, 9 Cow. 316, aff'g *Van Rensselaer v. Stafford*, Hopk. 569; *Douglass v. Peele, Clarke*, 563.

³¹ *Jones v. Phelps*, 2 Barb. Ch. 440.

³² *Rhoades v. Canfield*, 8 Paige, 545. See also *Sparks v. The State Bank*, 7 Blackf. (Ind.) 469.

³³ *Rev'g Greene v. Deal*, 4 Hun, 703.

³⁴ *Hendrickson's Appeal*, 24 Pa. St. 363.

³⁵ *Gansen v. Tomlinson*, 23 N. J. Eq. 405.

ter of law place their liens on an equality; in the absence or waiver or estoppel the lien of the vendor's mortgage is superior.³⁶

ACKNOWLEDGMENT OF PROOF.

§ 486. In order that an instrument shall be entitled to be recorded, it is necessary that its authenticity be attested in the form prescribed by the statute regulating the acknowledgment and proof of deeds. If this be omitted, or if the acknowledgment be informal or defective, the record, being unauthorized, will not be notice.³⁷ A certificate of acknowledgment which conforms on its face with the statute, is proof of its own genuineness; and where it describes the proper officer acting in the proper place, it is taken as proof both of his character and local jurisdiction.³⁸ The certificate is not conclusive, however, and the party affected by it may question its validity and the force and effect of the formal proof.³⁹

§ 487. **Impeaching certificate of acknowledgment.**—It is provided by statute as follows: "A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance duly recorded, within the State, or a transcript thereof duly certified, is evidence, with like effect as the original conveyance."⁴⁰

It is further provided that "the certificate of the acknowledgment, or of the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received

³⁶ *Boies v. Benham*, 127 N. Y. 620; 28 N. E. 657.

³⁷ *Real Prop. Law*, §§ 298 *et sequi*; *Frost v. Beekman*, 1 Johns. Ch. 288. See also *Dodd v. Parker*, 40 Ark. 536; *Wood v. Reeves*, 23 S. C. 382; *Girardin v. Lampe*, 58 Wis. 267; 16 N. W. 614.

³⁸ *Thurman v. Cameron*, 24 Wend. 87.

³⁹ *Jackson v. Schoonmaker*, 4 Johns. 161; *Jackson v. Perkins*, 2 Wend. 308; *Morris v. Keyes*, 1 Hill, 540; *Jackson v. Rumsey*, 3 Johns. Cas. 234; *Thurman v. Cameron*, 24 Wend. 87.

⁴⁰ *Code Civ. Proc.*, § 935.

in evidence, until its execution is established by other competent proof.”⁴¹

It has been said that the true view is that the certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal between the parties by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the acknowledging officer to certify, if he has jurisdiction. As to all other persons it is open to dispute.⁴²

In the absence of proof of fraud and collusion on the part of the officer taking and certifying the acknowledgment of a mortgage or other instrument, the officer's certificate in proper form will, for the purpose of protecting a *bona fide* purchaser, prevail over the unsupported testimony of the mortgagor that the same is false and the instrument is forged.⁴³ It has also been said that in taking the acknowledgment of a married woman to a deed or mortgage, the officer acts judicially, and, in the absence of fraud or duress, the evidence of the parties to the instrument is not admissible to contradict his official certificate, and to vitiate the instrument as against the title thereunder of a *bona fide* grantee or mortgagee.⁴⁴

A certificate of proof or acknowledgment to an instrument does not preclude any person affected by it to deny that the instrument was delivered,⁴⁵ or to show that one of the grantors was an infant, or *non compos mentis*.⁴⁶

§ 488. Who may certify as to proof or acknowledgment.—The act of taking and certifying the acknowledgment involves the dis-

⁴¹ Code Civ. Proc., § 936.

⁴² Whart on Ev., § 1052, and cases cited; Heeter v. Glasgow, 79 Pa. St. 79; 21 Am. R. 46.

⁴³ Howland v. Blake, 97 U. S. 624; Monroe v. Poormun, 62 Ill. 523; Gorham v. Anderson, 42 Ill. 514; Borland v. Walrath, 33 Iowa, 130; Van Orman v. McGregor, 23 Iowa, 300; Hourtunne v. Schnoor, 33 Mich. 274; Pereau v. Frederick, 17 Neb. 117; 22 N. W. 235; Heeter v. Glasgow, 79 Pa. St. 79.

⁴⁴ Real Prop. Law, § 302; Homeopathic Mut. Life Ins. Co. v. Mar-

shall, 32 N. J. Eq. 103, and cases cited by the court and by the reporter in a valuable note. See also Shear v. Robinson, 18 Fla. 379; Kerr v. Russell, 69 Ill. 666; 18 Am. Rep. 634; White v. Graves, 107 Mass. 325; 9 Am. Rep. 38; Johnston v. Wallace, 53 Miss. 331; 24 Am. Rep. 699; Singer Mfg. Co. v. Rook, 84 Pa. St. 442; 24 Am. Rep. 204.

⁴⁵ Jackson v. Perkins, 2 Wend. 308.

⁴⁶ Jackson v. Schoonmaker, 4 Johns. 161.

charge of no judicial duty which would incapacitate a person related to one of the parties from acting. It is merely a ministerial act, and may be performed by a person who is so related to the parties as to be disqualified as a judge or juror.⁴⁷

The officials qualified to act are named in the Real Property Law.⁴⁸

§ 489. Sufficiency of certificate.—If the certificate of acknowledgment is substantially defective, the paper cannot be read in evidence, and, though recorded, the record will not be effectual as notice.⁴⁹ And if the record shows no sufficient acknowledgment it will not be operative, though the original instrument is duly acknowledged.⁵⁰

A certificate of proof or acknowledgment need not be in the precise language of the statute, but is to be liberally construed, and is sufficient if it shows a substantial compliance with the law.⁵¹

The recording of an instrument as a notice to subsequent purchasers or incumbrancers is not invalidated by proof of a latent defect in the acknowledgment. Thus, where the acknowledgment of an assignment of a mortgage was taken in New Jersey by a notary public of New York, but the certificate was in due form and purported to have been taken in New York, and the assignee had taken the assignment in good faith for a sound and adequate consideration, the record was held sufficient, and evidence of the irregularity was not permitted.⁵² Where the venue was laid in a

⁴⁷ *Lynch v. Livingston*, 6 N. Y. (2 Seld.) 422.

⁴⁸ §§ 298, 299, 300, 301. See Executive Law, §§ 101–109; Laws of 1913, ch. 418, amending Laws of 1901, ch. 464, § 58 (charter of New York City).

⁴⁹ *Merritt v. Yates*, 71 Ill. 636; 22 Am. R. 128; *Grove v. Todd*, 41 Md. 633; 20 Am. R. 76.

⁵⁰ *Bishop v. Schneider*, 46 Mo. 472; 2 Am. R. 533. So also if the statute requires a witness and the record does not show one. *Pringle v. Dunn*, 37 Wis. 449; 19 Am. R. 772.

⁵¹ *Canandaigua Academy v. Mc-*

Kechnie, 19 Hun. 62; *Jackson v. Gu-maer*, 2 Cow. 552; *Troup v. Haight*, *Hopk.* 239; *Duval v. Covenhoven*, 4 *Wend.* 561; *Meriam v. Harsen*, 4 *Edw. Ch.* 70; 2 *Barb. Ch.* 232; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Ritter v. Worth*, 58 N. Y. 627, *rev'g* 1 T. & C. 406.

As to acknowledgment by corporation, see *Trustees Can. Academy v. McKechnie*, 90 N. Y. 618.

⁵² *Heilbrun v. Hammond*, 13 Hun. 474. See also *Ross & Co.'s & Elsbrie's Appeals*, 106 Pa. St. 82; *Fuhrman v. Loudon*, 13 *Serg. & R. (Pa.)* 386; *Angier v. Schieffelin*, 72 Pa. St. 106; 13 Am. R. 659.

county where the officer had no jurisdiction, it was held that parol proof was admissible to show that, as a matter of fact, it was taken in his county.⁵³

METHOD OF RECORDING.

§ 490. In order to be valid as against strangers, a mortgage should give reasonable notice of the incumbrance. But to constitute such reasonable notice it is not requisite that the condition should be so completely certain as to preclude the necessity of extraneous inquiry; and it is sufficient to state the subject matter of the mortgage and that from which, by the exercise of common prudence and ordinary diligence, the extent of the incumbrance may be ascertained.⁵⁴

So, a clause in an indemnity mortgage, to the effect that it is made to secure the payment of all sums now due or to grow due to the mortgagee from the mortgagor hereafter, is sufficient.⁵⁵

Where a recorded mortgage recited that the bond was "conditioned for the payment of \$1,500, lawful money of the United States, as in and by said obligation will appear," but the bond was conditioned for the payment of \$1,500, lawful *silver* money of the United States, it was held that the mortgage could be satisfied by a *bona fide* purchaser without notice, by the payment of the amount in lawful money of any description.⁵⁶

§ 491. A mortgage given for advances to be made is notice to all intending purchasers and incumbrancers to its full amount, and this without regard to the question whether the advancements are optional or not. By such a record all persons are put upon inquiry to ascertain to what extent the advances have been made, and they may by notice prevent other advances to their prejudice.⁵⁷

§ 492. Defective record.—A recording officer is liable for any damage caused by his erroneous or defective performance of his

⁵³ Angier v. Schieffelin, 72 Pa. St. 106; 13 Am. R. 659.

⁵⁴ Stoughton v. Pasco, 5 Conn. 442.

⁵⁵ Bishop v. Allen, 55 Vt. 423.

⁵⁶ Eagle Beneficial Society Appeal, 75 Pa. St. 226.

⁵⁷ Ackerman v. Hunsicker, 85 N. Y. 43, rev'g 21 Hun, 53, and overruling Ketcham v. Wood, 22 Hun, 64. See further as to this, *ante*, §§ 215 to 213.

duties,⁵⁸ as by marking a discharge upon the wrong mortgage, in consequence of which a purchaser suffers loss.⁵⁹

An omission in the record of the middle name or initial of the mortgagor, or a mistake in it, will not affect its validity. It is enough if one christian name is properly added to the surname.⁶⁰

The record of a mortgage from which the name of the mortgagee is omitted, does not charge a subsequent purchaser with notice.⁶¹

After a paper is properly recorded, it continues to be notice even if the record is destroyed by fire.⁶²

§ 493. **Omission of seal.**—It has been held that a purchaser from the mortgagor will not be charged with constructive notice of a mortgage, the record of which shows that it was not under seal.⁶³

§ 494. **The mistake of a recording clerk** cannot operate to enlarge the effect of a conveyance. For this reason, where a release of part of mortgaged premises was correctly made and executed, and in recording it the word "except" was erroneously omitted from the description, whereby an entirely different meaning was given to it, it was held that the mistake in the record could be shown, even as against a person purchasing on the faith of it.⁶⁴

§ 495. **Indexing the record.**—General statutes require the clerks in the various counties of this State, and the registers in the counties of New York and Kings, to keep proper indices of the conveyances, mortgages, and other instruments left with them for record. For a willful or fraudulent omission to note any paper in the proper index, any clerk or register would be liable to be indicted, and he would for any such omission, whether caused by mere neglect or otherwise, be liable in damages to any person who might thereby be made to suffer. The index, however, is not an essential part of the recording of any instrument. When a conveyance is delivered to the clerk, the statute provides that it shall

⁵⁸ *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *State v. Davis*, 96 Ind. 539; *Gilchrist v. Gough*, 63 Ind. 576.

⁵⁹ *Building Ass'n v. Whitacre*, 92 Ind. 547.

⁶⁰ *Clute v. Emmerich*, 26 Hun, 10; *Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardinier*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102; *Weber v. Fowler*, 11 How. Pr. 458.

⁶¹ *Drake v. Wright*, 49 Iowa, 538.

⁶² *Shannon v. Hall*, 72 Ill. 354; 22 Am. R. 146; *Alvis v. Morrison*, 63 Ill. 181; 14 Am. R. 117; *Myers v. Buchanan*, 46 Miss. 397.

⁶³ *Caconillat v. Rene*, 32 Cal. 450.

⁶⁴ *Simonson v. Falihee*, 25 Hun, 570.

be "considered as recorded from the time of such delivery,"⁶⁵ and the accidental destruction of the records will not affect rights accrued.⁶⁶ After such delivery nothing more need be done to keep the record perfect, except at the proper time to record it in its proper order in the proper book; and yet if the conveyance in the meantime, before the record thereof, should be mislaid at the clerk's office, or lost or purloined, the record would still remain complete. In such case there could be no index of such conveyance, because, until the time for recording it had arrived, it could not be known in what book, or in what place in any book, it would be recorded.⁶⁷

§ 496. Conveyances and mortgages must be recorded in different sets of books.—The statute requires that different sets of books shall be provided by the clerks of the several counties, for the recording of deeds and mortgages; in one of which sets, all conveyances absolute in their terms, and not intended as mortgages or as securities in the nature of mortgages, shall be recorded; and in the other set, such mortgages and securities shall be recorded.⁶⁸ A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.⁶⁹

§ 497. The record must be according to law.—It is a general principle that where the recording of an instrument is made constructive notice, the record, to be effectual, must be according to law.⁷⁰ Upon this principle, and under these statutory provisions,

⁶⁵ Kessler v. The State *ex rel.* Wilson, 24 Ind. 313; Woods's & Brown's Appeal, 82 Pa. St. 116.

⁶⁶ Hall v. Shannon, 85 Ill. 473; Shannon v. Hall, 72 Ill. 354; 22 Am. Rep. 146.

⁶⁷ Mutual Life Ins. Co. v. Dake, 87 N. Y. 257, *aff'g* 1 Abb. N. C. 381; Bedford v. Tupper, 30 Hun, 174. See Viele v. Judson, 82 N. Y. 32, *rev'g*

15 Hun, 328, and overruling, Moore v. Sloan, 50 Barb. 442; Bishop v. Schneider, 46 Mo. 472; 2 Am. R. 533; Schell v. Stein, 76 Pa. St. 398; 18 Am. R. 416.

⁶⁸ Real Prop. Law, § 315.

⁶⁹ Real Prop. Law, § 320.

⁷⁰ N. Y. Life Ins. Co. v. White, 17 N. Y. 469; Frost v. Beekman, 1 Johns. Ch. 288. See also Parsons v.

it has been held that the recording, as a deed, of an absolute deed intended as security in the nature of a mortgage, is not notice to a subsequent *bona fide* grantee or mortgagee, even though the defeasance is not in writing,⁷¹ and the like effect will follow if the deed and the defeasance are both recorded among the conveyances.⁷² If the defeasance is by parol, the mortgagee should execute a written defeasance and record it with the deed among the mortgages.⁷³

A deed, absolute on its face, but intended as security, though registered as a deed, is valid between the parties as a mortgage.⁷⁴ If it be recorded as a deed, the record is a nullity, but, upon the mortgagee acquiring the equity, the record of the deed becomes operative.⁷⁵

Where a conveyance is accompanied by an agreement which gives to the grantor a right to a portion of the profits on a resale within a specified time, and which requires the grantee to sell if a specified price can be obtained; such an agreement is not inconsistent with the vesting of the title, and the conveyance is a deed and should be recorded as such.⁷⁶

When a conveyance, absolute upon its face, is intended as a mortgage, the purchaser from the grantee with notice of the facts, stands in the place of the equitable mortgagee.⁷⁷ But where a deed intended as security is recorded, the defeasance not being recorded, a purchaser for value from the grantee, without notice of the defeasance, will hold an absolute title as against the grantor and his grantees. It is an absolute deed, as regards third per-

Lent, 34 N. J. Eq. 67; Lessee of Heister v. Fortner, 2 Binn. (Pa.) 40.

⁷¹ Howells v. Hettrick, 13 App. Div. 366; 43 N. Y. Supp. 183, aff'd 160 N. Y. 308; 54 N. E. 677; Bentley v. Gardner, 45 App. Div. 216; 60 N. Y. Supp. 1056; Hoschke v. Hoschke, 42 Misc. R. 125; 85 N. Y. Supp. 1006; Dey v. Dunham, 2 Johns. Ch. 182; Dunham v. Dey, 15 Johns. 555; James v. Johnson, 6 Johns. Ch. 417; White v. Moore, 1 Paige, 551. See also Ives v. Stone, 51 Conn. 446; Clark v. Watson, 141 Mass. 248. But see Bank, etc., v. Sav. Inst'n, 62 Miss. 250; Clark v. Condit, 18 N. J. Eq. 358.

⁷² Jackson v. Van Valkenburgh, 8 Cow. 260; Brown v. Dean, 3 Wend. 208; White v. Moore, 1 Paige, 551; Grimstone v. Carter, 3 Paige, 421. See also Corpman v. Baccastow, 84 Pa. St. 363.

⁷³ Warner v. Winslow, 1 Sandf. Ch. 430; White v. Moore, 1 Paige, 551.

⁷⁴ James v. Johnson, 6 Johns. Ch. 417.

⁷⁵ Warner v. Winslow, 1 Sandf. Ch. 430.

⁷⁶ Macaulay v. Porter, 71 N. Y. 173.

⁷⁷ Williams v. Thorn, 11 Paige, 459.

sons, and a *bona fide* purchaser will take the land discharged of the equity of redemption of the mortgagor.⁷⁸

§ 498. Order of record.—Conveyances are directed to be recorded “in the order and as of the time when the same shall be delivered to the clerk for that purpose.”⁷⁹ If a county clerk should record a mortgage or deed in a blank space left in a book which had ceased to be used for current records, or in the book in use at a place among records of a date long anterior to the time it was left for record and to its date, it could not be affirmed that it was recorded according to law, or that it furnished the notice to subsequent incumbrancers or purchasers which the statute has provided for.⁸⁰

EFFECT OF THE RECORD.

§ 499. Failure to record a mortgage does not affect its validity as between the parties, and such a mortgage may be foreclosed.⁸¹

It is binding upon the mortgagor’s administrator,⁸² his heirs or devisees,⁸³ and is valid as against his general creditors or creditors who have no specific lien upon or interest in the property,⁸⁴ unless impeached for fraud. In this connection it is well to note that withholding a mortgage from record has been held an evidence of fraud.⁸⁵

§ 500. The effect of the record is limited to giving notice.—The effect of the recording of an instrument is limited to giving constructive notice to the extent provided by the statute. Every purchaser of realty is not presumed to have knowledge of every fact disclosed by the record or to which an inquiry suggested by the record would have led.⁸⁶

Nor does the record confer validity upon the instrument which

⁷⁸ *Mills v. Comstock*, 5 Johns. Ch. 214; *Whitlick v. Kane*, 1 Paige, 202; *Stoddard v. Rotton*, 5 Bosw. 378.

⁷⁹ Real Prop. Law, § 317, 1 R. S. § 24.

⁸⁰ *N. Y. Life Ins. Co. v. White*, 17 N. Y. (3 Smith) 469.

⁸¹ *Forrester v. Parker*, 14 Daly, 208; 6 N. Y. St. R. 274; *Clute v. Robinson*, 2 Johns. 595. See *Girard Trust Co. v. Baird*, 212 Pa. St. 41; 61 Atl. 507; 1 L. R. A. N. S. 405;

Snowden v. Pitcher, 45 Md. 260; *Stewart v. Hopkins*, 30 Ohio St. 502.

⁸² *Sanders v. Barlow*, 21 Fed. 836; *Andrews v. Burns*, 11 Ala. 691.

⁸³ *Gill v. Pinney*, 12 Ohio St. 38.

⁸⁴ *Clift v. Williams*, 105 Ky. 559; 49 S. W. 328; 51 S. W. 821; *Gill v. Pinney*, 12 Ohio St. 38.

⁸⁵ *Heathman v. Rogers*, 54 Ill. App. 592.

⁸⁶ *Potter v. Sacks*, 45 App. Div. 454; 61 N. Y. Supp. 426. See § 520.

it did not have before, and for this reason the recording of a mortgage which has not been delivered is a nullity, and the subsequent assent of the mortgagee will not give him a preference over a person who has acquired rights in the property.⁸⁷ Any instrument which upon its face is regular, and purports to be a conveyance or a mortgage, may be recorded. But if it is not in truth what it purports to be, it will not be aided by being engrossed by a recording clerk and put upon the files of a public office.⁸⁸ The Recording Act was not intended to be a protection to innocent purchasers or mortgagees against theft, forgery, fraud or duress.⁸⁹ Such presumption of validity as may arise from the record of a mortgage requiring extraneous evidence to overcome it presents a case for the exercise of equitable jurisdiction for its cancellation as a cloud upon the title to the land.⁹⁰

§ 501. What the record of a deed is notice of.—A deed duly recorded is evidence not only of the transfer and title, but of the covenants contained in it,⁹¹ and the record of a mortgage is notice of the statements contained in it which describe the debt, either in accurate terms or by reference to the bond which it is intended to secure.⁹² The record of a mortgage which, upon its face, does not contain an accurate and full statement of the debt secured, is nevertheless notice of its existence and contents, and the purchaser with such notice is bound by all of the equities which the holder of the mortgage had against the mortgagor whose place he takes. The condition of a purchaser in such a case is precisely the same as it would have been at common law, if he had purchased with actual notice of the prior mortgage.⁹³ A mortgage, properly recorded, is notice to all persons that such an instrument exists, and that its contents are what is spread upon the record.⁹⁴

87 *Howells v. Hettrick*, 160 N. Y. 308; 54 N. E. 677; *Foster v. Beardsley Scythe Co.*, 47 Barb. 505.

88 *Jackson v. Richards*, 6 Cow. 617; *Morrison v. Brand*, 5 Daly, 40.

89 *Howells v. Hettrick*, 160 N. Y. 308; 54 N. E. 677.

90 *National Bank v. Levy*, 127 N. Y. 549; 28 N. E. 592.

91 *Morris v. Wadsworth*, 17 Wend. 103.

92 *Dimon v. Dunn*, 15 N. Y. (1 Smith) 498. But see *Payne v. Avery*, 21 Mich. 524.

93 *Youngs v. Wilson*, 27 N. Y. 351, rev'g 24 Barb. 510.

94 *Thomson v. Wilcox*, 7 Lans. 376.

Notice to lessee. *Hartley v. Meyer*, 2 Misc. R. 56; 20 N. Y. Supp. 855.

§ 502. The registry of a mortgage is notice of the contents of it, and of no more, and the purchaser is not to be charged with notice of facts which the records do not disclose. He is not bound to attend to the correctness of the registry. That is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great difficulty. The statute did not mean to put the party upon further inquiry. The registry was intended to contain, within itself, all the knowledge of the mortgage requisite for the purchaser's safety. On this principle, a mortgage for \$3,000, incorrectly registered as being for \$300, was held to be notice to a subsequent purchaser only for the smaller amount.⁹⁵

Where a mortgage was made to secure debts, one of "\$30 or thereabouts," and another of "\$40 or thereabouts," and the debts were \$25.21 and \$59.66 respectively, this was held sufficient to bind subsequent purchasers.⁹⁶

§ 503. Priority of unrecorded conveyances and mortgages over judgments.—An unrecorded conveyance or mortgage is prior to a judgment docketed subsequently to the time of its delivery.⁹⁷ It is obvious that this rule invites frauds and perjuries, and in some States statutes have been enacted to extend the benefits of the recording acts to judgment creditors.¹ Not only is the judgment creditor deferred to the prior unrecorded mortgage or conveyance, but the purchaser at the sheriff's sale under the judgment takes

⁹⁵ Frost v. Beekman, 1 Johns. Ch. 288, aff'd 18 Johns. 544. See also Gilchrist v. Gough, 63 Ind. 576; Lowry v. Smith, 97 Ind. 466; State v. Davis, 96 Ind. 539; Hill v. McNichol, 76 Me. 314; Stevens v. Batchelder, 28 Me. 218; Ijames v. Gaither, 93 N. C. 358.

⁹⁶ Booth v. Barnum, 9 Conn. 286.

⁹⁷ Baker v. George, 10 App. Div. 249; 41 N. Y. Supp. 1030; Thomas v. Kelsey, 30 Barb. 268.

¹ Bailey v. Timberlake, 74 Ala. 221; Clement's Ex'rs v. Bartlett, 33 N. J. Eq. 43.

his title subject to all of the infirmities of the lien and subject to be cut down or defeated by unrecorded liens or grants.² The rule is different in New Jersey³ and in Alabama.⁴

An attaching creditor is not a purchaser in a sense that would give him priority over a grantee or mortgagee holding under a prior unrecorded deed.⁵

§ 504. Record is notice only when grantor's deed is also recorded.

—The recording acts do not declare what effect shall be given to the recording of conveyances upon the point of notice. They declare that, unless recorded, they shall be void as against subsequent purchasers in good faith and for value whose conveyances are first recorded. The courts, by construction, make the record of a conveyance notice to subsequent purchasers; but this doctrine is subject to the limitation that it is notice only to those claiming under the same grantor, or through one who is the common source of title.⁶ One of the rules as to notice from the registry of conveyances is, that the registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title, from the same grantor, but that it is not notice to a purchaser of the legal title from a person who appears by the record to be the real owner.⁷

Thus, where a copartnership firm purchased and paid for real estate to be used for the purposes of its business and took the legal title in the name of one of the partners, the record of a mortgage executed by one of the other members of the firm of all of his right, title and interest in the property, was determined to be no notice to a purchaser from the partner holding the title.⁸

² *Clute v. Emmerich*, 99 N. Y. 342, 350; 2 N. E. 6; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553.

³ *Sharp v. Shea*, 32 N. J. Eq. 65.

⁴ *Bailey v. Timberlake*, 74 Ala. 221.

⁵ *Cowley v. McLoughlin*, 141 Mass. 181; 4 N. E. 821.

⁶ *Murray v. Ballou*, 1 Johns. Ch. 565; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Raynor v. Wilson*, 6 Hill, 469; *Cook v. Travis*, 20 N. Y. 400; *Truscott v. King*, 6 Barb. 346. See also *Fenno v. Sayre*, 3 Ala. 458; *Whittington v. Wright*, 9 Ga. 23; *Hal-*

stead v. Bank of Kentucky, 4 J. J. Marsh (Ky.) 558; *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Traphagen v. Irwin*, 18 Neb. 195; 24 N. W. 684; *Losey v. Simpson*, 3 Stockt. 246; *Leiby v. Wolf*, 10 Ohio, 83; *Ligtner v. Mooney*, 10 Watts (Pa.) 407; *Wiseman v. Westland*, 1 Younge & Jerv. 117; *Bedford v. Backhouse*, W. Kelynge, 5; *Le Neve v. Le Neve*, Amb. 436; 2 Lead. Cas. in Eq., 4th Am. Ed. 180, and note.

⁷ Per *ANDREWS, J.*, in *Tarbell v. West*, 86 N. Y. 280.

⁸ *Tarbell v. West*, 86 N. Y. 280.

When the deed of a vendor is not recorded, the record of a mortgage given by his vendee for the purchase money will not be notice to a subsequent purchaser.⁹

Where a deed and a mortgage to the grantor to secure part of the purchase money were executed simultaneously on February 28, and were recorded together on March 3 at noon, and another mortgage on the same premises to another person, also stating that it was given to secure part of the purchase money, was executed March 1, and was recorded March 3 shortly before noon, it was held that the first mortgage was entitled to priority, and that the record of the second mortgage was not notice to the first mortgagee, the vendor, since at that time the vendee's deed had not been recorded.¹⁰

A sheriff's deed given in pursuance of a judgment and sale upon execution, is treated as if given by the judgment debtor himself. It conveys precisely what he could have conveyed when the judgment was docketed. The sheriff, by authority of law, takes his property and conveys it to satisfy his debt, and the transfer of title is the same as if the sheriff had in fact acted as the authorized attorney of the debtor. The grantee in such a case holds, not under the sheriff, but under the debtor, and the deed, when recorded, is protected by, and has the benefit of, the recording act.¹¹ Priority is ordinarily controlled by date of the record and not that of the mortgages.¹² So the fact that a mortgage is dated later than the time when it was recorded, does not give priority to another mortgage recorded after the record of the first, but before its date.¹³ Where a mortgage is executed earlier and recorded later than another mortgage, it still retains its priority, if the second mortgage is given to secure an antecedent indebtedness.¹⁴

⁹ *Todd v. Eighmie*, 4 App. Div. 9; 38 N. Y. Supp. 304; *Losey v. Simpson*, 11 N. J. Eq. 246.

¹⁰ *Boyd v. Mundorf*, 30 N. J. Eq. 545.

¹¹ *Per EARL, J.*, in *Hetzel v. Barber*, 69 N. Y. 1; *Jackson v. Chamberlain*, 8 Wend. 620; *Jackson v. Post*, 15 Wend. 588, 596; *Hooker v. Pierce*, 2 Hill, 650. See also *Lessee of Cooper v. Galbraith*, 3 Wash. C. C.

R. 546, 550; *McKnight v. Gordon*, 13 Rich. Eq. 222, 239.

¹² *Douglass v. Miller*, 102 App. Div. 94; 92 N. Y. Supp. 514.

¹³ *Fowler v. Merrill*, 11 How. (U. S.) 375; *Stonebreaker v. Kerr*, 40 Ind. 186; *Jacobs v. Denison*, 141 Mass. 117; 5 N. E. 526; *Partridge v. Swazey*, 46 Mo. 412; *Parke v. Neeley*, 90 Pa. St. 52.

¹⁴ *Matter of City of Rochester*, 136 N. Y. 83; 32 N. E. 702.

A mortgage recorded but not delivered, and held by the mortgagor ready for delivery when the loan to be secured by it is made, is not operative as against other liens until its delivery,¹⁵ except in favor of *bona fide* purchasers of it.¹⁶

A mortgage not recorded until after the death of the mortgagor is not for that reason inoperative as against the general creditors of the estate.¹⁷

A mortgage dated and recorded before the deed to the mortgagor is dated and recorded, is nevertheless notice to a purchaser from the mortgagor after the recording of his deed.¹⁸ But the record of the mortgage is not notice to a purchaser from the grantor of the mortgagor until his deed is recorded.¹⁹

§ 505. Notice of grantor's title.—While it is true as a general rule that a purchaser is not bound to search the records for incumbrances as against a title not appearing by the records,²⁰ this is not a universal rule, and it is not applicable when the purchaser has actual notice of the existence of a mortgageable estate, in the person against whom the search is made, prior to the date of the evidence of such person's title to the absolute fee. So, where a person who was in possession of land under a parol contract of purchase, executed a mortgage which was recorded, it was held that as against one who knew the nature of the interest of the mortgagor, such mortgage was constructive notice.²¹

§ 506. Covenants of seizin and title.—A mortgage recorded before the date of the mortgagor's title is not, ordinarily, notice to a subsequent purchaser.²² If, however, the mortgage contains covenants of seizin and of title, and the title is subsequently acquired by the mortgagor, he will not, in a court of justice, be heard to say that he had not title at the time it was executed, or that the title did not pass to the mortgagee. The doctrine is also well settled that the estoppel binds not only the parties, but all

¹⁵ Life Ins. Co. v. Rowand, 26 N. J. Eq. 389.

¹⁶ Bailey v. Crim, 9 Bissell, 95.

¹⁷ Gill v. Pinney's Adm'r, 12 Ohio St., 38.

¹⁸ Semon v. Terhune, 40 N. J. Eq. 364, and note.

¹⁹ Bingham v. Kirkland, 34 N. J. Eq. 229.

²⁰ Cook v. Travis, 20 N. Y. 402; Losey v. Simpson, 3 Stockt, 246.

²¹ Crane v. Turner, 7 Hun, 357, aff'd 67 N. Y. 437.

²² Farmers' Loan & Trust Co. v. Maltby, 8 Paige, 361; N. Y. Life Ins. Co. v. White, 17 N. Y. 469; Cook v. Travis, 20 N. Y. 400; Doyle v. Peerless Pet. Co., 44 Barb. 239; 1 Story's Eq. Jur. §§ 396, 397.

privies in estate, privies in blood, and privies in law; and in such case, the title is treated as having been previously vested in the mortgagor, and as having passed immediately upon the execution of his mortgage by way of estoppel. A record, therefore, of the mortgage prior to the acquisition of title by the mortgagor, is in such a case, constructive notice to a subsequent purchaser in good faith.²³

§ 507. Extent to which records must be searched to insure safety.

—If a conveyance be made for a valuable consideration and without notice to the grantee, either actual or constructive, of any other grant or incumbrance, the grantee will be protected as against all subsequently recorded transfers and liens. This protection will also be extended to a purchaser from the grantee, and if such purchaser could know that the first transfer had been *bona fide* and without actual notice, outside of the records, of any defect, he could examine the records down to the date of the record of the conveyance to his grantor, and there stop. If, however, the conveyance from the original grantor had been without consideration, or if it had been received by the grantee when he had notice of an unrecorded conveyance, which was afterward recorded, the innocent purchaser from such grantee would be bound by the subsequent record.²⁴

Since a purchaser is charged with notice of all recorded instruments made by any persons through whom the title passed, which contain covenants of warranty, even though they be recorded prior to the date of the conveyance to the persons by whom they are made, it is necessary, in order to insure absolute protection, that he should search the records from the time that each owner became of full age. And since some one of the conveyances through which he must trace title may have been without actual consideration, though a consideration be expressed, and since some one of the grantors may have had actual notice of an unrecorded instrument, he must also search for conveyances and mortgages made by each and every of the grantors down to the time when he

²³ *Tefft v. Munson*, 57 N. Y. 97; *White v. Patten*, 24 Pick. (Mass.) 324.

²⁴ *Jackson v. Post*, 15 Wend. 588; *Van Rensselaer v. Clark*, 17 Wend. 25; *Ring v. Steele*, 3 Keyes, 450;

Goelet v. McManus, 1 Hun, 306, *aff'd* by Court of Appeals; *Schutt v. Large*, 6 Barb. 373. See *contra*, *Greene v. Deal*, 4 Hun, 703, *rev'd* 64 N. Y. 220; *Ledyard v. Butler*, 9 Paige, 132.

himself pays his consideration and records his deed. It is not the practice to make so thorough an examination of the records, and if made, it would, in our principal cities, impose an oppressive tax and expense upon real estate transfers. As the law stands, it is believed by many conveyancers to constitute a dangerous trap for honest purchasers.²⁵

WHO PROTECTED BY RECORDING ACTS.

§ 508. The recording acts only protect bona fide purchasers.—No person is protected by the recording acts who is not a “purchaser in good faith and for a valuable consideration.” He must not only have received his deed without notice of the prior unrecorded deed, but he must also have surrendered some security or valuable right.²⁶ The receiving of the property as security for, or in payment of, a precedent debt, when no security is surrendered or anything of value parted with, is not a purchase for a valuable consideration.²⁷

The extension of the time for the payment of a debt will make a mortgagee a purchaser for value.²⁸ But the mere taking of collateral security on time will not have this effect.²⁹

Where an assignment of a mortgage was made in payment in part for a precedent debt and in part for value, the assignee was protected as against equities only to the extent of the money actually paid on the faith of the security.³⁰

²⁵ See *Greene v. Deal*, 4 Hun, 703, and note.

²⁶ *Webster v. Van Steenberg*, 46 Barb. 211; *Lawrence v. Clark*, 36 N. Y. 128; *Westbrook v. Gleason*, 79 N. Y. 23. See *Wallach v. Schulze*, 22 App. Div. 57. See also *Merriman v. Hyde*, 9 Neb. 113; 2 N. W. 218.

²⁷ *Young v. Guy*, 87 N. Y. 457, aff'g 23 Hun, 1; *De Lancey v. Stearns*, 66 N. Y. 157. See as to a valuable consideration within the meaning of the recording acts, *Dickerson v. Tillinghast*, 4 Paige, 215; *Evertson v. Evertson*, 5 Paige, 644, and cases cited; *Weaver v. Barden*, 49 N. Y. 286.

²⁸ *O'Brien v. Fleckenstein*, 180 N. Y. 350; 73 N. E. 30, aff'g 86 App.

Div. 140; 83 N. Y. Supp. 499; *Durkee v. Nat. Bank of Fort Edward*, 36 Hun, 565; *Hale v. Omaha Nat. Bank*, 39 N. Y. Supr. (7 J. & S.) 207; *Weaver v. Barden*, 49 N. Y. 286; *Gilchrist v. Couch*, 19 Alb. L. J. 276; See also *Jones v. Robinson*, 77 Ala. 499; *Port v. Embree*, 54 Iowa, 14; 6 N. W. 83; *Schumber v. Dillard*, 55 Miss. 348.

²⁹ *Cary v. White*, 52 N. Y. 138, rev'g 7 Lans. 1. See also *Lewis v. Anderson*, 20 Ohio St. 281.

³⁰ *French v. O'Brien*, 52 How. Pr. 394, citing *Weaver v. Barden*, 49 N. Y. 286, where this subject is elaborately discussed in two opinions, reaching different conclusions.

A person who receives a conveyance and pays nothing, but simply gives his bond and mortgage to secure the entire consideration payable at a future day, is not a purchaser for a valuable consideration.³¹ But a person in the possession of lands under a contract of purchase, who has made payments under the contract, and has made valuable improvements upon the premises, and who takes a deed and surrenders his equitable title, giving a purchase-money mortgage for the balance of the price, is a purchaser for value within the recording act, and is protected from a prior unrecorded mortgage.³²

An unrecorded grant or mortgage has a preference over a subsequent general assignment.³³ In the absence of proof that the mortgagor was insolvent at the time the mortgage was executed, or that the mortgage was withheld from record in pursuance of an agreement between the parties, or with intent to defraud creditors, or that an attempt was made to keep its execution secret, or that credit was extended to the mortgagor upon the faith of his apparently unincumbered title.³⁴

§ 509. Purchase from one having notice.—A *bona fide* purchaser who records his deed is protected by the recording acts from all unrecorded conveyances and mortgages of which he has no notice, even though his grantor may have had notice of them.³⁵

§ 510. Burden of proof.—A party claiming the benefit of the recording act as a purchaser in good faith, has the burden of proving the payment of consideration.³⁶ And a person seeking to charge another with notice, must prove that fact.³⁷

A deed acknowledging the payment of the purchase money is *prima facie* evidence that the grantee was a purchaser in good faith for a valuable consideration within the recording act.³⁸

³¹ Westbrook v. Gleason, 79 N. Y. 23.

³² Westbrook v. Gleason, 89 N. Y. 641.

³³ Dunn v. O'Connor, 25 App. Div. 73; 49 N. Y. Supp. 894; Wyckoff v. Remsen, 11 Paige, 564. See also Nice's Appeal, 54 Pa. St. 200.

³⁴ Hardin v. Dolge, 46 App. Div. 416; 61 N. Y. Supp. 753; Kingman v. Dunsbaugh, 19 App. Div. 549; 46 N. Y. Supp. 602.

³⁵ Wood v. Chapin, 13 N. Y. 509;

Fort v. Burch, 5 Denio, 187; Westbrook v. Gleason, 79 N. Y. 23, 31; Decker v. Boice, 83 N. Y. 215, 221; Varick v. Briggs, 6 Paige, 323.

³⁶ Seymour v. McKinstry, 21 W. Dig. 77. See also Withers v. Little, 56 Cal. 370.

³⁷ Fort v. Burch, 6 Barb. 60; Hoskins v. Carter, 66 Iowa, 638; 24 N. W. 249; Jackson v. Reid, 30 Kan. 10; 1 Pac. 308.

³⁸ Lacustrine Fer. Co. v. L. G. & Fer. Co., 82 N. Y. 476; Wood v.

§ 511. Subsequent purchasers alone protected.—When an administrator sold land, in ignorance of an unrecorded mortgage upon it, for the purpose of obtaining assets to pay creditors, under an order of the court, it was held that while the purchaser was protected under the recording acts, this did not relieve the administrator from the equitable charge of the mortgage lien, which was directed to be paid out of the proceeds of the land in preference to general creditors.³⁹

Where a mortgagor, with the intent and purpose to defraud his mortgagee and defeat his lien, executes a junior mortgage and procures it to be recorded prior to the recording of the prior mortgage, he is liable in damages to the holder of the first mortgage. The basis of the action is the dishonest purpose, the burden of proving which rests upon the plaintiff.⁴⁰

§ 512. The recording acts protect only those who record their deeds.—It will also be noted that no one is protected by the recording acts, except a person “whose conveyance shall be first duly recorded.”⁴¹

NOTICE AS AFFECTING RECORDING ACTS.

§ 513. What actual notice is equivalent to a record.—The object of the recording acts is to protect the vigilant, by affording to every purchaser the means of ascertaining the condition of the title which he is about to purchase. An unrecorded deed is always good as against the grantor or his heirs,⁴² and also as against all persons who take title from the grantor with actual notice of it.⁴³ But notice of a prior unrecorded mortgage subsequent to

Chapin, 13 N. Y. (3 Kern.) 509;
Jackson v. McChesney, 7 Cow. 360.

³⁹ Kirkpatrick v. Caldwell's Adm'r,
32 Ind. 299.

⁴⁰ Graves v. Briggs, 6 Abb. N. C.
38.

⁴¹ Fort v. Burch, 5 Den. 187;
Westbrook v. Gleason, 79 N. Y. 23,
rev'g 14 Hun, 245. See Martindale v.
Western N. Y. & P. R. Co., 45 App.
Div. 328; 60 N. Y. Supp. 1026.

⁴² Jackson v. Colden, 4 Cow. 266;
Jackson v. West, 10 Johns. 466;
Wood v. Chapin, 13 N. Y. (3 Kern.)
509.

⁴³ Howells v. Hettrick, 13 App. Div.
366; 43 N. Y. Supp. 183, aff'd 160 N.
Y. 308; 54 N. E. 677; Fort v. Burch,
5 Den. 187; Jackson v. Van Valken-
burgh, 8 Cow. 260; Butler v. Viele,
44 Barb. 166. See also Thompson v.
Maxwell, 16 Fla. 773; Hunt v. Hunt,
38 Mich. 161; Manufacturers' & Me-
chanics' Bank v. Bank of Pennsyl-
vania, 7 Watts & Serg. (Pa.) 335;
42 Am. Dec. 240; Kirkpatrick v.
Ward, 5 Tenn. (B. J. Lea) 434. In
Ohio a purchaser for value has su-
perior title to an unrecorded mor-
tgage of which he has notice. Doherty

the execution and delivery of a later mortgage and the passing of the consideration but before it is recorded will not affect the priority of the lien of the subsequent mortgage.⁴⁴

The recording acts supply a means of giving notice, and all purchasers are bound to acquaint themselves with the facts which are spread upon the public records, but they cannot, by doing this, disregard all information which may reach them from other sources. The earlier cases, both in England and in this country, favored the doctrine that actual notice, in order to be a substitute for record notice, must be more clear and distinct than would be required in the absence of a recording act,⁴⁵ but some later decisions disregard or repudiate the distinction. There is no foundation in reason for a rule which would require more evidence to establish a want of good faith under the recording acts than in any other case, and the authorities are sufficient to show that such distinction is not uniformly recognized at the present day by the courts.⁴⁶

Though the record is not constructive notice of any fact not appearing on it, an inspection of the record will be actual notice and may suggest inquiries which will charge a purchaser with notice.⁴⁷

§ 514. **Constructive notice.**—Notice is of two kinds, actual and constructive. Actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute. "Constructive notice," says Judge STORY, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."⁴⁸ A recorded deed is an instance of constructive notice. It is of no consequence

v. Stimmel, 40 Ohio St. 294; Bloom v. Noggle, 4 Ohio St. 55.

⁴⁴ Constant v. University of Rochester, 133 N. Y. 640; 31 N. E. 26.

⁴⁵ Dey v. Dunham, 2 Johns. Ch. 182; Jackson v. Van Valkenburg, 8 Cow. 260; Riley v. Hoyt, 29 Hun, 114.

⁴⁶ Williamson v. Brown, 15 N. Y. 354, 358; Tuttle v. Jackson, 6 Wend. 213; Jackson v. Post, 15 Wend. 588; Grimstone v. Carter, 3 Paige, 421.

⁴⁷ Musgrove v. Bonser, 50 Oreg. 313; 20 Am. R. 737.

⁴⁸ Story's Eq. Jur. § 399.

whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, notice to an agent is constructive notice to the principal, and it would not in the least avail the latter to show that the agent had neglected to communicate the fact.⁴⁹ But where the same agent conducted the negotiations for two mortgagees, and the last mortgage executed was first recorded, it was held that the owner of such mortgage was not bound by his agent's knowledge of the prior lien, unless the agent recollected the fact that there was a prior outstanding mortgage when he procured the execution of the second, and that the burden of proving such recollection rests upon the plaintiff.⁵⁰ In such cases, the law imputes notice to the party, whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof.⁵¹

§ 515. Notice to put upon inquiry.—If direct and actual notice be given to the purchaser of the very fact of the existence of the prior conveyance, and of all the rights which were acquired under it, as, for instance, by showing to him the conveyance itself, there can be no difficulty in charging him with the consequences if he assumes to disregard the existence of equities which are so plainly exhibited to him. But actual notice is seldom so full and satisfactory as to furnish all the details which a purchaser would desire to know, and it is sometimes so vague as merely to suggest the possibility of the existence of a previous conveyance. It is not necessary to show express notice of the particular instrument, but notice of any fact calculated to put a party upon inquiry is, in the absence of explanation, sufficient to charge him with notice of all instruments which an inquiry would have disclosed. The degree of notice required is, in the language of the authorities, such as “would lead any honest man using ordinary caution to make further inquiries.”⁵²

⁴⁹ *May v. Borel*, 12 Cal. 91; *Chase v. Welsh*, 45 Mich. 345; 7 N. W. 895; *Spielman v. Kliest*, 36 N. J. Eq. 199.

⁵⁰ *Constant v. University of Rochester*, 133 N. Y. 640; 31 N. E. 26.

⁵¹ *Per SELDON, J.*, in *Williamson v. Brown*, 15 N. Y. 354. See article 29 Alb. L. J. 244.

⁵² *Reed v. Gannon*, 50 N. Y. 345, 349; *Howard Ins. Co. v. Halsey*, 8 N. Y. (4 Seld.) 275; *Pitney v. Leonard*, 1 Paige, 461; *Hawley v. Cramer*, 4 Cow. 717; *Jackson v. Cadwell*, Cow. 622; *Tuttle v. Jackson*, 6 Wend. 213; *Albany Exchange Savings Bank v. Brass*, 59 App. Div. 370; 69 N. Y. Supp. 391.

§ 516. **Degree of inquiry required.**—The cases received a careful examination by Judge SELDEN, in *Williamson v. Brown* (15 N. Y. 354, 362), and he stated the true doctrine on this subject to be, “that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part.”⁵³ In the same case Judge PAIGE states the rule as follows: “A party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him.”⁵⁴ In *Howard Ins. Co. v. Halsey* (4 Sand. 578), Judge DUER states the rule as follows: “The rule of law that must govern us is as inflexible as it is just, that he who is bound to inquire before the performance of an act, by which he has reason to believe that the rights of others may be affected, is chargeable with a knowledge of all the facts that an inquiry properly made would have disclosed to him.” In *Flagg v. Mann* (2 Sumner, 554), Judge STORY states the rule as follows: “If he does not inquire, he is bound in the same manner as if he had inquired and had positive notice of the title of the party in possession.”

In *Reed v. Gannon* (50 N. Y. 345), a trust deed of certain chattels was executed by a husband for the benefit of his wife, from whom he was separating, in which he covenanted to pay “any lien, mortgage, or incumbrance, of whatever kind or description, existing on the same,” within a specified time. This was held to be sufficient to put the trustee upon inquiry as to the extent and description of the existing incumbrances referred to, and to charge him with notice of them.

In *Ellis v. Horrman* (90 N. Y. 466), the authorities were elaborately examined by Judge TRACY, and a purchaser of real estate

⁵³ See also *Reed v. Gannon*, 50 N. Y. 345, 350. sey, 4 Sand. 575; *Kennedy v. Greene*, 3 Mylne & Kees, 699.

⁵⁴ Citing *Howard Ins. Co. v. Hal-*

was held bound by knowledge of a vendor's lien from statements made to him by the person from whom he purchased to the effect that she "had to pay \$500 on the place now." This was held to be sufficient to notify him that there was a vendor's lien and to put him upon inquiry as to its extent.

One, who, with knowledge that a mortgage upon the property had been given, which was not filed, makes a loan relying on the statement of the mortgagor that such mortgage had been paid, or upon an examination of the record without inquiry of the mortgagee as to its payment or satisfaction, is not a subsequent mortgagee in good faith and is not entitled to the property as against the prior mortgage or his bailee.⁵⁵

§ 517. **The notice which will put a party upon inquiry** must be actual notice.⁵⁶ A purchaser is bound by the constructive notice furnished by the public records, but he is never constructively put upon inquiry by them. He may get actual notice of facts by papers which are irregular or defective in their execution when he inspects and examines the copies of them in the books in the clerk's office, and knowledge so acquired may put him upon inquiry, but he is not legally chargeable, under the recording acts, with knowledge of any fact except those which the records disclose. The object of recording deeds is not to suggest inquiries, but to answer them.⁵⁷

Notice may be given to the purchaser, or to his agent or attorney in the special transaction,⁵⁸ but while, as a rule, it is true that the knowledge of the attorney is the knowledge of his client, the principle does not apply where the attorney is himself the borrower.⁵⁹

Where a conveyance or mortgage is good for want of notice of a prior unrecorded incumbrance, it cannot be affected by subsequent notice of it. Persons taking title under the grantee or mortgagee will be protected, no matter what notice they may have had, for it would be idle to pronounce a title valid which would not be equally valid when transferred to a new owner.⁶⁰

⁵⁵ *Goodwin v. Bayerle*, 18 Misc. R. 62; 41 N. Y. Supp. 20.

⁵⁶ See article in 29 Alb. L. J. 244.

⁵⁷ *Frost v. Beekman*, 1 Johns. Ch. 288, aff'd 18 Johns. 544; *Thomson v. Wilcox*, 7 Lans. 376; *Riley v. Hoyt*, 29 Hun, 114.

⁵⁸ *Haywood v. Shaw*, 16 How. Pr. 119.

⁵⁹ *The Hope Fire Ins. Co. v. Cambrelling*, 1 Hun, 493.

⁶⁰ *Cook v. Travis*, 22 Barb. 338; *Jackson v. Given*, 8 Johns. 137; *Jackson v. McChesney*, 7 Cow. 360;

§ 518. **Possession as notice.**—As a general rule, the law regards the actual occupancy of land as equivalent to notice to all persons dealing with the title, of the claim of the occupant.⁶¹ But this is not an absolute proposition which is to be taken as true in all possible relations. The circumstances known may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim under which it may be held; and where the inquiry may be omitted in good faith and in the exercise of ordinary prudence, no one is bound to make it. Possession out of the vendor and in another person only suggests an inquiry into the claims of the latter. Ordinarily that inquiry should be made, because it evinces bad faith or gross neglect not to make it. But the question in such cases is one of actual notice, and such notice will be imputed to a purchaser only where it is a reasonable and just inference from the visible facts. He cannot wilfully close his eyes and then allege good faith, nor can he pause in the examination where the facts made known to him plainly suggest a further inquiry to be pursued. The adjudged cases which have been the most carefully considered, do not carry the doctrine of notice, as implied or inferred from circumstances, further than is here indicated.⁶²

The possession which will be equivalent to actual notice to a subsequent purchaser, must be an actual open and visible occupation inconsistent with the title of the apparent owner by the record; not equivocal, occasional, or for a special and temporary purpose. Constructive possession will not suffice.⁶³

Lacustrine Fer. Co. v. L. G. and Fer. Co., 82 N. Y. 476, 483; *Griffith v. Griffith*, 9 Paige, 315.

⁶¹ *Noyes v. Hall*, 97 U. S. 34; *Pique v. Arendale*, 71 Ala. 91; *Brunson v. Brooks*, 68 Ala. 248; *Clevinger v. Ross*, 109 Ill. 349; *Coari v. Olsen*, 91 Ill. 273; *Weisburger v. Wisner*, 55 Mich. 246; 21 N. W. 331; *Allen v. Caldwell*, 55 Mich. 8; 20 N. W. 692; *Morrison v. March*, 4 Minn. 422; *Ranney v. Hardy*, 43 Ohio St. 157; 1 N. E. 523; *Bank v. Sawyer*, 38 Ohio St. 339; *Cunningham v. Buckingham*, 1 Ohio St. 264; *Rowe v. Ream*, 105 Pa. St. 543; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Berryhill v. Kirchner*,

96 Pa. St. 489; *Perkins v. West*, 55 Vt. 265; *Le Neve v. Le Neve*, Amb. 436; 2 Lead Cas. in Eq. 4th Am. Ed. 180; *Holmes v. Powell*, 8 De G. M. & W. 572; *Wade on Notice* §§ 273-306.

⁶² *Comstock, J.*, in *Cook v. Travis*, 20 N. Y. 400; *Phillips v. Owen*, 99 App. Div. 19; 90 N. Y. Supp. 947; 15 Ann. Cas. 361. See *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Flagg v. Mann*, 2 Sumn. 555; *Hewes v. Wiswall*, 8 Greenl. (Me.) 94; *McMechan v. Griffing*, 3 Pick. (Mass.) 156; *Scott v. Gallagher*, 14 Serg. & R. (Pa.) 333; *Jones v. Smith*, 1 Hare 43.

⁶³ *Brown v. Volkenning*, 64 N. Y. 76, 83; *Page v. Waring*, 76 N. Y.

Where the owner and occupant of a house and lot conveyed the same to her son, and took back a lease for her life, and there was no change in the possession, and the conveyance was recorded, but the lease was not, it was held that the possession of the mother was no notice of her rights to a mortgagee of the son.⁶⁴ So, the residence of a wife on lands with her husband is no notice to purchasers from him that she claims rights in them.⁶⁵

§ 519. Notice to an agent is for some purposes deemed equivalent to notice to the principal. But to have it operate in this way, the agency must be of such a nature as to make it the duty of the agent to communicate the information to his principal.⁶⁶ Notice to an attorney employed to examine a title of a defect in it would be as operative as if it were given to his principal,⁶⁷ and the rule will embrace other agents.⁶⁸ But in all these cases notice to bind the principal should be notice in the same transaction or negotiation; for if the agent, attorney, or counsel was employed in the same thing by another person or in another business or affair, and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal on account of such a defect of memory.⁶⁹

A principal with knowledge of facts derogatory to the title which he is about to purchase cannot protect himself by the employment of an agent who is ignorant of them.⁷⁰

§ 520. Recitals in conveyances.—A grantee is ordinarily chargeable with notice of the stipulations and recitals of the conveyances

463; *Moyer v. Hinman*, 13 N. Y. 180. See also *Noyes v. Hall*, 97 U. S. 34; *Smith v. Jackson*, 76 Ill. 254; *Cabeen v. Breckenridge*, 48 Ill. 91; *Greer v. Higgins*, 20 Kan. 420; *Atwood v. Bearss*, 47 Mich. 72; 10 N. W. 112; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Meehan v. Williams*, 48 Pa. St. 238; *Ely v. Wilcox*, 20 Wis. 523; Article in 29 Alb. L. J. 265.

64 *Staples v. Fenton*, 5 Hun, 172.

65 *Paulus v. Latta*, 93 Ind. 34.

66 *Bierce v. Red Bluff*, 31 Cal. 160; *Fairfield Savings Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319, 322, note; *Drake v. Barker*, 54 Vt. 372.

67 *Constant v. American Baptist Home Mission Society*, 3 How. N. S.

517; *Ingalls v. Morgan*, 10 N. Y. 178. See also *Bauer v. Pierson*, 46 Cal. 293.

68 *Bank of the United States v. Davis* 2 Hill, 451; *Dillon v. Anderson*, 43 N. Y. 231; *The Bank for Savings v. Frank*, 45 N. Y. Supr. Ct. R. 404; *Kendall v. Niebur*, 45 N. Y. Supr. Ct. R. 542, aff'd 46 N. Y. Supr. Ct. R. 544; 87 N. Y. 1. See also *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Robinson v. Peabworth*, 71 Ala. 240.

69 1 Story Eq. Jr. § 408; *Yerger v. Barz*, 56 Iowa, 77; 8 N. W. 769.

70 *Murphy v. Nathans*, 46 Pa. St. 508.

under which he claims title, and if the premises are expressly declared to be subject to a specified mortgage, he may not defeat the claims of the mortgagee because such mortgage was not recorded.⁷¹ Upon the same principal a second mortgagee takes subject to a prior unrecorded mortgage expressly referred to in the deed to his grantor and excepted therefrom.⁷² It has also been said that if there is anything contained in any deed or record constituting a part of the chain of title which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with notice of the facts so contained,⁷³ and some early cases, and particularly some English cases, carry this doctrine to an extreme length.⁷⁴ But the principles upon which our recording acts are based require that the notice of a purchaser shall be limited to the facts actually spread out upon the public records. For, as has been said before, the function of a record is not to suggest inquiries, but to answer them.⁷⁵ A purchaser is bound to note the exceptions and reservations from his title contained in earlier deeds, but inquiries outside of the records are not required unless the omission to make them can be said to amount to bad faith. So it has been held that a purchaser will not be charged with notice of an unrecorded mortgage merely because a previous conveyance recites that the premises are subject to a mortgage of a certain amount, but without disclosing the name either of the mortgagor or the mortgagee.⁷⁶ And it has been held that the recital of an unrecorded deed in a mortgage does not operate under the recording acts as notice of that deed.⁷⁷

§ 521. The mere silence of a mortgagee who has recorded his mortgage, when he is present at the execution of a subsequent conveyance or mortgage, is not sufficient to affect his right, unless that silence was intentional and for the purpose of deception.

71 *Garrett v. Puckett*, 15 Ind. 485; *Howard v. Chase*, 104 Mass. 249; *Kitchell v. Mudgett*, 37 Mich. 81; *Ross v. Worthington*, 11 Minn. 438.

72 *Baker v. Mather*, 25 Mich. 51.

73 *Cambridge Valley Bank v. Delano*, 48 N. Y. 327, 336.

74 *Brisco v. Earl of Banbury*, 1 Ch. Ca. 287; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hope v. Liddell*, 21 Beav. 183; *Howard Ins. Co. v. Hal-*

sey, 8 N. Y. 271; *Green v. Slayter*, 4 Johns. Ch. 38.

75 *Frost v. Beekman*, 1 Johns. Ch. 288, *aff'd* 18 Johns. 544.

76 *Croft v. Wood*, 3 Hun, 571; *Jackson v. Davis*, 18 Johns. 7.

77 *Todd v. Eighrine*, 4 App. Div. 9; 38 N. Y. Supp. 304; *People's Trust Co. v. Tonkonogy*, 144 App. Div. 333; 128 N. Y. Supp. 1055.

That inference is not to be drawn from silence alone, but from the operation of our recording acts. There must be active fraud charged and proved, such as false representations or denial upon inquiry, or artful assurances of good title, or deceptive silence when information is asked. The burden of the charge and of the proof lies upon the purchaser. He must make out the fraud, and the mortgagee is to be presumed innocent until proved to be guilty.⁷⁸

Where a mortgage was duly executed and recorded and the mortgaged premises were subsequently sold at sheriff's sale on a judgment subsequent to the recording of the mortgage, and the mortgagee was present at the sheriff's sale and kept silent in respect to his mortgage, it was held that he was not estopped from asserting his prior claim.⁷⁹

RECORDING ASSIGNMENTS OF MORTGAGES.

§ 522. Before the passage of the Revised Statutes, an assignment of a mortgage might be recorded, and the record was evidence,⁸⁰ but it was not required to be recorded; and on the principle that the law will not intend that to be known for the existence of which there is no legal necessity, it was held that the recording of an assignment of a mortgage did not amount to constructive notice.⁸¹

§ 523. Under the provisions of the Revised Statutes the principles of the recording acts were extended to an assignment of a mortgage of an interest in real estate; and it was determined that the assignment of a mortgage of real estate was a "conveyance" within the meaning of those acts. This has remained the law since that time. The record of such an assignment is constructive notice thereof to all subsequent assignees of the mortgage who purchase it from the assignors; and unless such assignment is recorded, it will be invalid as against a subsequent assignee or purchaser of the mortgage in good faith and without notice, whose assignment shall be first duly recorded.⁸² It is, however, pro-

⁷⁸ *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Rice v. Dewey*, 54 Barb. 455. See also *Fisher's Ex'r v. Mossman*, 11 Ohio St. 42.

⁷⁹ *Fisher's Ex'r v. Mossman*, 11 Ohio St. 42.

⁸⁰ *Roberts v. Jackson*, 1 Wend. 485.

⁸¹ *James v. Morey*, 2 Cow. 246.

⁸² *Vanderkemp v. Shelton*, 11 Paige, 28; *Belden v. Meeker*, 2 Lans. 470, aff'd 47 N. Y. 307; *Fort v. Burch*, 5 Den. 187; *Williams v. Birbeck*, Hoff. Ch. 359; *New York Life Ins. & Trust Co. v. Smith*, 2 Barb. Ch. 82; *Purdy v. Huntington*,

vided that "the recording of an assignment of a mortgage is not in itself a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee."⁸³ This provision has no application to an action by the purchaser of mortgaged premises to remove the cloud of a recorded assignment of the mortgage where, although the mortgagee had undertaken to satisfy the mortgage after its assignment and before the plaintiff's purchase of the premises, there is no evidence that the mortgagor made any payment to the mortgagee, or gave him any consideration, for the satisfaction of the mortgage.⁸⁴

§ 524. The recording of the assignment is notice, therefore, to subsequent assignees of the mortgage in good faith and for a valuable consideration. It is not notice to the mortgagor, or his heirs or personal representatives, for the purpose of invalidating payments made by them, or either of them, to the mortgagee;⁸⁵ but it is notice to subsequent grantees of the mortgagor,⁸⁶ and it may also be questionable as to whether it is not for certain purposes notice to the mortgagor himself. In some cases the statement has been broadly made that it is notice only to subsequent assignees of the mortgage;⁸⁷ but this notion has been distinctly overruled.⁸⁸ It is notice to all persons, save as excepted by the statute.⁸⁹ On the other hand, it has been determined that the record of an assignment is notice to a purchaser at a foreclosure under a prior mortgage, and that if the assignee is not made a party, his claim will not be barred by the sale.⁹⁰ It has also

46 Barb. 389; *The Trustees, etc., v. Wheeler*, 59 Barb. 585; *Campbell v. Vedder*, 3 Keyes, 174; *Purdy v. Huntington*, 42 N. Y. 334; *Westbrook v. Gleason*, 79 N. Y. 23.

Written instrument extending time for payment of a mortgage and reducing rate of interest thereon is a conveyance. *Weideman v. Zielinski*, 102 App. Div. 163; 92 N. Y. Supp. 493.

⁸³ Real Prop. Law § 324; 1 R. S. 763, § 41. See *Van Keuren v. Corkins*, 66 N. Y. 77, aff'd 4 Hun, 129.

⁸⁴ *Larned v. Donovan*, 155 N. Y. 341; 49 M. E. 942.

⁸⁵ *Assets Realization Co. v. Clark*,

205 N. Y. 105; *Pettus v. McGowan*, 37 Hun, 409.

⁸⁶ *Brewster v. Carnes*, 103 N. Y. 556; 9 N. E. 323; 35 Alb. L. J. 95.

⁸⁷ *Greene v. Warnick*, 64 N. Y. 220; *Crane v. Turner*, 67 N. Y. 437; *Reed v. Marble*, 10 Paige, 409; *Campbell v. Vedder*, 3 Keyes, 174; *Purdy v. Huntington*, 42 N. Y. 334; *The New York Life Ins. & Trust Co. v. Smith*, 2 Barb. Ch. 82; *Hoyt v. Hoyt*, 8 Bosw. 511; *Gillig v. Maass*, 28 N. Y. 191.

⁸⁸ *Decker v. Boice*, 83 N. Y. 214, 221.

⁸⁹ *Viele v. Judson*, 82 N. Y. 32.

⁹⁰ *Vanderkemp v. Shelton*, 11

been held that an assignment of a mortgage, duly recorded, is constructive notice, as against a grantee of the mortgagor, that the mortgagee can no longer deal with the mortgage interest; and that a subsequent discharge or release of the lien of the mortgage executed by him is invalid.⁹¹

It has been asserted that the record of an assignment of a mortgage is notice to all the world except the mortgagor, his heirs and personal representatives;⁹² and this doctrine seems to be sustained by the more recent decisions.⁹³ So the record of the assignment of a mortgage is notice to all persons of the assignee's rights as against any subsequent acts of the mortgagee affecting the mortgage, and protects the assignee against a subsequent unauthorized discharge of the mortgage by the mortgagee,⁹⁴ and, where a bankrupt, having no actual notice that the mortgage given by him had been assigned, scheduled the original mortgagee as the creditor, his discharge in bankruptcy is a defense to an action upon the accompanying bond.⁹⁵

The recording of an assignment of a mortgage is notice to a purchaser of the equity of redemption, and payments made by him to the assignor after the assignment are invalid and do not bind the assignee.⁹⁶ The assignee of a recorded mortgage upon real estate which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage, has a valid lien as against a purchaser of the land from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee as well as the conveyance from the mortgagee to the purchaser were recorded before the assignment was placed on record.⁹⁷

§ 525. To what extent recording assignment protects assignee.—
The *bona fide* purchaser of a mortgage who procures the assign-

Paige, 28, approving Clarke, 321 Moore v. Sloan, 50 Barb. 442; Pickett v. Barron, 29 Barb. 505; Winslow v. McCall, 32 Barb. 241; Ely v. Scofield, 35 Barb. 330.

⁹¹ Belden v. Meeker, 47 N. Y. 307; 2 Lans. 470; Smyth v. Knickerbocker Life Ins. Co., 21 Hun, 241; Heilbrun v. Hammond, 13 Hun, 474.

⁹² Ely v. Scofield, 35 Barb. 330.

⁹³ Decker v. Boice, 83 N. Y. 215;

Smyth v. Knickerbocker Life Ins. Co., 84 N. Y. 589.

⁹⁴ Larned v. Donovan, 155 N. Y. 341; 49 N. E. 942.

⁹⁵ Mueller v. Goerlitz, 53 Misc. R. 53; 103 N. Y. Supp. 1037.

⁹⁶ Brewster v. Carnes, 103 N. Y. 556; 9 N. E. 323; 35 Alb. L. J. 95.

⁹⁷ Curtis v. Moore, 152 N. Y. 159; 46 N. E. 168.

ment to him to be properly recorded, is protected by the recording acts as against previous unrecorded releases, or agreements to release, executed by his assignor.⁹⁸

The purchaser of a recorded mortgage, without actual notice of a prior unrecorded mortgage, obtains priority, and this rule prevails notwithstanding the party from whom he purchased had notice.¹ The recording of the assignment of a mortgage is sufficient to sustain a finding that it was delivered to the assignee.²

§ 526. Assignment is a "conveyance."—An assignee in good faith, and for a valuable consideration, of a recorded mortgage gets no preference over an unrecorded deed or mortgage by reason of such record of the assigned mortgage, when the mortgagee or assignor himself could not claim it in consequence of having had notice, or by reason of any other equity.³ The contrary rule, which was declared in *Jackson v. Van Valkenburgh* (8 Cow. 260), under the former statute, cannot, in view of the decisions under the Revised Statutes, be regarded as any longer in force.⁴ But it does not follow that an assignee of a mortgage does not gain a preference over an unrecorded mortgage by reason of the prior recording of his assignment. An assignment of a mortgage is "conveyance" within the recording act. An assignee, therefore, whose assignment is first recorded, and who takes his assignment in good faith and for a valuable consideration, is protected against all unrecorded mortgages which are, as to him, by the express terms of the statute, void. The assignee in good faith and for value of a mortgage, by recording his assignment may, in this way, gain priority over a prior unrecorded mortgage, although it could not be claimed by his assignor.⁵

So, where a mortgage was assigned and the assignment was recorded, a release subsequently executed by the mortgagee was held of no force, and the mortgagor's grantee was not permitted to

⁹⁸ *St. John v. Spaulding*, 1 N. Y. Sup. (T. & C.) 483.

¹ *Jackson v. Reid*, 30 Kans. 10; 1 Pac. 308; *Morse v. Curtis*, 140 Mass. 112; 2 N. E. 929; *Glidden v. Hunt*, 41 Mass. 221; *Trull v. Bigelow*, 16 Mass. 406; *Mott v. Clark*, 9 Pa. St. 399; *Wade on Notice*, §§ 241, 262.

² *Van Gaasbeek v. Staples*, 85

App. Div. 271; 83 N. Y. Supp. 225, aff'd 177 N. Y. 524; 69 N. E. 1132.

³ *Decker v. Boice*, 83 N. Y. 215, 219; *Fort v. Burch*, 5 Den. 187; *Westbrook v. Gleason*, 79 N. Y. 23.

⁴ Per ANDREWS, J., in *Decker v. Boice*, 83 N. Y. 215, 219.

⁵ *Decker v. Boice*, 83 N. Y. 215, aff'd 19 Hun, 152; overruling *Crane v. Turner*, 67 N. Y. 437.

show that such release was executed in pursuance of a parol agreement contemporaneous with the mortgage.⁶

The apparent owner of record of a mortgage may execute a certificate competent to discharge it, notwithstanding the fact that he has executed and delivered an assignment which has not been recorded. If this is done, a new mortgage to a *bona fide* mortgagee duly recorded, or a recorded assignment of a new mortgage to a *bona fide* purchaser, will have a preference.⁷

It is not necessary that an assignment of a mortgage should be recorded in order to enable the assignee to maintain an action for foreclosure.⁸

§ 527. Production of bond on assignment.—While the recording of an assignment of a mortgage is notice to a subsequent purchaser of the bond and mortgage; it does not follow that it is the only notice of that fact. A bond and mortgage may be assigned by parol, accompanied by a delivery of the securities; and possession of the evidences of debt, is a strong and common evidence of title. The purchaser of a bond and mortgage, therefore, who fails to require the production of the bond, is chargeable with notice of any defect in the assignor's title thereto.⁹

This is not the rule, however, when payment is made.¹⁰

Where a mortgage was given to secure a note and the debtor gave a new note, thus securing possession of the original obligation, which he surrendered to a *bona fide* purchaser of the property, it was held that the mortgage could still be enforced.¹¹

§ 528. Assignment of mortgage must be recorded among mortgages.—An assignment of a mortgage is not "duly recorded," if recorded among conveyances; and it will not operate as constructive notice if so recorded.¹²

§ 529. Noting assignment on margin of record.—It is the practice of the clerks to note the place of recording an assignment upon the margin of the record of the mortgage. This is a matter of

⁶ Smyth v. Knickerbocker Life Ins. Co., 84 N. Y. 589, aff'g 21 Hun, 240.

⁷ Clark v. Mackin, 95 N. Y. 346, aff'g 30 Hun, 411; Van Keuren v. Corkins, 66 N. Y. 77; Bacon v. Van Schoonhoven, 87 N. Y. 446.

⁸ Pratt v. Bank of Bennington, 10 Vt. 293. See Public Bank of New

York City v. Oshinsky, 169 N. Y. 464; 127 N. Y. Supp. 618.

⁹ Kellogg v. Smith, 26 N. Y. 18.

¹⁰ Van Keuren v. Corkins, 66 N. Y. 77.

¹¹ Bolles v. Chauncey, 8 Conn. 389.

¹² Gillig v. Maass, 28 N. Y. 191; Purdy v. Huntington, 42 N. Y. 334.

convenience merely and is not required by any statute. An assignment is sufficient if it describes the mortgage with definiteness, and no rule of law requires the place of record of the mortgage to be referred to in the assignment. Without such a reference the clerk cannot conveniently make the customary marginal reference, but the rights of the assignee are not in any manner affected by such omission.¹³

JUDGMENT LIENS SUSPENDED UPON APPEAL.

§ 530. It is provided by section 1256 of the Code of Civil Procedure, that where an appeal from a judgment has been perfected, and an undertaking has been given sufficient to entitle the appellant to a stay of the execution of the judgment, without an order for that purpose, the court, in which the judgment was recovered, may, in its discretion and upon such terms as justice requires, make an order, upon notice to the attorney for the respondent, and to the sureties in the undertaking, exempting from the lien of the judgment, as against judgment creditors, and purchasers and mortgagees in good faith, the real property or chattels real upon which the judgment is a lien, or a portion thereof, specially described in the order. If all the property, subject to the lien, is so exempted, the order must direct the clerk, in whose office the judgment-roll is filed, to make an entry, on the docket of the judgment, in each place where it appears in the docket-book, substantially as follows: "Lien suspended upon appeal. See order entered"; adding the proper date. If a portion only is exempted, the order must direct the clerk to make, in like manner, an entry, substantially as follows: "Lien partially suspended upon appeal. See order entered"; adding the proper date. The clerk must, when he files the motion papers, and enters the order, make the entry or entries in the docket-book, as required by the order.

§ 531. Purchasers and mortgagees "in good faith."—The question has been made as to who are purchasers and mortgagees "in good faith." It has been determined that it is not necessary that a mortgagee, in order to be within the protection of the statute, should show that he has parted with value on the faith of the mort-

¹³ *Viele v. Judson*, 82 N. Y. 32, rev'g 15 Hun, 328, and overruling *Moore v. Sloan*, 50 Barb. 442.

gage.¹⁴ A purchaser or mortgagee "in good faith" is one who has taken his conveyance or mortgage without any design to defraud the plaintiffs in the judgment, or anybody else, and upon some *bona fide* consideration either present or past. Such a person may avail himself of the protection of the statute, provided that a court having jurisdiction has made the necessary order.¹⁵

Where an order has regularly been made suspending a judgment lien upon appeal, it is not competent for the court, by vacating the order of suspension *nunc pro tunc*, to restore the lien as against a person not a party to the action who has acquired rights upon the faith of it. And this is true, even if the rule is found to favor a person who has purchased a lien at a very low price.¹⁶

TAXING ACTS.

§ 532. **Recording Tax.**—By the laws of 1905, chapter 729 an annual tax, amounting to one half of one per centum of the sum secured, was imposed on all mortgages of real property within the state. By the laws of 1906, chapter 532, the act was amended and the tax changed to a recording tax of one half of one per centum payable, when the instrument was recorded or when the money was advanced. This act was taken over into the consolidated laws and is now in force.¹⁷ By the repeal of the act of 1905 mortgages executed before the passage of the act of 1906 are left subject to general taxation under sections 2 and 3 of the Tax Law. The repeal of the act of 1905 did not impair any contract obligations between the States and individuals taking mortgages when said act was in force.¹⁸ By the terms of the statute a "mortgage of real property" includes every mortgage by which a lien is created or imposed on real property, notwithstanding that it may also be a lien on personal property. So also executory contracts for the sale of real property under which the vendee has or is entitled to possession are deemed mortgages, and are assessed at the amount unpaid on such contracts. Contracts by which the indebtedness secured by any mortgage is increased or added to, come within the operation of the statute

¹⁴ Union Dime Savings Ins. v. Duryea, 67 N. Y. 84.

¹⁵ Bronner v. Loomis, 17 Hun, 439.

¹⁶ Harmon v. Price, 87 N. Y. 10.

¹⁷ Tax Law §§ 250 *et sequi*.

¹⁸ People *ex rel.* Cosovy v. Diamond, 121 App. Div.

and are taxable as mortgages for the amount of the increase or addition.¹⁹ A lease of real property for a term of five years is a chattel real and a mortgage thereon is subject to the recording tax.²⁰

§ 533. The statute is not unconstitutional as violative of the provisions of section 1 of article 14 of the Federal Constitution in that it denies the holders of certain mortgages the equal protection of the law. The tax is laid as an equal burden upon all whose property has been brought into a designated class for the purpose of taxation and according to a common ratio.²¹ Nor is it unconstitutional because it deprives the holders of certain mortgages of their property without due process of law, since taking property under the taxing power is taking it by due process of law.²²

§ 534. With the exception of certain franchise taxes, all mortgages, which are so taxed, are exempt from other taxation by the state or its sub-divisions.²³ No mortgage is subject to the tax unless it creates or secures a new or further indebtedness or obligation. Mortgages for indefinite amounts are taxed for the maximum amount secured, or which may be secured by them,²⁴ except trust mortgages made by corporations, which by conforming to the requirements of the statute²⁵ may postpone the payment of the tax on amounts to be advanced, until the same shall be advanced.

§ 535. Exemptions.—“No mortgage of real property situated within this State shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this State shall be exempt, from the taxes imposed by this article by reason of anything contained in any other statute, or by reason of any provision in any private act or charter which is subject to amendment or repeal by the legislature, or by reason of nonresidence within this State or for any other cause.”²⁶

¹⁹ Tax Law § 250.

²⁰ People *ex rel.* Elias Brewing Co. v. Gass, 120 App. Div. 147; 104 N. Y. Supp. 885.

²¹ People *ex rel.* Eisman v. Ronner, 185 N. Y. 285; 77 N. E. 1061.

²² People *ex rel.* Eisman v. Ron-

ner, 185 N. Y. 285; 77 N. E. 1061.

²³ Tax Law § 251. Matter of Pullman, 52 Misc. 1; 102 N. Y. Supp. 35.

²⁴ Tax Law § 256.

²⁵ Tax Law § 259.

²⁶ Tax Law § 252.

So, although the corporate charter of a charitable educational institution authorizes its founder to convey to it certain property and further provides that such property so conveyed shall be exempt from taxation "while the same shall be appropriated to the uses, intents and purposes . . . provided for," no such contractual relation existed between the State and the founder as prevented the literal enforcement of the act, since the State Constitution in force at the time of the incorporation²⁷ provided that all general laws and special acts authorizing the formation of corporations "may be altered from time to time or repealed," and the founder and incorporators must be presumed to have known that this was the fundamental law of the State.

§ 536. The record owner of a mortgage recorded prior to July 1st, 1906, may, by filing a verified statement of the amount remaining unpaid, elect that it shall be brought within the operation of the statute, and the owner of an unrecorded mortgage, executed and delivered prior to that date, may record the same by filing with the recording officer a similar statement, and paying the tax, with the effect of exempting the mortgage from other taxes.²⁸

§ 537. Payment and effect of non-payment.—The law further provides: "The taxes imposed by this article shall be payable on the recording of each mortgage of real property subject to taxes thereunder. Such taxes shall be paid to the recording officer of any county in which the real property of any part thereof is situated. It shall be the duty of such recording officer to indorse upon each mortgage a receipt for the amount of the tax so paid. Any mortgage so indorsed may thereupon or thereafter be recorded by any recording officer and the receipt for such tax indorsed upon each mortgage shall be recorded therewith. The record of such receipt shall be conclusive proof that the amount of tax stated therein has been paid upon such mortgages."²⁹ "No mortgage of real property shall be recorded by any county clerk or register unless there shall be paid the tax imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor

²⁷ N. Y. Const. of 1846, Art. 8, § 1.

²⁸ Tax Law § 254. See Tax Law § 264.

²⁹ Tax Law § 257.

shall any assignment of, or agreement extending, any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article. No judgment or final order in any action or proceeding shall be made for the foreclosure or enforcement of any mortgage which is subject to the taxes imposed by this article or of any debt or obligation secured by or which secures any such mortgages, unless the taxes imposed by this article shall have been paid as provided in this article.”³⁰

So where it appeared by a paper offered for record at the same time with deeds absolute on their face, that such deeds were in fact mortgages, the failure of the recording officer to collect a tax thereon was a violation of the condition of his bond faithfully and diligently to discharge the duties of his office.³¹

But it is not necessary that a mortgage be recorded at once upon its delivery, and failure to do so and to pay the tax, does not render the instrument void. It may be recorded and the tax paid at any time before the mortgagee seeks to enforce it.³²

§ 538. Apportionment of Tax.—When the mortgaged property is assessed in more than one county, or is a first lien on realty in one tax district and a subordinate lien on realty in an adjoining tax district, or covers land lying partly in this and partly in another State, the State Board of Tax Commissioners shall apportion the tax to be paid to each recording officer,³³ and if only some of the bonds to be secured by a mortgage have been issued, that Board may base the tax upon the amount of money advanced thereon, before the mortgage is recorded. It has jurisdiction to make a similar determination as each subsequent advancement is made upon the bonds, and each determination as made is final until reversed or set aside for fraud, or mistake or like cause. But the board itself cannot review its prior action and redetermine the relative amount of property within the State to readjust a former assessment.³⁴

30 Tax Law § 258. *Mutual Life Ins. Co. v. Nickolas*, 144 App. Div. 95; 128 N. Y. Supp. 902.

It is not necessary to allege in the complaint in an action for the foreclosure of a mortgage upon real property, that the recording tax upon the mortgage has been paid. *Moore v.*

Lindsay, 61 Misc. R. 176; 114 N. Y. Supp. 684.

31 *People v. Gass*, 206 N. Y. 609.

32 *Mutual Life Ins. Co. v. Nickolas*, 144 App. Div. 95; 128 N. Y. Supp. 902.

33 Tax Law § 260.

34 *People ex rel. Buffalo & L. E. T.*

The determination of the Board may be reviewed by certiorari. Such a proceeding is the only remaining remedy for a mortgagee who has unsuccessfully appealed from the imposition by the county clerk of a recording tax, alleged to be excessive. While the appeal to the State Board of Tax Commissioners is pending such mortgagee may not institute an action at law against the county clerk for the recovery of any part of excessive tax, for a party cannot pursue two remedies and, if the determination of one be favorable and of the other adverse, adopt the favorable one and ignore the other.³⁵

Where a foreign corporation executes a trust mortgage of lands lying partly in this State and partly in a foreign State to secure debenture bonds and, by the terms of the mortgage, the trustee, a domestic corporation, is entitled to immediate possession of the debentures and is the only proper custodian thereof, the debentures, whether tangible or intangible property, cannot be considered as property without the State so as to be added to the value of the foreign real estate and diminish the portion of the mortgage property situate within this State for the purpose of apportioning the mortgage tax under section 260 of the Tax Law, even though the trustee wrongfully allowed the mortgagor to retain possession of the debentures in the foreign jurisdiction.³⁶

§ 539. Recording tax a lien.—The tax is a lien upon the mortgage and upon the debt or obligation secured thereby,³⁷ and in case it is not paid, the State Board of Tax Commissioners may notify the attorney general to enforce the payment thereof, and for that purpose he may maintain an action in the name of the people of the State in any court of competent jurisdiction, either to sell the mortgage, or against the mortgagee or his successors in interest, or where by stipulations contained in the mortgage it is made the duty of the mortgagor to pay the tax, then against him or his successors in interest. If the amount involved exceeds fifty dollars the action shall be tried in Albany County. Punitive interest is provided for, and the manner of sale of the mortgage is in the discretion of the court.³⁸

Co. v. Woodruff, 144 App. Div. 812; 129 N. Y. Supp. 799.

³⁵ Hygienic Ice & Refrigerating Co. v. Franey, 142 App. Div. 143; 127 N. Y. Supp. 30.

³⁶ People *ex rel.* De Nemours Powder Co. v. Tax Commissioners, 140 App. Div. 783; 125 N. Y. Supp. 843.

³⁷ Tax Law § 265.

³⁸ Tax Law § 266.

TAX LIEN.

§ 540. **Generally.**—By virtue of legislative enactment the lien of the State for unpaid taxes and assessments is paramount.³⁹

The law in force at the time of making the contract is a part of the contract, and the mortgagee takes his security subject to such liens as may thereafter be levied in compliance with the law.⁴⁰

The system by which real property is taxed at its entire assessed value is not unconstitutional even though no deduction is allowed for the debts of the owner thereof, secured by a mortgage thereon.⁴¹ But that system is not followed in assessing the capital stock of a corporation under section 12 of the Tax Law providing for the assessment of such stock at its actual value, "after deducting the assessed value of its real estate," etc. In such a case where the real estate is incumbered with a mortgage the payment of which has not been assumed by the corporation, and the value of the equity of redemption alone has been included in determining the value of its capital stock, the company is entitled to have deducted from the valuation only the value of such equity, and not the whole assessed value of its real estate.⁴²

§ 541. **Lien of mortgage not affected by tax sale.**—It is expressly provided by statute⁴³ that the lien of a mortgage duly recorded or registered at the time of the sale of any lands for non-payment of any tax or assessment thereon, shall not be destroyed, or in any manner affected, except as provided by the section. The purchaser at any such sale

³⁹ Tax Law §§ 3, 9. *Central Trust Co. v. New York City & Northern R. Co.*, 110 N. Y. 250; 18 N. E. 92; *N. Y. Terminal Co. v. Gans*, 204 N. Y. 512; 98 N. E. 11, aff'g 139 App. Div. 347; 124 N. Y. Supp. 200. As to when mortgages are subject to transfer or general personalty tax see: *Matter of Bronson*, 150 N. Y. 1; 44 N. E. 707; *Matter of Whiting*, 150 N. Y. 27; 44 N. E. 715; *Matter of Morgan*, 150 N. Y. 35; 44 N. E. 1126; *People ex rel. Day v. Barker*, 135 N. Y. 656; 32 N. E. 252.

⁴⁰ *Warren v. Sohn*, 112 Ind. 213; 13 N. E. 863.

⁴¹ *Paddell v. City of New York*, 211 U. S. 446, aff'g 187 N. Y. 552, aff'g 50 Misc. R. 422.

⁴² *People ex rel. Weber Prino Co. v. Wells*, 180 N. Y. 62; 72 N. E. 636; *People ex rel. Seelye v. Keefe*, 119 App. Div. 713; 104 N. Y. Supp. 154. *Matter of Preston*, 75 App. Div. 250; 78 N. Y. Supp. 91; *Matter of Sutton*, 3 App. Div. 208; 38 N. Y. Supp. 277; aff'd 149 N. Y. 618; *Matter of Livingston*, 1 App. Div. 598; 37 N. Y. Supp. 463; *Matter of Offerman*, 25 App. Div. 94; 48 N. Y. Supp. 993.

⁴³ Tax Law § 138.

shall give to the mortgagee a written notice of such sale within one year from the expiration of the time to redeem, . . . requiring him to pay the amount of purchase money, with interest at the rate allowed by law in case of redemption by occupants, within six months after giving the notice.⁴⁴ Such notice may be given either personally or in the manner required by law in respect to notices of non-acceptance or non-payment of notes or bills of exchange, and a notarial certificate thereof shall be presumptive evidence of the fact that may be recorded in the county in which the mortgage was recorded, in the same manner and with the same effect as a deed or other evidence of title of real property.⁴⁵

The manner in which the mortgagee may redeem and the time within which he may redeem are set forth in the statute.⁴⁶

§ 542. **Redemption by mortgagee from tax sale.**—The title of a purchaser at a tax sale is subject to the mortgagee's right to redeem,⁴⁷ and the term "holder of any mortgage" used in the statute includes a purchaser at a mortgage foreclosure sale,⁴⁸ and it is therein provided that he shall have a lien on the premises redeemed for the amount paid by him with interest from the time of payment, in like manner as if it had been included in the mortgage. It may be assumed that the last proposition is merely declaratory of the law for, aside from statutory enactment, the same result would be obtained on the equitable doctrine of subrogation.⁴⁹

⁴⁴ Tax Law § 136.

⁴⁵ Tax Law § 138.

⁴⁶ Tax Law § 139.

⁴⁷ Tax Law § 139, *Becker v. Holdridge*, 66 N. Y. 5.

⁴⁸ *People ex rel. Brooklyn Union El. R. R. Co. v. Morgan*, 85 App. Div. 292; 83 N. Y. Supp. 86.

⁴⁹ As to purchase by a mortgagee at a tax sale, see *ante* §§ 28, 281.

CHAPTER XIII

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INSURABLE INTERESTS OF PARTIES TO MORTGAGES.

§ 543. The mortgagor and the mortgagee have each an insurable interest in the mortgaged premises. Even in the case of a chattel mortgage, after default has occurred, the mortgagor has an interest in the property which may be insured, although this interest is one which is not recognized in courts of law, and consists only of a right to redeem on application to a court of equity.¹ The insurable interest of the mortgagor continues after he has parted with his property, for he still retains an interest in its preservation, in order that his debt may be paid out of it, the land, as between him and the grantee, being primarily charged with its payment.² On the same principle a guarantor of a mortgage debt, personally liable for its payment, has an insurable interest in the property, and where the only insurable interest arises from personal obligation to pay the debt, the interest ceases when the obligation is discharged.³

If the owner of a piece of property conveys it by a deed absolute upon its face, but intended as security, he is in reality a mortgagor, and retains an insurable interest. The fact that the deed was intended as a mortgage may be shown by parol in an action against the insurer upon the policy.⁴ On a like principle an insurance by the grantee under such a deed must be as mortgagee, or it may be void.⁵

§ 544. A mortgagee has an insurable interest in the property to the extent of his lien,⁶ as has also the assignee of a mortgage.⁷ A person who has agreed to purchase a bond and mortgage, and who has covenanted to pay the purchase price, also has an in-

¹ Allen v. Franklin Ins. Co., 9 How. Pr. 501.

² Waring v. Loder, 53 N. Y. 581; Herkimer v. Rice, 27 N. Y. 163. See also Buck v. Ins. Co., 76 Me. 586; Strong v. Ins. Co., 10 Pick. (Mass.) 44.

³ The Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249.

⁴ Hodges v. The Tennessee Marine & Fire Ins. Co., 8 N. Y. (4 Seld.) 416.

⁵ Jenkins v. Quincy Mutual Fire Ins. Co., 73 Mass. (7 Gray) 370. But a mortgagee may insure as general owner unless his interest is inquired about. Buck v. Phoenix Ins. Co., 76 Me. 586.

⁶ Kernochan v. N. Y. Bowery Fire Ins. Co., 5 Duer, 1; 17 N. Y. (3 Smith) 428. See also Buck v. Phoenix Ins. Co., 76 Me. 586; Sussex Co. Mut. Ins. Co., v. Woodruff, 26 N. J. L. 541.

⁷ Tillou v. Kingston Mutual Ins. Co., 7 Barb. 570.

surable interest to the extent of the full amount secured by the mortgage. When such an agreement is made, the purchaser of the mortgage becomes the equitable owner of it, even though the legal title is retained by the mortgagee as security for the purchase money.⁸

The extent of the insurable interest of the mortgagee is the amount of his lien not exceeding the value of the property insured.⁹

A bond and mortgage executed by a husband to his wife for a just and valuable consideration may be enforced in equity, and the wife acquires an equitable interest in the property covered thereby, which she may insure.¹⁰

§ 545. When insurable interest of mortgagor ceases.—It was held in *McLaren v. The Hartford Fire Ins. Co.* (5 N. Y. [1 Seld.] 151), that a mortgagor had no insurable interest remaining in buildings covered by a mortgage, after a sale of the mortgaged premises under a decree of foreclosure, and payment of part of the purchase money; although the decree may not have been enrolled, and no deed be executed at the time of sale. The theory of the court was that a deed subsequently executed by the master, operated by way of relation as a transfer of the property at the time of the sale. The sale took place in September, a loss occurred in October, and the master's deed was not delivered until November, and it was held that the mortgagor had no insurable interest at the time of the loss. In *Cheney v. Woodruff* (45 N. Y. 98), the principle of *McLaren v. The Hartford Fire Ins. Co.* (*supra*) was doubted, though the decision was pronounced correct upon other grounds; and it was held that, at least to the extent of being entitled to collect rents, the mortgagor retains an interest in the property until the purchaser receives his deed, and acquires a right of possession.¹¹

The trustees in a deed of trust in the nature of a mortgage, has an insurable interest in the mortgaged property distinct from that of the mortgagor. *Dick v. Ins. Co.*, 81 Mo. 103, and cases cited.

⁸ *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 7 Lans. 138, aff'd 55 N. Y. 343.

⁹ *Excelsior Fire Ins. Co. v. Royal*

Ins. Co., 55 N. Y. 343; *Tillou v. Kingston Mutual Ins. Co.*, 7 Barb. 570; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 428.

¹⁰ *Mix v. Andes Ins. Co.*, 9 Hun, 397.

¹¹ Examine as to this, also, *Aspinwall v. Balch*, 4 Abb. N. C. 193; *Mutual Life Ins. Co. v. Balch*, 4 Abb. N. C. 200.

A mortgagor whose right in the equity of redemption has been taken on execution, has an insurable interest, nor is it divested by the sale so long as the right to redeem remains.¹² The value of the mortgagor's redeemable interest in the property insured is not material. If he had an insurable interest at the time the policy was effected, and also at the time of the loss, he can recover the whole damage, not exceeding the sum insured.¹³

§ 546. **Insurable interest of purchaser at foreclosure sale.**—Whatever doubt there may be as to the time when the insurable interest of the mortgagor ceases, there can be no doubt that the purchaser at a foreclosure sale acquires an insurable interest in the property at the time of signing the contract of purchase, and paying an instalment of the purchase price.¹⁴ It is his right to insure this interest; and it has been held that if he fails to do so, and the buildings upon the property are injured or destroyed by fire, he will not on that account be entitled to be relieved from his purchase.¹⁵

The weight of authority is, however, to the effect that the premises are at the risk of the purchaser only when the contract is absolute and the vendee is authorized to take immediate possession of the land.¹⁶ The first rule upon judicial sales, is that which places the property at the risk of the purchaser only when the deed has been or should be delivered; in other words, when by the terms of sale he became entitled to possession, with the corresponding right to the rents and profits.¹⁷

FORM OF CONTRACT OF INSURANCE.

§ 547. **Contract in name of mortgagor.**—Where a mortgagor procures insurance on the mortgaged premises in his own name, but

¹² Strong v. Manufacturers' Ins. Co., 27 Mass. (10 Pick.) 40.

¹³ Insurance Co. v. Stinson, 103 W. S. 25; Carpenter v. Providence Wash. Ins. Co., 16 Peters (U. S.) 495; Stephens v. Ill. Mutual Fire Ins. Co., 43 Ill. 327; Buck v. Phoenix Ins. Co., 76 Me. 587; Strong v. Manufacturers' Ins. Co., 27 Mass. (10 Pick.) 40.

¹⁴ McLean v. The Hartford Fire Ins. Co., 5 N. Y. (1 Seld.) 151.

¹⁵ Per LARREMORE, J., at Special T., N. Y. Common Pleas, May 1876; in The Mutual Life Ins. Co. v. Tallman; Vance v. Foster, 9 Bush (Ky.) 389. See also Ryan v. Preston, 44 L. T. Rep. N. S. 787; 24 Alb. L. J. 231.

¹⁶ McKechnie v. Sterling, 48 Barb. 330.

¹⁷ Mutual Life Ins. Co. v. Balch, 4 Abb. N. C. 200; Aspinwall v. Balch, 4 Abb. N. C. 193.

causes it to be inserted in the policy as a part of the agreement, that the loss, if any, is payable to the mortgagee, the contract is none the less one made between the insurers and the mortgagor. It is a contract to indemnify the mortgagor against any loss or damage that may be received by him. The undertaking to pay the mortgagee is collateral to, and dependent upon, the principal undertaking to insure the mortgagor. The effect of it is, that the insurers agree that whenever any money shall become due to the mortgagor upon the contract of insurance, they will, instead of paying it to the mortgagor himself, pay it to the mortgagee. The mortgagor must sustain a loss for which the insurers are liable before the party appointed to receive the loss will have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers.¹⁸

A common-law action to recover on a policy of insurance cannot be maintained where an award has been made and paid under a written agreement to appraise a loss, unless the plaintiffs first rescind and restore, and although the award was paid to the mortgagee, the insured owners must nevertheless restore it, where it was paid for their benefit and under the terms of the policy.¹⁹

A clause reading "loss if any on buildings, payable" to the mortgagee "as his interests may appear," limits the recovery of the mortgagee, as against the general creditors of the insured, to the insurance collected for damage to the buildings.²⁰

§ 548. Upon this principle it was held in *Grosvenor v. The Atlantic Fire Ins. Co.* of Brooklyn (17 N. Y. [3 Smith] 391), that if the mortgagor who procures such insurance to be made shall, prior to the fire, part with his interest, no loss will be sustained by him, and consequently the mortgagee will not be allowed to recover. This case overruled several earlier ones,²¹ and it seems to conflict with the doctrine advanced in later decisions to the

¹⁸ *Grosvenor v. The Atlantic Fire Ins. Co. of Brooklyn*, 17 N. Y. (3 Smith) 391; *Merwin v. Star Fire Ins. Co.*, 7 Hun, 659. See also *Macomber v. The Cambridge Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 133; *Pitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass. 431.

¹⁹ *Townsend v. Greenwich Ins. Co.*,

39 Misc. R. 87; 78 N. Y. Supp. 897, aff'd 86 App. Div. 323; 83 N. Y. Supp. 909.

²⁰ *Miller v. Gibbs*, 108 App. Div. 103; 95 N. Y. Supp. 385.

²¹ *The Traders' Ins. Co. v. Robert*, 9 Wend. 474; *Tillou v. The Kingston Mut. Ins. Co.*, 5 N. Y. (1 Seld.) 405.

effect that, so long as the mortgage debt continues, the insurable interest of the mortgagor also continues, even though he has parted with the title, for the property stands as the primary fund from which the debt should be paid.²²

§ 549. Another result of the rule that insurance procured by the mortgagor with the stipulation on the policy of "loss, if any, payable to the mortgagee," is a contract made with the mortgagor and not with the mortgagee, is found in the fact that any act or neglect of the mortgagor, either in procuring the policy or after the rights the mortgagee have vested,²³ will avoid the policy. Thus in *Bidwell v. Northwestern Ins. Co.* (19 N. Y. 179), a policy in this form obtained by the owner of a vessel, was held to be void because of a warranty contained in it to the effect that the property was free from all liens, when, as a matter of fact, the vessel was subject to two prior mortgages. If the insurance had been of the interest of the mortgagee alone, this warranty would have been harmless.

§ 550. Over-insurance by mortgagor.—In *The Buffalo Steam Engine Works v. The Sun Mutual Ins. Co.* (17 N. Y. [3 Smith] 401), the same principle was applied, and resulted in destroying the claims of a mortgagee to insurance because, after the assignment of the policy to him, the mortgagor had violated one of the conditions of the policy by procuring an over-insurance. This could not be, if the theory that the contract was with the mortgagee should be recognized, since the act of a stranger to an agreement cannot invalidate it. But the contract is with the mortgagor, and the mortgagee receives by the assignment of the policy a right merely to the fruits of the bargain. And when, by the terms of the contract, the liability of the insurer is made to depend upon the performance of an act by the mortgagor, an assignment of the contract will not operate to dispense with the performance of the act as a condition of liability.²⁴

²² *Waring v. Loder*, 53 N. Y. 581.

²³ *Moore v. Hanover Fire Ins. Co.*, 141 N. Y. 219; 36 N. E. 191; *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106; 22 N. E. 229; *The Buffalo Steam Engine Works v. The Sun Mut. Ins. Co.*, 17 N. Y. [3

Smith) 401. See also *Loring v. Manufacturers' Ins. Co.*, 74 Mass. (8 Gray) 28.

²⁴ See the cases on this subject examined and discussed by HARRIS and PRATT, JJ., in 17 N. Y. pp. 391, 401.

§ 551. Insurance "as interest may appear."—An insurance effected of A. B., "as interest may appear," will sufficiently cover an interest as mortgagee, notwithstanding a condition in the policy requiring that when a person procures a policy otherwise than as sole owner, that fact should be expressed in the policy, and in case of failure the policy to be void. The effect of the words, "as interest may appear," is to waive the condition.²⁵

In *Rogers v. The Traders' Ins. Co.* (6 Paige, 583), the agents for the proprietors of a steamboat effected an insurance upon the boat for the benefit and on account of whomsoever it might concern at the time of the loss, if any should occur, and it was held that a mortgagee of the interest of one who was the owner at the time of the insurance, and for whose benefit the policy was underwritten, had a right to the mortgagor's portion of the purchase money, to the extent of the debt secured by the mortgage.

In *Salmon v. North British & Mercantile Insurance Company* (150 App. Div. 728) the insurance company was erroneously informed by the broker that the plaintiff had become the owner of the premises instead of the assignee of a mortgage thereon as was the case. The company endorsed the policy, "Interest vested in S. Loss as before." It was held that the plaintiff was entitled to a reformation of the policy and to recover thereon on the ground of mutual mistake of fact.

§ 552. Property unoccupied.—Where a building was insured against fire by a policy which provided that "if the assured shall vacate the property in whole or in part, this policy shall be void," and an indorsement was made upon the policy by which it was made payable to the mortgagee, and the property was afterward destroyed when unoccupied, the policy was held to be void both as to the insured and to the mortgagee.²⁶

§ 553. Condition against use of property.—A policy of insurance, effected by a mortgagor out of possession, which by its terms is to cease and be of no effect if the premises insured shall be used for certain specified purposes, was rendered void by the use of them for such purposes by the lessee of the mortgagee in possession.²⁷

²⁵ *De Wolf v. Capital City Ins. Co.*, 16 Hun, 116.

²⁶ *Franklin Savings Ins. Co. v. Central Ins. Co.*, 119 Mass. 240.

²⁷ *Wetherell v. City Fire Ins. Co.*, 82 Mass. (16 Gray) 276.

§ 554. **Condition against alienation.**—The giving of a mortgage upon lands creates a lien and does not transfer title. A mortgage does not, therefore, operate to annul a policy of insurance forbidding any alienation of the insured property,²⁸ and the same rule applies to a conveyance, absolute in its terms, but intended as a mere security, there being a parol defeasance.²⁹ So a mortgage is not a violation of a clause against the “sale, conveyance, alienation, transfer, or change of title of the property”;³⁰ or of a prohibition against “any change in the title or possession of the property, whether by sale, voluntary transfer, or conveyance.”³¹

Where a by-law provided that the policy should be void if the premises were “alienated by sale, mortgage, or otherwise,” it was held that the executing of a mortgage was not an alienation and did not affect the validity of the policy.³²

Where, however, a policy of insurance provides that no mortgage shall be imposed upon the insured property without the consent of the insurer, the condition will be enforced in accordance with its terms.³³

But where separate and distinct classes or species of property, each of which is separately valued, are insured under a policy which provides that the entire policy shall be void if the subject of insurance be personal property and be or become incumbered by a chattel mortgage, it has been held that a chattel mortgage given upon one species or class of the property does not affect the insurance as to the other.³⁴ If the policy requires the mortgagee to notify the insurer of any change of ownership or occupancy, a failure to notify the company of a vacancy for several

²⁸ *Conover v. Mutual Ins. Co.*, 1 N. Y. 290; 3 Denio, 254; *Woodward v. Republic Fire Ins. Co.*, 32 Hun, 365. The rule is different in the case of chattel mortgages. *Woodward v. Republic Fire Ins. Co.*, 32 Hun, 365.

²⁹ *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1; 17 N. E. 405; *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. 416; *contra*, *Barry v. Hamburg-Bremen Ins. Co.* (N. Y. Supr. Ct.), 24 W. Dig. 325.

³⁰ *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. R. 582.

³¹ *Hartford Fire Ins. Co. v. Walsh*,

54 Ill. 164; 5 Am. R. 115. See also *Savage v. Howard Ins. Co.*, 52 N. Y. 502; 11 Am. R. 74.

³² *Shepherd v. Ins. Co.*, 38 N. H. 232.

³³ *Gould v. Holland Purchase Ins. Co.*, 16 Hun, 538. See also *McGowan v. People's Fire Ins. Co.*, 54 Vt. 211; 26 Alb. L. J. 253.

³⁴ *Adler v. Germania Fire Ins. Co.*, 17 Misc. R. 347; 39 N. Y. Supp. 1070, rev'g 15 Misc. R. 471; 37 N. Y. Supp. 207; 72 St. R. 787; *Huff v. Jewett*, 20 Misc. R. 35; 45 N. Y. Supp. 311.

months in consequence of the tenant being dispossessed, is a bar to an action on the policy.³⁵

An assignment under proceedings in insolvency by a debtor, is an "alienation" of his property within the meaning of a stipulation in a mutual insurance policy, that "when any property insured shall be taken possession of by a mortgagee, or in any way alienated, the policy shall be void," and defeats the right of a mortgagee to recover a portion stipulated by the policy to be paid to him in case of loss.³⁶

The mere commencement of a proceeding to foreclose a mortgage without notice to the insurer, is not such a "change of ownership or increase of hazard" as will invalidate an insurance for the benefit of a mortgagee, under a clause forbidding such change of ownership,³⁷ except where the policy contains an express stipulation to that effect,³⁸ in which case such provision would control in the absence of a waiver or estoppel.³⁹

A condition against alienation does not operate to render a policy void until the title has actually been transferred, and an executory contract for such transfer has no such effect.⁴⁰

Where a policy which is to become void in case of a change in title or possession otherwise than by death provides that the interest of the mortgagee shall not be invalidated for that cause if the latter shall notify the company of any change coming to his knowledge, notice to the mortgagee's agent of a conveyance will be regarded as notice to the principal which will avoid the policy in case of a failure to notify the company.⁴¹

§ 555. Other insurance forbidden.—The inhibition against other

35 *Hupfel & Sons v. Boston Fire Ins. Co.*, 55 Misc. R. 125; 104 N. Y. Supp. 659.

36 *Young v. Eagle Fire Ins. Co.*, 80 Mass. (14 Gray) 150.

37 *Uhlfelder v. Palatine Ins. Co.*, 111 App. Div. 57; 97 N. Y. Supp. 499; *Phoenix Ins. Co. v. Union Mut. Life Ins. Co.*, 101 Ind. 392; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41.

38 *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356; 31 N. E. 31.

39 *Gibson El. Co. v. L. & L. & G. Ins. Co.*, 159 N. Y. 418; 54 N. E. 23, *Armstrong v. Agricultural Ins. Co.*,

130 N. Y. 560; 29 N. E. 991; *Benjamin v. Palatine Ins. Co.*, 80 App. Div. 260; 80 N. Y. Supp. 256, *aff'd* 177 N. Y. 588; 70 N. E. 1095.

Where written waiver is required verbal assent of an agent will not suffice. *Moore v. Hanover Fire Ins. Co.*, 141 N. Y. 219; 36 N. E. 191.

40 *Haight v. Continental Ins. Co.*, 92 N. Y. 51. Failure to obtain insurer's consent to alienation invalidates policy. *Lett v. Guardian Fire Ins. Co.*, 125 N. Y. 82; 25 N. E. 1088.

41 *Golantschik v. Globe Fire Ins. Co.*, 10 Misc. R. 369; 31 N. Y. Supp. 32.

insurance of the interest of the owner, does not operate to render the policy void because of an insurance made by the mortgagee on his interest as such.⁴² The principles which distinguish between the interests of the mortgagor and the mortgagee as distinct subjects of insurance, are illustrated by a New Hampshire case where the question at issue was the apportionment of a loss among several insurers. The plaintiff's policy was on the interest of the mortgagor in the mortgaged premises. There was another policy on the same interest in another company, and also an insurance on the interest of the mortgagee in a third company. The plaintiff's policy contained a provision that the assured should not be entitled to recover of the defendants any greater proportion of the loss than the amount insured by their policy bore to the whole some insured on said property, without reference to the solvency or liability of other insurers. It was held that the jury was properly directed to apportion the loss between the defendants and the other company having insurance on the same interest, without taking into account the value of the interest of the mortgagee or the insurance on that interest.⁴³

§ 556. **Satisfaction of mortgage.**—The assignment of a mortgage to the owner of the equity of redemption operates as a merger and satisfaction of it, and a policy of insurance which is invalid in the hands of the owner of the property as such, cannot be enforced by him because of his ownership of the mortgage.⁴⁴

Where a mortgage has been paid in full, the fact that it has not been discharged of record does not constitute a breach of warranty against incumbrances contained in a policy of insurance.⁴⁵

§ 557. **Waiver of conditions.**—Where there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that

⁴² *Adams v. Greenwich Ins. Co.*, 9 Hun, 45; *Tyler v. Etna Fire Ins. Co.*, 12 Wend. 507; 16 Wend. 385; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235; *Acer v. Merch. Ins. Co.*, 57 Barb. 68.

⁴³ *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326.

⁴⁴ *Macomber v. Cambridge Mut. Fire Ins. Co.*, 62 Mass. (8 Cush.) 46.

⁴⁵ *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452.

effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act, or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in our Court of Appeals, after some difference of opinion, that such waiver need not be based upon any new agreement or an estoppel.⁴⁶

So, where there was a condition in a policy that it should be void if foreclosure proceedings should be commenced against the insured property and this condition had been violated, it was held that the forfeiture thus caused was waived by requiring the insured, under another condition in the policy, to appear before a person appointed by the insurer, and there be subjected to an inquisitorial examination. By doing this the insurer affirmed the validity of the policy.⁴⁷

“MORTGAGEE CLAUSE” IN POLICY.

§ 558. **Mortgagee clause.**⁴⁸—If the insurance be procured by the mortgagor and the policy be assigned to the mortgagee for his protection, or if the insurance is made in the name of the mortgagor, the loss being payable to the mortgagee, the mortgagee will in either case take the policy subject to all of its conditions; and if, by the act of the mortgagor, the policy by its terms thereafter becomes void, neither the mortgagor nor the mortgagee will be able to collect upon it. The consent of the insurers to the

⁴⁶ Per EARL, J., in *Titus v. Glens Falls Insurance Company*, 81 N. Y. 410, 419; *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 N. Y. 480, 493; *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108. See also *Insurance Co. v. Norton*, 96 U. S. 234; *Allen v. Vermont Mut. Fire Ins.* —

Co., 12 Vt. 366; *Gans v. St. Paul Ins. Co.*, 43 Wis. 109; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67.

⁴⁷ *Titus v. Glens Falls Insurance Company*, 81 N. Y. 410.

⁴⁸ The New York Standard Mortgage Clause will be found quoted at length in the appendix of forms.

assignment will not operate as a waiver of the conditions of the policy,⁴⁹ and it has become usual, when insurance is made for the benefit of a mortgagee, to have a clause annexed to the policy, commonly known as the "mortgagee clause," to the effect that the policy is not to become void as to the mortgagee by reason of any act or neglect of the mortgagor subsequent to the assignment, and providing for an assignment of the mortgage securities in case the insurer desires to contest the claims of the mortgagor; only requiring from the mortgagee that he shall notify the insurers of any change of ownership that may come to his knowledge. When this condition is made a part of the contract of insurance, the mortgagee is protected by it, and, in case the mortgagor shall, by any act subsequent to the issuance of the policy, violate any of its conditions, as, for example, by parting with his property in the mortgaged premises without notice to the insurers, the insurers may, upon payment of the loss, enforce the mortgage for their indemnity.⁵⁰

The "mortgagee clause" is, indeed, agreed upon for this very purpose, and creates an independent and new contract which removes the mortgagee beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagee a party who has a distinct interest separate from the owner, embraced in another and separate contract. The tendency of the recent cases is to recognize these distinctions, and thus protect the rights of the mortgagee when named in the policy, and the interest of the owner and the mortgagee are regarded as distinct subjects of insurance.⁵¹

The contract between the insurer of real estate and the mortgagee, as expressed in the usual mortgagee clause, is separate and distinct from the contract between the insurer and the owner.

⁴⁹ *The Buffalo Steam Engine Works v. The Sun Mutual Ins. Co.*, 17 N. Y. 401.

⁵⁰ *The Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389. See *Rosenstein v. Traders' Ins. Co.*, 79 App. Div. 48; 79 N. Y. Supp. 726.

⁵¹ Per MILLER, J., in *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Springfield Ins. Co. v. Allen*, 43 N. Y. 392; *Phæ-*

nix Ins. Co. v. Floyd, 19 Hun, 287; *Foster v. Van Reed*, 70 N. Y. 19, rev'g 5 Hun, 321; *Ulster Co. Savings Institution v. Leake*, 73 N. Y. 161, rev'g *Ulster Co. Savings Institution v. Decker*, 11 Hun, 515. In Massachusetts the making of a memorandum on the policy and addition of mortgagee clause is a void act, and mortgagee cannot recover unless new consideration is paid. *Davis v. Ins. Co.*, 135 Mass. 251.

The former is nothing more than a contract of indemnity, and the liability of the insurer to the mortgagee is measured not by the amount of the policy, but by the amount of loss suffered by him.⁵² But this clause does not relieve the mortgagee from a condition of the policy requiring the interest of the insured in the property to be truly stated therein.⁵³

§ 559. **Other insurance.**—Where the mortgagor after insurance effected in this way procures other insurance which entitles the first insurer to contribution, the mortgagee can nevertheless recover the full amount of insurance.⁵⁴ In such a case, however, the insurer may require an assignment of the mortgage and may enforce it, to the extent of its claim for contribution.⁵⁵

A mortgagee who procures insurance under such a stipulation is bound to good faith toward the insurer, and a failure to disclose the condition of the property, known either to him or to his agent acting for him, will avoid the policy.⁵⁶

AGREEMENT TO INSURE CONTAINED IN THE MORTGAGE.

§ 560. **Lien of mortgagee on mortgagor's insurance.**—If the mortgagor procures insurance for his own benefit, without any agreement to insure for the benefit of the mortgagee, the latter cannot claim any benefit from the insurance.⁵⁷ A contract of insurance against fire, as a general rule, is a mere personal contract between the assured and the underwriter to indemnify the former against the loss he may sustain; and in case a mortgagor effects an insurance upon the mortgaged premises, the mortgagee can claim no benefit from it, unless he can base his claim upon some agreement. But where the assured has agreed to insure for the protection and indemnity of another person having an interest in

⁵² *Heilbrunn v. German Alliance Ins. Co.*, 150 App. Div. 670.

⁵³ *Genesee Falls Sav. Ass'n v. U. S. Fire Ins. Co.*, 16 App. Div. 587; 44 N. Y. Supp. 979.

⁵⁴ *Eddy v. London Assurance Corp.*, 143 N. Y. 311; 38 N. E. 307; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, aff'g 12 Hun, 416.

⁵⁵ *Phoenix Ins. Co. v. Floyd*, 19 Hun, 287; *Ulster Co. Savings Institution v. Leake*, 73 N. Y. 161, rev'g

Ulster Co. Savings Institution v. Decker, 11 Hun, 515.

⁵⁶ *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36.

⁵⁷ *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 84; *Neale v. Reid*, 3 Dowl. & Ryl. 158; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Carter v. Rockett*, 8 Paige, 437; *Vandegraaf v. Medlock*, 3 Porter, 389; *Plimpton v. Ins. Co.*, 43 Vt. 497.

the subject of the insurance, then such third person has an equitable lien in case of loss upon the money due upon the policy to the extent of such interest.⁵⁸

Thus, in a case in the Court of Chancery in Maryland, where the mortgagor covenanted with the mortgagee that he would keep the premises insured during the continuance of the lien of the mortgage, and in case of loss, that the amount received upon the policy should be applied to the rebuilding of the property insured, it was decided that the mortgagee had an equitable lien upon the fund received by the mortgagor under the policy, to satisfy the balance due upon the mortgage which could not be collected upon a foreclosure and sale of the mortgaged premises.⁵⁹

A similar decision was also made by the Court of King's Bench, in England, in a case where a lessee of premises covenanted with the lessor to keep the premises insured.⁶⁰ Under a covenant to keep buildings insured for the benefit of the mortgagee, the latter is held to have a right to require the insurance to be procured in such company as he directs but if this right is waived the mortgagee cannot thereafter procure additional insurance at the expense of the mortgagor in the absence of any sufficient cause.⁶¹

§ 561. Recording of covenant to insure is not notice.—It was held *In re Sands' Ale Brewing Co.* (3 Biss [Dist. Ct. U. S.] 175) that a covenant to insure contained in a mortgage acts upon the insurance as soon as it is effected, runs with the land, and, being recorded, gives notice to all subsequent incumbrancers that the policy is treated as equitably assigned to the plaintiff. The direct effect of this ruling is to declare that equity makes an as-

⁵⁸ Per EARL, Com., in *Cromwell v. The Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 47; *Carter v. Rockett*, 8 Paige, 437; *Thomas' Adm'rs v. Von Kapff's Ex'rs*, 6 Gill. & J. 372; *Providence Co. Bank v. Benson*, 24 Pick. 204; *Nichols v. Baxter*, 5 R. I. 491; *Ellis v. Kreutsinger*, 27 Mo. 311; *Re Sands' Ale Brewing Co.*, 3 Biss. 175; *Dunlop v. Avery*, 23 Hun, 509; *Ames v. Richardson*, 29 Minn. 330; 13 N. W. 137; *Miller v. Aldrich*, 31 Mich. 408. But the mortgagee has no claim against the insurer after the loss has been settled with the mortgagor without notice of his rights:

Burns v. Collins, 64 Me. 215. And it has been held that the mortgagee has no legal or equitable lien upon the policy; *Sterns v. Quincy Mut. Life Ins. Co.*, 124 Mass. 61; 26 Am. R. 647.

⁵⁹ *Thomas, Adm'rs v. Von Kapff's Ex'rs*, 6 Gill. & J. 372; cited and approved by WALWORTH, C., in *Carter v. Rockett*, 8 Paige, 437.

⁶⁰ *Vernon v. Smith*, 5 Barn. & Ad. 1.

⁶¹ *Heal v. Richmond County Savings Bank*, 127 App. Div. 428; 111 N. Y. Supp. 602, aff'd 196 N. Y. 549; 89 N. E. 1101.

signment to the mortgagee of every policy obtained by the mortgagor the moment he procures it, and the record gives to subsequent incumbrancers notice of such equitable assignment.⁶²

This rule does not obtain in this State. Our Court of Appeals, in *Dunlop v. Avery* (89 N. Y. 592), has held that while there is no doubt as to the correctness of the rule that, where the mortgagor is bound by the terms of the mortgage to keep the premises insured for the security of the mortgagee, as between him and the mortgagee an equitable lien arises in favor of the mortgagee for the money received upon the policy to the extent of the mortgage, this rule does not apply where the policy itself provides for the payment of the loss to another incumbrancer. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured, does not charge a subsequent incumbrancer with constructive notice of the covenant, and the recording act has no application to it. Such a covenant is not a covenant running with the land, but is entirely personal in its character.⁶³

§ 562. **Parol contract to insure.**—A contract to protect the mortgagee's interest by insurance may be made by parol outside of the mortgage, and where insurance premiums are paid by the mortgagee by the request of the mortgagor, they become charges constituting liens upon the land.⁶⁴

A stipulation to insure the amount "due" on a mortgage has been construed to mean the amount owing upon it.⁶⁵

§ 563. **Insurance by mortgagee without agreement with mortgagor.**—It was said in *Matter of Bogart* (28 Hun, 466), that a mortgagee has a right to make a payment of premium on a policy of insurance against fire for the protection of the estate mortgaged, and to add the amount paid to the mortgage debt, independent of an express agreement authorizing such payment. No authority is cited to sustain this proposition, and it is of doubtful accuracy.

§ 564. **Liability of mortgagee for premiums.**—Where the owner of real property covered by a mortgage containing a covenant to

⁶² See as to this case *Dunlop v. Avery*, 23 Hun, 509, rev'd 89 N. Y. 592.

⁶³ *Reid v. McCrum*, 91 N. Y. 412.

⁶⁴ *Faure v. Winans*, Hopk. 283;

Fowley v. Palmer, 71 Mass. (5 Gray) 549.

⁶⁵ *Fowler v. Hoffman*, 31 Mich. 215.

insure the buildings and assign the policies obtains such insurance and has the usual mortgagee clause attached to the policy which provides that, if the mortgagor neglects to pay the premiums, the mortgagee will pay them on demand, the insurer cannot maintain an action for premiums against the mortgagee upon his owner's failure to pay them, without proof of knowledge of the clause by the mortgagee, and the express agreement on the part of the mortgagee to pay them or facts from which such an agreement may be implied.⁶⁶

ENFORCING PAYMENT BY INSURERS.

§ 565. **Proof of loss.**—Where a policy is procured by the mortgagee, insuring "A. B. as owner, and C. D. as mortgagee; loss, if any, payable to C. D. as mortgagee," the proof of loss required by the condition usual in policies may be furnished by the mortgagee alone,⁶⁷ though the more prudent course is for both to unite in such proof. In such a case, where the mortgagor's interest was held, under a conveyance from him, by an infant whose mother and general guardian refused to make or to join in the proofs of loss, an action was commenced by the mortgagee against the insurer and the mortgagor's grantee to compel proofs of loss to be made and to enforce payment. This relief was denied on the ground that no obligation to furnish such proofs existed on the part of the mortgagor's grantee, who had made no covenant to insure, and who was not liable for the debt, and for the reason that the plaintiff's own theory of the case against the insurer was based upon the assumption that the condition of serving proofs of loss had neither been complied with nor nullified.⁶⁸

Under the mortgagee clause as contained in the standard policy the mortgagee may recover without alleging or proving that either he or the mortgagor furnished proof of loss within the time prescribed by the policy.⁶⁹

⁶⁶ *Muddle v. Van Slyke*, 63 Misc. R. 229; 118 N. Y. Supp. 473, citing *Northern Ins. Co. v. Goelet*, 31 Misc. R. 361; 65 N. Y. Supp. 403, *aff'd* 69 App. Div. 108.

⁶⁷ *McDowell v. St. Paul Fire & Marine Ins. Co.*, 145 App. Div. 724; 130 N. Y. Supp. 294; *Graham v. Phoenix Ins. Co.*, 17 Hun, 156.

⁶⁸ *Graham v. Phoenix Ins. Co.*, 77 N. Y. 171, *aff'd* 12 Hun, 446.

⁶⁹ *Heilbrunn v. German Alliance Insurance Co.*, 140 App. Div. 557; 125 N. Y. Supp. 374, *aff'd* 202 N. Y. 610; 95 N. E. 823. See Appendix of forms.

§ 566. **Action by mortgagor to recover insurance.**—In *Heilman v. Westchester Fire Ins. Co.* (75 N. Y. 7), a policy of insurance had been issued to the plaintiff, who was mortgagor, “loss, if any, payable to B., mortgagee,” which contained the following clause: “The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same made by the assured and received at this office in accordance with the provisions of this policy, *unless the property be replaced, or the company have given notice of their intention to rebuild or repair the damaged premises.*” There was also a provision giving the company the option to repair or rebuild upon giving notice. Such notice was given to the plaintiff, but the defendant thereafter neglected and refused to rebuild, when the action was brought. The question presented was as to whether the mortgagee ought not to have been the plaintiff, and it was held that the agreement to pay was modified by the agreement to rebuild, and that the action was properly brought in the name of the mortgagor, and that the defendant would not have been liable to an action by the mortgagee. It was remarked by the court that it may be that under some circumstances a mortgagee might intervene in equity in case of insufficient security to prevent the payment of the money to the mortgagor or its misappropriation, but no such question arose in the case.⁷⁰

It has been held that a mortgagor insured on a sealed policy of insurance may sue in his own name, though the policy have written on it, “loss, if any, payable to A. B., mortgagee.” It was said that the indorsement was not a transfer, and did not merge or extinguish the contract of the insurers, and that, if the insurers had paid to the mortgagee, this would have been a defense.⁷¹

§ 567. **Action by mortgagee to recover insurance.**—Where a policy of insurance is taken in the name of the mortgagor, and contains a clause, “loss, if any, payable to the mortgagee,” such

⁷⁰ *Friemansdorf v. Watertown Ins. Co.*, 9 Biss. 167; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Turner v. Quincy Ins. Co.*, 109 Mass. 568. But a mortgagee to whom a policy of insurance is made payable in case of loss, is not bound

by an adjustment of such loss, made without his knowledge and consent, by the assured mortgagor with the insurance company. *Harrington v. Fitchburgh Ins. Co.*, 124 Mass. 126.

⁷¹ *Martin v. Franklin Fire Ins. Co.*, 38 N. J. 140; 20 Am. Rep. 372.

words operate to give the mortgagee, for most purposes, the same rights and interests in the policy which he would have had if, without such words, the policy had been assigned to him with the consent of the insurers.⁷² The Code having provided that an action shall be brought in the name of the party in interest, it has accordingly been held that the person to whom the loss is payable, can sustain an action against the insurers.⁷³

Accordingly the owner is not a necessary party plaintiff.⁷⁴

Where the insurance is made of the interest of the mortgagor, "loss, if any, payable to the mortgagee," the mortgagee may recover the whole amount of loss though in excess of his lien, and, after payment of his demand, he will hold the balance as a trustee for the mortgagor.⁷⁵ Nor will his right of action be barred by a settlement between the insurer and the owner without his knowledge or consent.⁷⁶ Though where one to whom a loss is payable as "mortgagee as his interest may appear" acts as representative and trustee for another, he may, under the Code,⁷⁷ sue as trustee of an express trust, without alleging the trust, where his representative capacity nowhere appears in the transaction.⁷⁸

§ 568. Action by both mortgagor and mortgagee to recover insurance.—Where the owner of the property and the mortgagee have, both of them, interests under the policy, it is proper for them to join as plaintiffs in an action to enforce it.⁷⁹ And it is held that the mortgagee is a necessary party, and may, where he refuses to join as a plaintiff, be made a party defendant.⁸⁰

72 *Luckey v. Gannon*, 37 How. Pr. 134, 138; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516; *Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn*, 5 Duer, 517; 17 N. Y. 391, 395.

73 *Frink v. Hampden Ins. Co.*, 45 Barb. 384; 31 How. Pr. 30; *Roussel v. St. Nicholas Ins. Co.*, 52 How. Pr. 495; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516. See also *Motley v. Manuf. Ins. Co.*, 29 Me. 337; *Hadley v. N. H. Ins. Co.*, 55 N. H. 110.

74 *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409; 32 N. E. 40.

75 *Mix v. Hotchkiss*, 12 Conn. 32; *Concord Union Mut. Ins. Co. v. Wood-*

bury, 45 Me. 447; *Fowley v. Palmer*, 5 Gray (Mass.) 549.

76 *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409; 32 N. E. 40.

77 Code Civ. Proc. § 449.

78 *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394; 31 N. E. 231.

79 *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409; 32 N. E. 40; *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185.

80 *Lewis v. Guardian Assur. Co.*, 93 App. Div. 525; 87 N. Y. Supp. 525, aff'd 181 N. Y. 392; 74 N. E. 224; Code Civ. Proc. §§ 446, 448.

RIGHTS OF THE PARTIES WHERE THE PREMIUM IS PAID BY THE
MORTGAGOR.

§ 569. **Agreement to insure.**—It is a common practice to insert a provision in mortgages obligating the mortgagor to procure insurance on the mortgaged premises as a collateral security to the mortgage, and, in default of his so doing, giving to the mortgagee the right to procure such insurance at the mortgagor's expense. This is a perfectly valid bargain, but in the absence of such an agreement, the mortgagee, if he insures at all, must do so at his own expense, and the premium paid for insurance cannot be tacked to the mortgage debt.⁸¹ If the mortgagee receives the money necessary to pay the premium, and undertakes to procure insurance, it becomes his duty to do so; if he omits to insure, he stands in the place of the insurance company, and, if a loss occurs, the amount of insurance which he undertook to obtain will be deducted from the debt.⁸²

§ 570. **Insurance procured by a mortgagee** upon the request or at the expense of the mortgagor, is held by the mortgagee for the protection of both interests. The import of the transaction is that the insurance is additional collateral security for the mortgage debt, furnished by the mortgagor at his expense, and procured by the mortgagee, acting as his agent and by his authority. The general rule that the proceeds of collateral securities in the hands of the creditor are to be applied when received by him in the reduction of the debt, requires that the insurance money, when collected by the mortgagee, shall be applied upon the mortgage debt, and if sufficient to pay, it shall extinguish it. It is immaterial to the mortgagor whether the insurance be in his name or in the name of the mortgagee, if the avails of it in case of loss, are to be applied in reduction of the debt, and the mortgagee has no interest to procure an insurance limited to his own protection merely, where the expense is to be paid by the other party and is secured on the land. In such cases the implied obligation is, that the insurance money when paid to the former shall apply upon the mortgage debt.⁸³

⁸¹ Faure v. Winans, Hopk. Ch. 283; Fisher on Morts., 493, 494.

⁸² Soule v. The Union Bank, 30 How. Pr. 105; 45 Barb. 111.

⁸³ Waring v. Loder, 53 N. Y. 581; Buffalo Steam Engine Works v. Sun Mutual Ins. Co., 17 N. Y. 406; Clinton v. Hope Ins. Co., 45 N. Y.

§ 571. **Agreement with insurer for subrogation.**—This rule has no application as against an insurer, however, when it is made a part of the contract of insurance between him and the mortgagee, that he shall have an assignment of the mortgage when a loss equal to its amount has been paid. In such a case, though the premium has been paid by the mortgagee under a clause in the mortgage at the expense of the mortgagor, the insurer may demand an assignment stipulated for in the policy, and may enforce it against the mortgagee.⁸⁴

In *Hay v. Star Fire Ins. Co.* (77 N. Y. 235, aff'g 13 Hun, 496), insurance was effected by the mortgagee at the expense of the mortgagor. The policy contained the following clause: "In all cases of loss the assured shall assign to this company all his right to receive satisfaction therefor, from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this company. When insured as a mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced, as can be collected out of the original security, to which this policy shall be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security." The action was brought to strike this clause out of the policy, on the ground of fraud in issuing it, and to recover upon the policy as reformed. In affirming the judgment granting this relief, the court remarked that the clause referred to made the defendant a mere guarantor of the collection of the mortgage and an insurer of the debt, a contract practically of no benefit either to the insured or to the mortgagors. It was an insurance which the mortgagee under his contract with the mortgagor had no right to accept, and one which in *Excelsior Ins. Co. v. Royal Ins. Co.* (55 N. Y. 343), it is more than intimated that the defendant had no right to make.⁸⁵

467; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 47; *Hamilton v. Gunther*, 32 Hun, 22. See also *Holbrook v. American Ins. Co.*, 1 Curtis 193; *Concord Union M. F. Ins. Co. v. Woodbury*, 45 Me. 447; *Felton v. Brooks*, 58 Mass. (4 Cush.) 203; *Wil-*

cox v. Allen, 36 Mich. 160; *Flanders on Ins.* 1871, 347-361.

⁸⁴ *Foster v. Van Reed*, 70 N. Y. 19, rev'g 5 Hun, 321. But see *Graves v. Hampden Fire Ins. Co.*, 92 Mass. (10 Allen) 281.

⁸⁵ *Buckley v. Garrett*, 60 Pa. St. 333.

§ 572. **Application of insurance money.**—The mortgagee cannot apply insurance moneys received by him from a policy on the mortgaged property, paid for by the mortgagor, to other debts of the mortgagor. And if the mortgage debt be not due, the mortgagee cannot apply such insurance moneys at all otherwise than in repairing the loss to the property, without the consent of the mortgagor.⁸⁶

The mortgagee has no authority to consent to the cancellation of the policy paid for by the mortgagor, for the protection of both interests.⁸⁷

The mortgagor and mortgagee may, as between themselves, agree before the insurance money is paid that it shall not all be applied on the mortgage indebtedness; and the mortgagee has a right to release a part of his security so far as the mortgagor is concerned, and to let him have a part of the insurance money.⁸⁸

Where a mortgagee had insurance on his interest and promised the mortgagor to give him credit for anything received on account of it, it was held that this promise could be enforced, and that the liability of the mortgagor was, in equity, a sufficient consideration.⁸⁹

RIGHTS OF THE PARTIES WHERE THE PREMIUM IS PAID BY THE MORTGAGEE.

§ 573. **Mortgagor has no claim to insurance.**—Where the insurance is procured by the mortgagee at his own expense, upon his own motion, and for his sole benefit, it is obvious that the mortgagor cannot be entitled to claim the fruits of a contract to which he was a stranger, and toward the consideration of which he had contributed nothing, and various interesting questions have arisen as to the rights in such cases of the mortgagee and the insurer as between each other. Thus, it has been said that an insurance by a mortgagee is not an insurance of the specific property, but of its capacity to pay the mortgage debt,⁹⁰ and again that "it is but an insurance of his debt, and if his debt is afterward

⁸⁶ *Fergus v. Wilmarth*, 117 Ill. 542; 7 N. E. 508; *Elliot Five Cent Savings Bank v. Commercial Union Ass'n Co.*, 142 Mass. 142; 7 N. E. 550; *Gordon v. Ware Savings Bank*, 115 Mass. 588.

⁸⁷ *Matter of Moore*, 6 Daly, 541.
⁸⁸ *Sherman v. Foster*, 158 N. Y. 587; 53 N. E. 504.
⁸⁹ *Collahan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106.
⁹⁰ *Flanders on Ins.* 360.

paid or extinguished, the policy from that time ceases to have any operation.”⁹¹

§ 574. If it is the debt only which is insured, it may be said that until the debt or some part of it is lost, there is no loss upon the policy, and that neither the debt nor any part of it is lost until the mortgagee fails to obtain it from an enforcement of his mortgage. There are a number of dicta of judges and text-writers which would seem to favor this rule. In one case in Pennsylvania it was said by GIBSON, J.,⁹² that “a mortgagee insures not the ultimate safety of the whole property, but only so much of it as is sufficient to pay the mortgage debt, and in effect the security is insured.” He also says, by way of illustrative enforcement of his argument, that a mortgagee insured, cannot recover of the insurer for the loss by fire of a few shingles when the premises are left amply sufficient to secure him his debt. So, Chancellor WALWORTH remarked⁹³ that a vendor who retained a lien for unpaid purchase money had an insurable interest only to the amount of his lien, “so far as the land upon which the house stood was insufficient to protect him from loss, provided the purchaser was unable to pay the same.”⁹⁴

§ 575. Debt is not insured.—It cannot be said, however, that in any strict legal sense the insurers contract to indemnify the mortgagee for a loss of the mortgage debt. They have, indeed, no power to guarantee the payment or collection of a debt. Fire underwriters in these days in this State, as in all the States, are creatures of the statute, and have no rights save such as the State gives to them. They may agree that they will pay such loss or damage as happens by fire to property. They are limited to this.⁹⁵ It was not readily that it was first held that they could agree with a mortgagee or lienor of property to reimburse to him the loss caused to him by fire. He is not the owner of it; how then can he insure it? was the query. And the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his bene-

⁹¹ Angell on Ins. § 59.

⁹² Smith v. Col. Ins. Co., 17 Pa. St. 253.

⁹³ *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 397.

⁹⁴ See also cases cited by FOLGER, J., in *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343.

⁹⁵ *Hay v. Star Fire Ins. Co.*, 77 N. Y. 236, aff'g 13 Hun, 496.

fit. And it was done by holding that, as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire, without meeting the objection that it was a wagering policy. The policy did not therefore become one upon the debt, and for indemnification against its loss, but still remained one upon the property, and against loss or damage to it. It is doubtless true, as was said by GIBSON, J., that *in effect* it is the debt which is insured. It is only in effect, however, an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt, a lien upon the property, creates that interest. The agreement is usually for insuring the property from loss or damage by fire. The interest of the mortgagor is in the whole property, just as it exists, undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is effected. It is not so great or so safe or so valuable as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium. The undertaking is that the property shall not suffer loss by fire; that is, in effect, that its capacity to pay the mortgage debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgage debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good as he was when he effected his insurance.⁹⁶

§ 576. **Damages repaired by mortgagor.**—A mortgagee has been held not to be entitled to recover from the insurer if the injury to the property has been entirely repaired by the mortgagor.⁹⁷

But where the mortgagees consented to the payment of the insurance money to the mortgagor upon the latter's promise to use the sum in erecting a new building upon the premises equal in

⁹⁶ FOLGER, J., in *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343; *Foster v. Van Reed*, 5 Hun, 321.

⁹⁷ *Matter of Moore*, 6 Daly, 541; *Matthewson v. Western Assurance Co.*, 10 Lower Canada, 18; *G. C. Montreal*, 8.

value to the one destroyed, they may, upon failure of the mortgagor to perform his agreement, maintain an action for money had and received.⁹⁸

WHEN THE INSURER IS ENTITLED TO BE SUBROGATED TO THE
RIGHTS OF THE MORTGAGEE.

§ 577. **Insurer entitled to be subrogated to do equity.**—It being established that the liability of the insurer of a mortgagee's interest extends to the full amount of the damage to the property, within the limits of the policy and of the mortgage debt, it becomes an interesting question as to what rights remain after the payment of the loss as between the parties. The mortgagor can make no claim to the insurance moneys if he has not paid the consideration for the policy. It has been said that, in such a case, the mortgagee is entitled both to the insurance money and to the mortgage debt, since neither the insurer by paying the loss, nor the mortgagor by paying the debt, does any more than each respectively contracted to do and was paid for doing.¹ This view, however, it will be seen, ignores the principle of public policy, that no man should be allowed to bargain for an advantage to arise from a destruction of life or property—in other words, to lay a wager that a particular person will die, or a particular property be burnt within a given period. A more equitable doctrine has prevailed, and it may now be regarded as settled that the insurer who pays the amount of the mortgage debt, or some part of it, is entitled to be subrogated to the rights of the mortgagee for his indemnity, and that he is entitled to an assignment of the rights of the assured, upon paying the full amount of the mortgage debt. This is put upon the analogy of the situation of the insurer to that of a surety;² and it might also safely rest upon the doctrine that upon an abandonment and payment, or upon a recovery as for a total loss, the insurers are entitled to subrogation in equity to all the rights and remedies which the assured has to the property which is not actually destroyed.³

⁹⁸ *Miller v. Harris*, 117 App. Div. 395; 102 N. Y. Supp. 604.

¹ *Shaw, C. J.*, in *King v. State Mutual F. Ins. Co.*, 7 Cush. (Mass.) 1.

² *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 359.

³ *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285; *Rogers v. Hosack's Ex'rs*, 18 Wend. 319; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 176; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire Ins. Co.*

§ 578. The right of subrogation is, however, an equitable one, and is only allowed when equity demands its exercise. It is only allowed in cases where the sum received by the insured does not go in reduction of the debt, and the insured might otherwise, notwithstanding the payment of the loss, proceed to collect the whole debt of the mortgagor. The utmost the insurers can claim is to be subrogated as to the amount paid by them to the right of the insured to collect the debt, irrespective of the sum received by him on the policy. It is a mere equity to be put in the place of the insured as to that sum, in regard to the bond and mortgage, whatever his rights may be. This equity does not arise out of the contract of insurance, but from all the circumstances of the case.⁴ So, where, although the contract as between the mortgagee and the insurers, may not provide for the insurance of any other than the interest of the mortgagee, still, if the premium be actually paid by the mortgagor, the insurers cannot demand an assignment of the mortgage, and the payment of loss will operate as a payment on account of the mortgage debt. The insurers cannot collect if the mortgagor could not do so, and the mortgagor would have an equitable claim upon the mortgagee for insurance procured at his expense.⁵

§ 579. Agreement for subrogation.—The obligation of the insurers is to be determined by the terms of the policy, and it is perfectly competent for them to stipulate for subrogation. So, where insurance was made of a mortgagor's interest, "loss, if any, payable to the mortgagee," and a stipulation was annexed to the contract such as has already been spoken of as a "mortgagee clause," and the insurance as to the mortgagor was rendered inoperative by a violation of a condition forbidding other insurance, the insurer was held entitled to subrogation on paying the mortgagee's claims.⁶

v. Boonier, 52 Ill. 442; Dick v. Ins. Co., 81 Mo. 103. The rule is different in Massachusetts, where a mortgagee may collect both from the mortgagor and the insurer. King v. State M. F. Ins. Co., 61 Mass. (6 Cush.) 456; Suffolk Fire Ins. Co. v. Boyden, 91 Mass. (9 Allen) 123. See also on this subject, White v. Brown, 56 Mass. (2 Cush.) 412; Ely v. Ely, 80 Ill. 532; Russell v. Southard, 12 How. (U. S.) 139; McIntyre

v. Plaisted, 68 Me. 363; Loudon v. Waddle, 98 Pa. St. 242.

4 Kernochan v. The N. Y. Bowery Fire Ins. Co., 17 N. Y. 428.

5 Hay v. Star Fire Ins. Co., 77 N. Y. 235; Kernochan v. The N. Y. Bowery Fire Ins. Co., 17 N. Y. 428.

6 Ulster Co. Savings Institution v. Leake, 73 N. Y. 161, rev'g Ulster Co. Savings Institution v. Decker, 11 Hun, 515; Phoenix Ins. Co. v. Floyd, 19 Hun, 287; Thornton v. Enterprise Ins. Co., 71 Pa. St. 234.

CHAPTER XIV

THE ASSUMING OF MORTGAGES

AGREEMENT TO ASSUME MORTGAGE.

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AGREEMENT TO ASSUME MORTGAGE.

§ 580. **Parol agreement to assume.**—When a person obligated to pay a mortgage debt conveys the premises upon which the mortgage is a lien, upon an agreement that the grantee shall, as part of the price, assume the payment of the mortgage debt, the contract of the grantee does not bind him as a guarantor for the payment of the debt of another person. The debt is his own debt contracted by him with his grantor, and constitutes a portion of the consideration for the estate upon which the mortgage is a charge, and the character of the obligation as an original undertaking is not changed by the fact that the payment is to be made to the mortgagee instead of to the vendor of the property.¹ The promise of the grantee is, therefore, not within the statute of frauds, but it stands upon the footing of a promise to pay for lands sold and conveyed, which can be enforced though it be not in writing.²

Where real estate is conveyed subject to a mortgage, it is not competent for the mortgagee to show that a parol agreement was made by which the grantee made himself personally holden for its payment, in contradiction of a written contract of sale which stipulates merely for a sale of the equity of redemption. Proof of such a parol agreement would conflict with the terms of the written contract, and is therefore not admissible on behalf of a person claiming under it.³

Where a grantee of two lots assumed payment of five mortgages

1 Ely v. McNight, 30 How. Pr. 97; Barker v. Bucklin, 2 Den. 45; Fish v. Dodge, 4 Den. 311; Murray v. Smith, 1 Duer, 412.

2 Thomas v. Dickinson, 12 N. Y. (2 Kern.) 364; Dorr v. Peters, 3 Edw. Ch. 132; Smith v. Truslow, 84 N. Y. 660; Tainter v. Hemmingway, 18 Hun, 458; Murray v. Smith, 1 Duer, 412; Minor v. Terry, 6 How. Pr. 208, 212; Sherman v. Willett, 42 N. Y. 146; Barker v. Bradley, 42 N. Y. 316; Remington v. Palmer, 62 N. Y. 31; Hebbard v. Haughian, 70 N. Y. 54; Arnot v. E. R. R. Co., 67 N. Y. 321. See also Warmouth v. Hatch, 33 Cal. 121; Wright v. Briggs,

99 Ind. 563; Bowden v. Kurtz, 37 Iowa, 239; Canfield v. Shear, 49 Mich. 313; 13 N. W. 605; Wilson v. King, 23 N. J. Eq. 150; Bolles v. Beach, 2 Zab. (N. J.) 680; Merri-man v. Moore, 90 Pa. St. 78. Under the Civil Code of California, § 2922, an oral agreement between the tenants in common of lands subject to a mortgage, that the interest of one shall be charged with the whole mortgage, and the interest of the other shall be charged with the whole debt, is of no effect. Porter v. Muller, 65 Cal. 512; 4 Pac. 531.

3 Selchow v. Stymus, 26 Hun, 145.

upon them, there being actually five on each, it was held that parol evidence was admissible to dispel the ambiguity.⁴

§ 581. Who bound by covenant.—Although the promise of a grantee to pay a mortgage is commonly expressed by a recital in the deed of conveyance, it may equally well be made in a written instrument between the grantor and grantee outside of the conveyance.⁵

And where a contract with a vendee states the terms of the mortgage and rate of interest, specific performance of the contract will be compelled, though the mortgage as recorded does not state these details, if they are in fact shown to be identical with those agreed upon.⁶ On the other hand though the terms of the mortgages are not stated in the contract the vendee is chargeable with notice of them as shown by the record and cannot refuse to take title because the contract does not specify them.⁷

A married woman is bound by a covenant to assume a mortgage contained in a conveyance to her.⁸

Where a party purchases real estate and assumes to pay one-half of certain mortgages thereon, he is a proper party to a suit to foreclose, and liable to a personal judgment for one-half of the mortgage debt.⁹

§ 582. Acceptance of conveyance containing covenant binds grantee.—While a parol promise by a grantee to assume and discharge a mortgage lien upon property conveyed to him would afford a perfect cause of action, the absence of any written evidence would be unusual, and the proof should be clear and convincing. The common and usual way in which the contract is evidenced is by inserting a recital in the deed of conveyance to the effect that the grantee assumes and agrees to pay the mortgage as part of the consideration therein expressed. This recital, coupled with the fact that the deed is accepted by the grantee, who takes and holds the estate which is granted by it, furnishes the most satisfactory evidence that he has adopted the seal of the

⁴ *Martindale v. Parsons*, 98 Ind. 174.

⁵ *Schmucker v. Sibert*, 18 Kans. 104; 26 Am. R. 765.

⁶ *Halpern v. Fisch*, 116 App. Div. 479; 101 N. Y. Supp. 1019.

⁷ *Feist v. Block*, 115 App. Div. 211; 100 N. Y. Supp. 843.

⁸ *Cashman v. Henry*, 75 N. Y. 103; 31 Am. R. 437; *Ballin v. Dil-laye*, 37 N. Y. 35; *Vrooman v. Turner*, 69 N. Y. 280.

⁹ *Logan v. Smith*, 70 Ind. 597.

grantor as his own, and he is estopped from denying that the recital is true.¹⁰

Where the grantee of a portion of mortgaged premises covenants to pay the mortgage upon the whole premises and to save the owner of the other portion harmless therefrom, the grantee not only becomes personally bound for the payment of the mortgage, but his portion of the land is chargeable primarily as the security.¹¹ And a grantee who by his deed has agreed to pay the mortgage on the premises cannot retain possession and at the same time avoid his obligation on the ground that the deed is invalid.¹²

The acceptance of a deed by an agent of the grantee, duly authorized to act for him, will be sufficient to bind him by its covenants.¹³

§ 583. Grantee not bound unless conveyance was accepted by him.

—Covenants on the part of the grantee in a deed are treated as his covenants, only upon the ground that the deed is accepted by him. By accepting the instrument, and thus taking the advantages which accompany it, he is presumed to have assented to its terms. Acceptance operates as an execution of the deed by the grantee, but until he has accepted it he is not bound by any of the recitals which it contains.¹⁴ If a conveyance of the mortgaged premises containing a covenant to assume the mortgage, is shown to have been executed and recorded, this is *prima facie* evidence of an acceptance by the grantee,¹⁵ but it is always competent to show

10 Bowen v. Beck, 94 N. Y. 86; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; 13 Am. R. 556, and cases cited; Comstock v. Drohan, 71 N. Y. 9, aff'g 8 Hun, 373; Wales v. Sherwood, 52 How. Pr. 413. See also Lewis v. Montgomery Mut. B. & L. Ass'n, 70 Ala. 276; Hancock v. Fleming, 103 Ind. 533; 3 N. E. 254; Ellis v. Johnson, 96 Ind. 377; Carley v. Fox, 38 Mich. 387; Hicks v. McGarry, 38 Mich. 667; Crawford v. Edwards, 33 Mich. 354; Lawrence v. Towle, 59 N. H. 28; Woodbury v. Swan, 58 N. H. 280; Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Sparkman v. Gove, N. J., 27 Alb. L. J. 33; Finley v. Simpson, 2 Zab. (N.

J.) 311; Davis v. Hulett, Vt., 33 Alb. L. J. 499.

11 Wilcox v. Campbell, 106 N. Y. 325; 12 N. E. 823; Jenks v. Quinn, 137 N. Y. 223; 33 N. E. 376.

12 Gifford v. Father Matthew T. & A. B. Soc., 104 N. Y. 139; 10 N. E. 39.

13 Fairchild v. Lynch, 42 N. Y. Super. (10 J. & S.) 265.

14 Van Horn v. Powers, 26 N. J. Eq. 257.

15 Jackson v. Perkins, 2 Wend. 308; Church v. Gilman, 15 Wend. 656; Gilbert v. The North Am. Fire Ins. Co., 23 Wend. 43; Jackson v. Phipps, 12 Johns. 418; Van Valen v. Schermerhorn, 22 How. Pr. 416; Wil-

that the conveyance has not been accepted. Any instrument which upon its face is regular and purports to be a deed of conveyance may be recorded, and if it is not in truth what it purports to be, it will not be aided by being engrossed by a recording clerk and put upon the files of a public office.¹⁶ A conveyance is usually beneficial to a grantee, and it is fair to presume, in the absence of evidence to the contrary, that it has been accepted by him, but it would be subversive of all principle to hold a nominal grantee concluded by acts which may be performed by the grantor without his knowledge, privity, or consent.¹⁷

§ 584. *Illustrations of the rule.*—Thus, where a grantee paid nothing for a conveyance, but consented that a deed might be made to him to accommodate the grantor, the title to remain in his name until a reconveyance should be requested, a covenant to assume was inserted and the deed was recorded without having been shown to the grantee. Subsequently, in conformity with the arrangement between the parties, the grantee, without receiving any valuable consideration, reconveyed the title, and thereafter it was sought to hold him on the covenant to assume. It was held that he was not bound.¹⁸

So, where a deed was executed and recorded by the owner of land in which the grantee was recited to have assumed payment of a mortgage thereon, and the grantee on being informed of what was done refused to accept the deed, but executed a retransfer of the title, it was held that by executing such reconveyance he did not recognize the validity of the deed himself, and did not become obligated by the covenant to assume.¹⁹

A married woman has also been held not to be liable on a covenant to assume mortgages in a deed accepted by her husband without her knowledge or authority.²⁰

Where a deed was made to a priest, who thereafter, in con-

sey v. Dennis, 44 Barb. 354; Lawrence v. Farley, 24 Hun, 293.

¹⁶ Blass v. Terry, 156 N. Y. 122; 50 N. E. 953; Jackson v. Perkins, 2 Wend. 308; Day v. Mooney, 6 T. & C. 382. See also Keller v. Ashford, 3 Mackey (D. C.) 444, rev'd, 133 U. S. 610.

¹⁷ Gifford v. Corrigan, 105 N. Y. 223; 11 N. E. 498; Jackson v. Richards, 6 Cow. 616.

¹⁸ Degermand v. Chamberlin, 22 Hun, 110.

¹⁹ Best v. Brown, 25 Hun, 223. See also Cordts v. Hargrave, 29 N. J. Eq. 446.

²⁰ Blass v. Terry, 156 N. Y. 122; 50 N. E. 953; Munson v. Dyett, 56 How. Pr. 333; Kell v. Greer, 19 W. Dig. 279. See also Culver v. Badger, 29 N. J. Eq. 74.

formity with the rules of his church, conveyed the property to his bishop, and his deed, reciting that the grantee assumed payment of a mortgage, was recorded, and the bishop never saw the deed or took possession of the property, it was held that he was not liable upon the covenant to assume.²¹

The presumption that a recorded deed was delivered, is repelled where it appears that the grantee never was in possession and that no claim was ever made under the deed.²²

Where a grantee has authorized another to deal in real estate in his name, he is liable on a covenant to assume contained in a deed accepted by his agent.²³

§ 585. **Holding stranger to the deed on covenant contained in it.**—Where the person purchasing real estate does so as the agent for another person, but takes the conveyance in his own name, an action on a covenant to assume a mortgage can be maintained against the actual covenantor only, and not against his principal.²⁴ And, in such a case, if the action is brought on a covenant made by the agent as such, an election to sue one will exonerate the other; both cannot be held.²⁵

On a like principle, a mortgagee cannot obtain a judgment for deficiency against a person not a party to a conveyance of land, on the ground that the grantee, in taking title and assuming the mortgage, acted as a member of a firm for the joint benefit of himself and the defendant, on an agreement to divide profits,²⁶ or on the ground that the defendant agreed with the grantee to pay a proportionate part of the mortgage.²⁷

Where a contract of purchase was made, one of the terms of which was that the purchaser was to assume the mortgage indebtedness, it was held that he was not released from this obligation by procuring the deed to be made to his wife instead of to himself.²⁸

²¹ Gifford v. McCloskey, 38 Hun, 350.

²² Knoles v. Barnhart, 71 N. Y. 474, aff'g 9 Hun, 443.

²³ Schley v. Fryer, 100 N. Y. 71; 2 N. E. 280.

²⁴ Tuthill v. Wilson, 90 N. Y. 423, 426; Briggs v. Partridge, 64 N. Y. 357; 21 Am. R. 617; Kiersted v. O. & A. R. R. Co., 69 N. Y. 345; 25 Am. R. 199. See also Beckham v. Drake, 9 M. & W. 95.

²⁵ Tuthill v. Wilson, 90 N. Y. 423, 428; Meeker v. Claghorn, 44 N. Y. 351. See also Addison v. Gaudassequi, 4 Taunt. 574; Curtis v. Williamson, L. R. 10, Q. B. 57.

²⁶ Williams v. Gillies, 75 N. Y. 197, rev'g 13 Hun, 422.

²⁷ Williams v. Gillies, 28 Hun, 175.

²⁸ Pike v. Seiter, 15 Hun, 402.

§ 586. **Conveyance subject to mortgage.**—There are many reasons why a clause may be inserted in a conveyance reciting mortgage incumbrances upon the property. It may be done for the purpose of qualifying the covenants for title,²⁹ or to impose a primary obligation upon a portion of the mortgaged premises for the payment of the whole or a specific portion of the debt;³⁰ or to preclude the grantee from defending against a mortgage on the ground of usury.³¹ But if there is no express contract imposing upon the grantee a personal duty to pay the mortgage debt, he acquires the equity of redemption merely, and thereafter owes nothing either to his grantor or to the mortgagee, other than not to commit waste, and to suffer the property to be sold when application is made for that purpose.³² In all of the cases in this State where a personal liability was imposed upon the grantee, it was in pursuance of his written or oral contract and agreement.³³

A class of early cases in the Pennsylvania courts sustained the notion that, where a conveyance was made "under and subject" to a certain mortgage "which is part of the consideration," a covenant would be implied, if not to pay the debt to the grantee, at least to indemnify the grantor.³⁴ But a statute passed in 1878 provided that the grantee should not be personally liable unless he shall expressly assume such liability by agreement in writing or condition in the conveyance.³⁵

In some States a clause in a conveyance to the effect that the premises are subject to a mortgage, the amount of which is deducted from or forms part of the purchase money, has been held to import an agreement on the part of the grantee to pay.³⁶

§ 587. **Language importing covenant to assume.**—The following

²⁹ *Collins v. Rowe*, 1 Abb. N. Cas. 97.

³⁰ *Hart v. Wandle*, 50 N. Y. 381; *Cherry v. Munro*, 2 Barb. Ch. 618; *Brewer v. Staples*, 3 Sand. Ch. 579; *Halsey v. Reed*, 9 Paige, 446.

³¹ *Hartley v. Harrison*, 24 N. Y. 170; *Freeman v. Auld*, 44 N. Y. 50.

³² *Smith v. Truslow*, 84 N. Y. 660; *Patton v. Adkins*, 42 Ark. 197.

³³ *Dorr v. Peters*, 3 Edw. Ch. 132; *Smith v. Truslow*, 84 N. Y. 660, 662; *Stebbins v. Hall*, 29 Barb. 524; *Collins v. Rowe*, 1 Abb. N. Cas. 97.

See also *Fiske v. Tolman*, 124 Mass. 254; 26 Am. R. 659.

³⁴ *Moore's Appeal*, 110 Pa. St. 433; 1 Atl. 593; 19 Alb. L. J. 257, and cases cited.

³⁵ Pamph. L. 205; Act of Jan. 12, 1878; *Purdon's Ann. Dig.* 1878, p. 2160, §§ 5, 6.

³⁶ *Townsend v. Ward*, 27 Conn. 610; *Heid v. Vreeland*, 30 N. J. Eq. 591; *Stevenson v. Black*, Saxt. 338; *Thayer v. Torrey*, 37 N. J. L. (8 Vroom) 339; *Tichenor v. Dodd*, 3 Green. Ch. 454.

have been held to be expressions importing an agreement to assume and pay: "Subject, however, to the assumption as a part of the consideration" of the conveyance, of the mortgage.³⁷ And again, "which said mortgage is assumed by the party of the second part, and the amount thereof constitutes part of the consideration of this conveyance and is deducted therefrom."³⁸ So of this, subject to a mortgage, etc., "which the said party of the second part hereby assumes and agrees to pay."³⁹ And where the language used was, "Subject, nevertheless, to a certain mortgage which the party of the *first* part assumes and agrees to pay as part of the consideration hereinbefore expressed," the word *first* was construed to mean *second*, and the grantee was held to be bound by the covenant.⁴⁰ The use of the word "assume" imports an agreement to pay.⁴¹

§ 588. **Language not importing covenant to assume.**—The following phrases have been held not to place the grantee under an engagement to pay the mortgage: "Subject, nevertheless, to the payment of one-eighth of a certain mortgage now on the premises."⁴² "Subject to the one-half part of the mortgage."⁴³ "Subject to a specified mortgage, which is part of the above-named consideration."⁴⁴

Where mortgages covered other land than that conveyed, the language was: "The above described property is alone to be holden for the payment of both the above debts," and "the above mortgages of \$15,000 which are part consideration of this deed." This was held not to impose any personal liability upon the grantee.⁴⁵

The words "under and subject" to a certain mortgage create no personal liability.⁴⁶

³⁷ Douglass v. Cross, 56 How. Pr. 330.

³⁸ Halsey v. Reed, 9 Paige, 446.

³⁹ Blyer v. Monholland, 2 Sand. Ch. 478.

⁴⁰ Fairchild v. Lynch, 42 N. Y. Super. Ct. (10 J. & S.) 265; 46 N. Y. Supr. (14 J. & S.) 1.

⁴¹ Schley v. Fryer, 100 N. Y. 71; 2 N. E. 280.

⁴² Collins v. Rowe, 1 Abb. N. Cas. 97; Stebbins v. Hall, 29 Barb. 524.

⁴³ Murray v. Smith, 1 Duer, 412.

⁴⁴ Equitable Life Ass. Sy. v. Bostwick, 100 N. Y. 628; Fiske v. Tolman, 124 Mass. 254; 26 Am. R. 659; Rapp v. Stoner, 104 Ill. 618; Walker v. Goldsmith, 70 Reg. 161.

⁴⁵ Hubbard v. Ensign, 46 Conn. 476.

⁴⁶ Girard Trust Co. v. Stuart, 86 Pa. St. 89; Moore's Appeal, 110 Pa. St. 433; 1 Atl. 593; 19 Alb. L. J. 257.

§ 589. **Extent of liability.**—A covenant to pay a certain mortgage “with interest thereon,” binds the grantee for back interest as well as for interest to accrue.⁴⁷

§ 590. **Form of action on covenant to assume.**—It needs no argument to show that a person claiming the benefits of a bargain ought equitably to bear the burdens which it imposes on him or, as was said in *Rogers v. Eagle Fire Ins. Co.* (9 Wend. 618), that “whoever takes an estate under a deed ought, in reason and equity, to be obliged to take it under the terms expressed in the deed,” but there has been much discussion as to the form of remedy where the evidence of an agreement to assume is contained in a conveyance which is not executed by the grantee. In Connecticut⁴⁸ and Massachusetts⁴⁹ assumpsit is held to be the proper remedy, while in New Jersey⁵⁰ and in this State⁵¹ the grantee is held liable as a covenantor.

§ 591. **Action at law by mortgagee on covenant to assume.**—The right of a mortgagee to enforce the covenant of a grantee of the mortgagor to assume the mortgage debt in an equitable action to foreclose, and to obtain a judgment for deficiency in such an action, is conceded in some States where the right to maintain an action at law upon such a covenant is denied.⁵² In this State, and in most of the others, a mortgagee can maintain an action at law on such a covenant on the broad ground that it is a promise made to a third person for his benefit.⁵³ This is true though the prop-

⁴⁷ *Smith v. Read*, 51 Conn. 10; *Sawyer v. Weaver*, 2 MacArthur (D. C.) 1; *Shanahan v. Perry*, 130 Mass. 460.

⁴⁸ *Hinsdale v. Humphrey*, 15 Conn. 432. So in District of Col.: *Willard v. Wood*, 4 Mackey (D. C.) 538.

⁴⁹ *Newell v. Hill*, 2 Metc. (Mass.) 180; *Nugent v. Riley*, 1 Metc. (Mass.) 117; *Goodwin v. Gilbert*, 9 Mass. 510; *Locke v. Horner*, 131 Mass. 93; but see *Dorn v. Harrahan*, 101 Mass. 398.

⁵⁰ *Finley v. Simpson*, 2 N. J. 311.

⁵¹ *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Thorp v. The Keokuk Coal Co.*, 48 N. Y. 253; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Belmont v.*

Coman, 22 N. Y. 438; *Trotter v. Hughes*, 12 N. Y. (2 Kern.) 74; *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, Paige, 433; *King v. Whitely*, 10 Paige, 465; *Binsse v. Paige*, 1 Keyes, 87. Holding that assumpsit is the remedy—*Rawson's Adm'x v. Copeland*, 2 Sandf. Ch. 251.

⁵² *Klapworth v. Dressler*, 13 N. J. Eq. (2 Beas.) 62; *Bissell v. Bugbee*, 8 Cent. L. J. 272; *Meech v. Ensign*, 49 Conn. 191; 44 Am. R. 225; *Bassett v. Brady*, 48 Conn. 224.

⁵³ *Burr v. Beers*, 24 N. Y. 178; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, aff'g 47 Barb. 439; *Campbell v. Smith*, 71 N. Y. 26, aff'g 8 Hun, 6. See also *Wormouth v. Hatch*, 33 Cal. 121; *Bowen v. Kurtz*, 37 Iowa, 239;

erty is located in another State. In the latter case the statute of limitations of this State controls.⁵⁴ It is, however, necessary to sustain such an action even upon this theory that the promise was made to a person obligated to pay the debt.⁵⁵ It has been held in other jurisdictions, aside from the doctrine of *Lawrence v. Fox*,⁵⁶ that if, for consideration, any one has promised to pay the mortgage debt, such promise may be availed of by the mortgagee in equity, for it is an asset incidental to the mortgage.⁵⁷

§ 592. Action by grantor against grantee on covenant to assume.

—As between the grantor and grantee a covenant to assume a mortgage upon property, contained in a conveyance of it, is a covenant of indemnity, and until it is determined that the property upon which the mortgage is a charge is not sufficient to pay the mortgage debt, an action by the grantor against the grantee is inequitable and cannot be maintained.⁵⁸ The liability of the grantee can only be enforced by the grantor after he has been compelled to pay some portion of the mortgage debt,⁵⁹ or after he has paid a judgment obtained against him for a deficiency,⁶⁰ or after he has become subrogated to the rights of the mortgagee by a voluntary payment.⁶¹

It is not necessary that the grantee shall have been a party to the action to foreclose, if he has parted with his interest in the property so that a title may be made without him; neither is it necessary for the grantor to give him notice of the proceedings in

Cooper v. Foss, 15 Neb. 515; 19 N. W. 506; *Urquhard v. Brayton*, 12 R. I. 169.

54 *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660; 26 N. E. 732.

55 *Vrooman v. Turner*, 69 N. Y. 280, 285. See *Wager v. Link*, 134 N. Y. 122; 31 N. E. 213.

56 20 N. Y. 268.

57 *Flint v. Winter Harbor Land Co.*, 39 Atl. 634 (Me.); *Crowell v. Currier*, 27 N. J. Eq. 152.

58 *Slauson v. Watkins*, 86 N. Y. 597; *Ayres v. Dixon*, 78 N. Y. 318; *Miller v. Winchell*, 70 N. Y. 437; *Burbank v. Gould*, 15 Me. 118. In Massachusetts and some other States it is held that a grantor has a cause of action against his grantee who

has assumed a mortgage which may be enforced for its full amount as soon as the mortgage is due, although he has not been called upon to pay any part of it. *Furnas v. Durgin*, 119 Mass. 500; 20 Am. R. 341; *Locke v. Homer*, 131 Mass. 93; 41 Am. R. 199; *Stout v. Folger*, 34 Iowa, 71; *Gregory v. Hartley*, 6 Neb. 356; *Wilson v. Stilwell*, 9 Ohio, 467; *Snyder v. Summers*, 1 Lea (Tenn.) 534.

59 *Halsey v. Reed*, 9 Paige, 446; *Dorr v. Peters*, 3 Edw. Ch. 132.

60 *Comstock v. Drohan*, 71 N. Y. 9, aff'g 8 Hun, 373.

61 *Ayres v. Dixon*, 78 N. Y. 318; *Mills v. Watson*, 1 Sweeny, 374. See also *Kinnear v. Lowell*, 34 Me. 299; *Baker v. Terrell*, 8 Minn. 195.

order to bind him by the deficiency as determined by the sale. The costs of the foreclosure and sale are a necessary expense incurred to apply the land in diminution of the obligation; and while a grantee, not a party to the foreclosure, incurs no personal liability for them, he is only entitled to be credited with such portion of the proceeds of the sale as remains after deducting them.⁶² But the liabilities of the purchasers of mortgaged premises, upon assumption clauses contained in their deeds, should not be determined in an action to foreclose a second mortgage, until the holder of the first mortgage has been made a party.⁶³

Where a mortgage for \$794 was made in consideration of \$494 in cash, and an oral promise to discharge a previous mortgage for \$300, it was held that a grantee of the mortgagor, with warranty as against the \$300 mortgage, could not maintain an action to compel such payment.⁶⁴

§ 593. **Other rights of action.**—A grantee under a conveyance purporting to be free of mortgage, where the only consideration is love and affection cannot, after payment, maintain an action against his grantor who has assumed the mortgage debt, upon the ground that, as his grantor was personally liable to pay the mortgage debt by virtue of the covenants contained in his deed, he is entitled to be subrogated to the remedy possessed by the mortgagee to charge him or his estate with the payment thereof. In such a case the land is the primary fund for the payment of the debt.⁶⁵ In general, a mortgagor, who conveys the mortgaged premises to one who does not assume the payment of the debt, although not technically a surety, will be treated as such, for the land is the primary fund for the payment of the debt.⁶⁶

The owner of land sold to satisfy a mortgage, may maintain an action to recover damages from a person who had assumed the mortgage, and whose default in payment has resulted in the loss of the property.⁶⁷

⁶² Comstock v. Drohan, 71 N. Y. 9, aff'd 8 Hun, 373.

⁶³ Rudolf v. Burton, 85 App. Div. 312.

⁶⁴ Miller v. Winchell, 70 N. Y. 437.

⁶⁵ Matter of Wilbur v. Warren,

104 N. Y. 192, rev'g 40 Hun, 203. See Adey v. Hallett, 3 App. Div. 308; 38 N. Y. Supp. 273.

⁶⁶ Cohen v. Spitzer, 144 App. Div. 104; 129 N. Y. Supp. 104.

⁶⁷ Wilcox v. Campbell, 35 Hun, 254, aff'd 106 N. Y. 325.

GROUNDS UPON WHICH THE MORTGAGEE MAY ENFORCE THE AGREEMENT TO ASSUME.

§ 594. The bargain to assume the payment of the mortgage, being made between the mortgagor and his grantee, the mortgagee is a stranger both to it and to its consideration. He is, in respect to it, in privity with neither of the parties to the contract, and yet he was, at an early day, held to be entitled to seize upon its advantages, and to pursue the person assuming the mortgage, and enforce the performance of his covenant. The reasons given for granting this relief have not always been uniform, and the following, which is taken from the examination of the authorities by RAPALLO, J., in *Garnsey v. Rogers* (47 N. Y. 233), will be found to be instructive:

“The liability of a grantee who accepts a conveyance, by the terms of which he assumes the payment of an existing mortgage upon the land, to respond directly to the mortgagee for a deficiency, in case of a foreclosure and sale, was first adjudged in this State in the case of *Halsey v. Reed* (9 Paige, 446). That adjudication was followed by others.⁶⁸ In these cases, the sole ground upon which the liability of the grantee was placed, was that as between the grantor and the grantee, the grantee by such an agreement became the principal debtor of the mortgage debt, and the grantor stood in the situation of surety for him. That the agreement of the purchaser was given for the indemnity of the vendor, who thus stood in the relation of surety for him, and that the mortgage creditor was entitled to the benefit of such indemnity, upon the principle that where a surety, or person standing in the situation of a surety, for the payment of the debt receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, though he did not even know of its existence.⁶⁹

§ 595. Doctrine of *King v. Whitely*.—“In *King v. Whitely* (10 Paige, 465), this was declared to be the principle of all the cases in which it was held that such a stipulation inured to the benefit of the mortgagee, and consequently it was held in that case, that when the grantor, in whose conveyance such a stipulation was

⁶⁸ Marsh v. Pike, 10 Paige, 597; Blyer v. Monholland, 2 Sandf. Ch. Cornell v. Prescott, 2 Barb. 16; 478.

⁶⁹ Curtis v. Tyler, 9 Paige, 432.

contained, was not himself personally liable for the mortgage debt, the holder of the mortgage acquired no right to resort to the grantee for payment.

“ In the case last sighted the chancellor distinctly repudiates the idea of any right being acquired by the holder of the mortgage, in case of such an agreement, on the ground that it was a contract made between the grantor and the grantee for the benefit of the mortgagee. And he refers to the older English cases which were cited in support of the doctrine, that if one man makes a promise to another for the benefit of a third, that third person may maintain an action on the promise, and shows that that principle applies only to third persons for whose special benefit the promise was intended, and that they rest upon the ground that the person obtaining the promise, and from whom the consideration proceeded, intended it for the benefit of the third person.

§ 596. **The case of *Russell v. Pistor*** (7 N. Y. [3 Seld.] 171) recognizes the ground of liability to be that stated by the chancellor, and in the case of *Trotter v. Hughes* (12 N. Y. [2 Kern.] 74.) the doctrine of *King v. Whitely* was adopted, and it was accordingly held that although accepting a deed containing such a stipulation, from a party personally liable to pay the mortgage, rendered the grantee liable to the mortgagee, yet the assumption of the mortgage, in a deed from a party not liable to pay it, did not make the grantee liable, inasmuch as the only ground of liability was that of equitable subrogation of the creditor to all securities held by the surety of the principal debtor, and the grantor, who was not personally liable for the mortgage debt, did not stand in the situation of surety.

§ 597. ***Burr v. Beers***.—“ Such was, in all the cases upon the subject, recognized as the sole ground of liability until the case of *Burr v. Beers* (24 N. Y. 178), which was an action at law, in which the mortgagee had recovered a personal judgment for the mortgage debt against a grantee, who had accepted a deed containing the usual clause whereby he assumed the payment of a mortgage which was a lien upon the premises. **DENIO, J.**, in delivering the opinion of the court, after referring to the previous cases on the subject, agrees that they do not proceed upon the notion of a contract between the owner of the equity of redemption and holder of the mortgage, but upon the principle that the under-

taking of the grantee to pay off the incumbrance is a collateral security obtained by the mortgagor, which inures, by an equitable subrogation, to the benefit of the mortgagee, and that the judgment under review could not be sustained on the doctrine of those cases, the action not being for a foreclosure of the mortgage, and the mortgagor not being a party. But, upon the authority of *Lawrence v. Fox* (20 N. Y. 268), the judgment was sustained on the broad principle that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on the promise."

§ 598. **Covenant to assume contained in mortgage.**—In *Garnsey v. Rogers* (47 N. Y. 233), from the opinion in which the foregoing examination of authorities is taken, a conveyance of the mortgaged property, absolute in its form, had been made by the mortgagor, but it was accompanied by an agreement for redemption by which it was shown that the whole transaction was intended as a security, and was therefore a mortgage, and nothing more. The conveyance contained a clause to the effect that the grantee thereby assumed payment of prior mortgages. Previous to the commencement of the foreclosure of the prior mortgages, the grantee reconveyed the premises to the mortgagor by a deed in which the mortgagor covenanted to reassume and pay the mortgages. The question then arose, upon these facts, as to whether the person who had for a time held the land as security for a debt, under a conveyance which was really a mortgage, could be held personally upon a covenant to pay prior incumbrances after the force and validity of the mortgage containing the covenant to assume had been destroyed by redemption and payment of the debt which it was given to secure. The grantee holding a security could not be held under the principle of the earlier cases, for if any relation of principal and surety existed, the mortgagor was the principal debtor, and was the person who would ultimately be obligated to pay the debts secured by the prior liens. Even if the agreement contained in the instrument were binding, it would only be so as a bargain by a junior mortgagee, to advance money to pay the debt of his grantor or mortgagor, which money, when advanced, he could collect under his mortgage.⁷⁰ It was also held that the grantee could not be held on the principle of *Burr v. Beers* (24 N. Y.

⁷⁰ *Western Ins. Co. v. The Eagle Fire Ins. Co.*, 1 Paige, 284.

178), because the contract was not made *for the benefit* of the holders of the prior incumbrance.

§ 599. In *Ricard v. Sanderson* (41 N. Y. 179), the facts were not materially different from those in *Garnsey v. Rogers* (*supra*), except that the conveyance containing the agreement to assume had not been cancelled payment of the debt which it was intended to secure; and the grantee, though he held only the rights of a mortgagee, was nominally the holder of the title at the time of the foreclosure of the prior incumbrance. In this case the court held the grantee liable for deficiency. There are other grounds of distinction suggested by RAPALLO, J., which were based upon doubts as to the facts in *Ricard v. Sanderson*, the report of which is rather meager, but the main difference is the one already pointed out. The principle which controls the two decisions seems to be, that an agreement made by a mortgagee as part of the inducement upon which he obtains the security, to protect the estate from being sacrificed under previous liens, may be valid, but that such an agreement is, in its nature, a part of the security, and is destroyed by redemption. It was said by RAPALLO, J.: ⁷¹ "A stipulation by a mortgagee in possession to keep down prior mortgages, taxes, etc., might perhaps be enforced by the mortgagor. But when the mortgage is cancelled, and the mortgagor is restored to the enjoyment of the property, such stipulations are extinguished with the mortgage." It will be noticed that in the later cases this distinction does not appear to have been deemed controlling.⁷²

§ 600. In *Pardee v. Treat* (18 Hun, 298),⁷³ a debtor in failing circumstances conveyed lands to certain creditors, the deed providing "that this conveyance is made subject to the mortgages, judgment and taxes, which are now a lien upon said premises, and which the said parties of the second part hereby assume and agree to pay as part of the consideration hereinbefore named." The expressed consideration was \$54,689, which was supposed to be the exact amount of the incumbrances and the grantees' claim, and the grantees thereupon gave to the wife of the grantor a writing, by which they agreed to convey said property to her on her paying them the said sum of \$54,689 by a day named, which she therein

⁷¹ 47 N. Y. 243.

⁷² *Pardee v. Treat*, 82 N. Y. 385; *Root v. Wright*, 84 N. Y. 72.

⁷³ Reversed 82 N. Y. 385.

agreed to do, and by which, also, they agreed she should have immediate possession. The action was brought by a judgment creditor to compel payment of his judgment upon the covenant in the deed, and it was urged in defense that the whole transaction constituted a mortgage, and the defendants were not liable, under the doctrine of *Garnsey v. Rogers*. The defendants were held liable at the General Term, and the case was sought to be distinguished from *Garnsey v. Rogers* in the fact that in that case the grantor might have reacquired the title to his property by paying the debt which the deed was made to secure, while in *Pardee v. Treat* the agreement of defeasance required payment as well of all other incumbrances. Another point of difference was thought to exist in the fact that in *Garnsey v. Rogers* the grantor had redeemed in pursuance of the condition of the defeasance before the suit was commenced. The Court of Appeals, however, reversed this ruling and held that the grantee was not bound by the covenant.⁷⁴ Judge ANDREWS, in giving the opinion of the court, remarks: "We think the true result of the decisions upon the effect of an assumption clause in a deed is, that it can only be enforced by a lienor, where in equity the debt of the grantor, secured by the lien, becomes, by the agreement between him and his grantee, who assumes the payment, the debt of the latter. On the other hand, if the assumption is in aid of the grantor, upon the security of the land, and not as between them, a substitution of the liability of the grantee for that of the grantor, or in other words, if, in equity as in law, the grantor remains the principal debtor, then the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee for any breach of the obligation is to the grantor only. Where the grantee is in equity bound to pay the debt as his own, then the covenant, according to the case of *Burr v. Beers* (24 N. Y. 178), may be treated as a promise made for the benefit of the lienor, and may be enforced in a legal action, although, even in that case, it would seem that the primary object of the covenant is to protect the grantor against his personal liability for the debt secured upon the land."⁷⁵

§ 601. In *Root v. Wright* (84 N. Y. 72), an absolute conveyance was executed and delivered containing a covenant to assume a

⁷⁴ *Pardee v. Treat*, 82 N. Y. 385.

⁷⁵ *Pardee v. Treat*, 385, 389, reversing 18 Hun, 298.

mortgage. It was in dispute as to whether the deed was given as security merely, or was an absolute conveyance, and no reconveyance or redemption had been had before the commencement of the action, which was brought to foreclose the mortgage and enforce the liability of the grantee. It was held that the grantee would not be liable if the conveyance were intended simply as a mortgage. If it was intended as a security merely, the covenant to assume and pay the plaintiff's mortgage was in effect an agreement between the mortgagor and the defendant that the latter should advance the amount of the prior lien upon the security of the land, and gave no right of action to the plaintiff, who was neither a party to the contract nor the person for whose benefit it was made.⁷⁶

§ 602. The rule in *Garnsey v. Rogers* has no application where the relation of debtor and creditor does not exist between the grantor and grantee. In *Campbell v. Smith* (71 N. Y. 26, aff'g 8 Hun, 6), one Burtis had purchased mortgaged real estate, received a deed from his grantor, which recited that the amount of the mortgage was deducted from the purchase price and the conveyance was subject thereto; and contained a covenant on the part of the grantee to pay the same. The name of the grantee was left blank and Burtis was authorized to insert the name of any person as grantee. Burtis thereafter, being indebted to the firm of which defendant was a member, agreed with the latter that he would insert his name in the deed, and that any profits arising from a sale or other disposition of the premises should be applied upon said indebtedness. Burtis thereupon inserted defendant's name as grantee in the deed, and had the same recorded with defendant's knowledge and consent. The mortgage was foreclosed without making defendant a party, and the action was afterward brought to recover the amount of the deficiency.

It was held that, as between the grantor and the grantee in the deed, the conveyance was absolute and unconditional. The defendant thereby acquired all the rights of a purchaser, and a part of the consideration for obtaining such rights was his covenant to pay the mortgage. The transaction with Burtis was collateral to the deed and affected only the parties to it, and the defendant was adjudged liable to pay.

Where a purchase-money mortgage contained a stipulation that

⁷⁶ *Root v. Wright*, 84 N. Y. 72, reversing 21 Hun, 344.

it should be "null and void" unless a certain other mortgage already given by the vendor upon the same property should be discharged, it was held that the provision was for the benefit of the vendees who gave the purchase-money mortgage, and if they did not insist upon it, the mortgagee in the prior mortgage could not.⁷⁷

EFFECT OF THE AGREEMENT WHERE THE GRANTOR IS NOT OBLIGATED TO PAY THE DEBT.

§ 603. When the courts abandoned the reasoning of the earlier cases, under which the right of a mortgagee to pursue a person who had assumed the payment of a mortgage was placed exclusively upon the equitable doctrine of the right of a creditor to seize hold of the securities obtained by a surety, and when they rested their decisions upon the broader ground of the legal obligation of a promise made by one person for the benefit of a third party, it is not strange that the earlier decisions were doubted.

§ 604. In *Thorp v. The Keokuk Coal Co.* (48 N. Y. 253), it was specially agreed by the mortgagor in the bond secured by the mortgage, that recourse should first be had to the mortgaged premises, and that he should be liable only for any deficiency that might remain after a foreclosure and sale. Subsequently to the execution of this bond and mortgage, the mortgagor sold and conveyed the mortgaged premises, and the purchaser, in and by the deed to him, assumed the payment of the mortgage. The mortgagee never resorted to his rights under the mortgage by foreclosure and sale, for the reason probably that the title was defective, but he brought an action against the purchaser on his covenant. It had been held in *King v. Whitely* (10 Paige, 465), and in other cases which followed,⁷⁸ that a purchaser from a person not bound for the payment of a mortgage, could not be held on an agreement to assume, because the grantor was not, in such a case, a surety, and the mortgage creditor could not take advantage of the bargains made by him. It was reasoned that since, if the grantee of a person not bound, would not be bound at all, therefore the grantee of a person bound conditionally would also be bound only conditionally. But the Commission of Appeals took a different view, and as it was said by

⁷⁷ *Pool v. Horton*, 45 Mich. 404; *Kern.*) 74; *Ford v. David*, 1 Bosw. 8 N. W. 59. 569.

⁷⁸ *Trotter v. Hughes*, 12 N. Y. (2

EARL, C.⁷⁹ "It matters not that the mortgagor was not liable to pay personally until after foreclosure, and that he was then liable only for deficiency. It would have made no difference if he had not been liable at all, the defendant having promised upon a sufficient consideration to pay the debt."

§ 605. Rule as settled.—After some little confusion and controversy, it is now settled in this State that a grantee is not bound upon a covenant to assume unless the grantor is bound, and that a promise to pay a mortgage debt cannot be enforced by a mortgagee unless made to a person who is obligated for its payment.⁸⁰ The same rule prevails in New Jersey.⁸¹

RELATIONS BETWEEN PARTIES AFTER AGREEMENT TO ASSUME.

§ 606. Mortgagor becomes surety after his grantee assumes.—As between the mortgagor and the person who has received the mortgaged estate from him under a promise to pay the mortgage debt, the purchaser is, upon the plainest principles of justice, the primary debtor. The land stands as the fund out of which the debt should, in the first instance, be satisfied;⁸² but if that be insufficient, it will rest upon the purchaser of the land to redeem the promise made by him on acquiring the estate, and to save the mortgagor harmless as against the debt. The land is the security both of the mortgagor and of his grantee as against their respective covenants, but the debt is that of the grantee, and the mortgagor stands merely as his surety.⁸³

⁷⁹ Thorp v. Keokuk Coal Co., 48 N. Y. 253, 257.

⁸⁰ Wager v. Link, 134 N. Y. 122; 31 N. E. 213; Vrooman v. Turner, 69 N. Y. 280; 25 Am. R. 195, rev'g 8 Hun, 78; Thayer v. Marsh, 75 N. Y. 340, rev'g 11 Hun, 501; Carter v. Holahan, 92 N. Y. 498; Simson v. Brown, 68 N. Y. 355; Williams v. Vangeisen, 76 App. Div. 592; 79 N. Y. Supp. 95; Jenkins v. Bishop, 136 App. Div. 104; 120 N. Y. Supp. 825; Munson v. Dyett, 56 How. Pr. 333; Cashman v. Henry, 5 Abb. N. C. 230; Smith v. Cross, 16 Hun, 487. See Durnheer v. Rau, 135 N. Y. 219; 32 N. E. 49. *Contra*, Meech v. Ensign, 49 Conn. 191; 26 Am. Rep. 660;

Dean v. Walker, Ill.; 28 Alb. L. J. 302; Birke v. Abbott, 103 Ind. 1; 1 N. E. 485; Merriman v. Moore, 90 Pa. St. 78.

⁸¹ Wise v. Fuller, 29 N. J. Eq. 257; Norwood v. De Hart, 30 N. J. Eq. 412.

⁸² Gottschalk v. Jungmann, No. 1, 78 App. Div. 171; 59 N. Y. Supp. 551; Mutual Life Ins. Co. v. Hall, 31 App. Div. 574; 52 N. Y. Supp. 404, aff'd 166 N. Y. 595; 59 N. E. 1127; Sinking Fund Com'rs v. Peters, 32 N. J. Eq. 113.

⁸³ Rubens v. Prindle, 44 Barb. 336; Tripp v. Vincent, 3 Barb. Ch. 613; Jumel v. Jumel, 7 Paige, 591; Halsey v. Reed, 9 Paige, 446; Marsh

§ 607. Results of mortgagor's rights as surety.—Under these circumstances the mortgagor may be released by the mortgagee without in any way impairing the mortgage security, or the mortgagor may acquire the mortgage debt by assignment, and may enforce it both as against the land and as against his grantee.⁸⁴ But, on the other hand, if the mortgage be assigned to the person who has assumed it, he being the person equitably chargeable with its payment, it thereupon becomes satisfied, and cannot thereafter be enforced, even in the hands of a *bona fide* purchaser.⁸⁵ So, where the mortgagor conveys only a part of the mortgaged estate, and the purchaser retains enough of the purchase money to satisfy the entire mortgage, and agrees to pay it, the same rule prevails, and an assignment of the mortgage to such purchaser will operate as a payment and discharge.⁸⁶ A release of the purchaser who has assumed the mortgage debt will discharge the mortgagor.⁸⁷ And where, after maturity, the mortgagor requests the mortgagee to foreclose and the latter does not, the former is thereafter relieved from liability for any deficiency arising on the sale to the extent of the depreciation resulting from delay.⁸⁸

The principle that the person purchasing the land and assuming the mortgage debt, becomes the primary debtor, and the mortgagor his surety, will operate to release the mortgagor if, without his consent, the owner of the land and the owner of the mortgage agree to vary the terms of the security by cancelling any right of the debtor which may be regarded as of any value to him, as by striking out a clause which permits the mortgagee to demand a release of part of the land on paying a proportionate amount of the debt.⁸⁹

The mortgagor whose grantee has covenanted to discharge the mortgage debt, may also seek the aid of a court of equity to compel a sale of the land in satisfaction of the demand, and to procure a personal judgment on the covenant for any deficiency;⁹⁰ but this

v. Pike, 10 Paige, 595; Cornell v. Prescott, 2 Barb. 16; Blyer v. Monholland, 2 Sandf. Ch. 478; Ferris v. Crawford, 2 Den. 595; Wales v. Sherwood, 52 How. Pr. 413; Comstock v. Drohan, 71 N. Y. 9, aff'd 8 Hun, 373; Bowne v. Lynde, 91 N. Y. 92. See also Smith v. Ostermeyer, 68 Ind. 432.

⁸⁴ Bentley v. Vanderheyden, 35 N. Y. 677.

⁸⁵ Kellog v. Ames, 41 Barb. 218; Ely v. McNight, 30 How. Pr. 97.

⁸⁶ Russell v. Pistor, 7 N. Y. (3 Seld.) 171.

⁸⁷ Knoblock v. Zochwetzke, 1 N. Y. St. Repr. 238.

⁸⁸ Gottschalk v. Jungmann, No. 1, 78 App. Div. 171; 59 N. Y. Supp. 551.

⁸⁹ Paine v. Jones, 14 Hun, 577.

⁹⁰ Marsh v. Pike, 10 Paige, 595; 1 Sand. Ch. 210; Cornell v. Prescott,

can only be done after request made of the grantee that he pay the debt, and of the mortgagee to permit a foreclosure in his name.⁹¹ And the right of a mortgagor to recover the amount of a deficiency judgment paid by him is not affected by a secret agreement between the mortgagee and grantee that no deficiency judgment shall be entered against the latter.⁹²

The effect upon the personal liability of the mortgagor of an extension of time to his grantee, is considered in a previous chapter of this work.⁹³

§ 608. Mortgagor not relieved by covenant of his grantee.—The liability of the original mortgagor to the mortgagee is not, in the absence of a release by the mortgagee, or some inequitable act of the mortgagee which operates as a release, in any degree impaired by the fact that a grantee of the mortgagor has assumed the mortgage.⁹⁴

Although the mortgagor may, by conveying to a third person and taking his covenant of indemnity, acquire some of the rights of a surety, the actual relation of debtor and creditor between the mortgagor and mortgagee cannot be destroyed by any act of the mortgagor alone, where the mortgage is given to secure the bond of the mortgagor. The courts have gone no further than to hold that, in such cases, the relation of creditor and of principal debtor is so far affected that the mortgagee is bound, after notice of the equitable rights of the mortgagor, as between himself and his vendee, to respect them, and do no act to their prejudice; and when he forecloses, the equities of the mortgagee will be protected in the order of sale. But the mortgagee may sue upon the bond in the first instance, notwithstanding the transfer of the land. In *Marsh v. Pike* (10 Paige, 595), it was held that where a vendee of the mortgaged premises had assumed the payment of the mortgage, the mortgagor could not compel his creditor to foreclose, where there was no good reason why he did not pay his bond according to his agreement, and take an assignment of the bond and mortgage,

2 Barb. 16. See also *Abell v. Coons*, 7 Cal. 105.

⁹¹ Per DANFORTH, J., in *Slausen v. Watkins*, 86 N. Y. 597, 602.

⁹² *Hyde v. Miller*, 45 App. Div. 396; 60 N. Y. Supp. 974.

⁹³ See *ante*, § 228.

⁹⁴ *Connecticut Mut. Life Ins. Co. v. Tyler*, 8 Biss. (U. S. C. C.) 369; *Kelso v. Fleming*, 104 Ind. 180; 8 N. E. 830; *Davis v. Hardy*, 76 Ind. 272; *Mechanics' Savings Bank v. Goff*, 13 R. I. 516.

and proceed against the land and the subsequent grantees thereof, for his indemnity; but that he could proceed in equity to compel such grantees, as to whom he stood in the situation of a mere surety, to discharge the debt for his protection.⁹⁵

§ 609. The mortgagor may protect himself from depreciation in value of the property arising from decay, the accumulation of taxes, or other causes, by requesting the mortgagee to enforce his security.⁹⁶ But this request may be answered by bringing an action on the bond, and it is, to say the least, doubtful whether the mortgagor thus situated has any remedy except to protect himself by watching the security; and if he finds that it is becoming impaired by lapse of time and the accumulation of interest and taxes, to take the steps pointed out in *Marsh v. Pike (supra)*. It is very clear, however, that, in the absence of notice of any change in the position of the mortgagor, and of any request to foreclose, a mortgagee out of possession may rely upon the personal liability of his debtor, and is not bound to look after or protect the mortgage premises; and that if he forecloses the mortgage, the debtor is entitled to credit only for the net proceeds of sale realized by his creditor, after the deduction of all liens for taxes, etc., and remains liable for the deficiency.⁹⁷

A mortgagee out of possession, in the absence of any notice of a change in the position of the mortgagor and of any request to foreclose, may rely upon the personal liability of his debtor, and is not bound to look after or protect the mortgaged premises. The debtor is entitled to credit only for the net proceeds of the mortgaged premises after deducting all liens for taxes, etc., and is liable for any deficiency, notwithstanding the fact that his grantee had assumed the payment of the debt and the mortgagor had not been diligent in enforcing his mortgage.⁹⁸

⁹⁵ See remarks of RAPALLO, J., in *Marshall v. Davies*, 78 N. Y. 414; *Young v. Hawkins*, 74 Ala. 371.

⁹⁶ *Remsen v. Beekman*, 25 N. Y. 552, 557; *Russell v. Weinberg*, 4 Abb. N. C. 139; 16 Alb. L. J. 164; *Colgrove v. Tallman*, 67 N. Y. 95; *Clark v. Sickler*, 64 N. Y. 231. See *ante*, §§ 223 to 239.

⁹⁷ Per RAPALLO, J., in *Marshall v. Davies*, 78 N. Y. 414, 422, rev'g 16 Hun, 606; *Mutual Life v. Davis*, 44 Super. Ct. 173; *Fleischauer v. Doellner*, 60 How. Pr. 438.

⁹⁸ *Marshall v. Davies*, 78 N. Y. 414, rev'g 16 Hun, 606.

DEFENSES TO ACTIONS ON COVENANTS TO ASSUME MORTGAGES.

§ 610. **Mortgagee cannot enforce a void covenant.**—There is no theory under which the holder of a mortgage can compel the purchaser of the mortgaged estate to respond personally for the payment of the mortgage debt unless such purchaser has made a binding agreement to do so. When a covenant to assume is inserted in a conveyance from the mortgagor, the mortgagee cannot enforce it unless the mortgagor could do so, since they must both claim under the same contract, and any defense which would be proper as between the parties to the deed, would also be proper in an action brought by the mortgagee.¹

§ 611. **In all cases it is quite material** to show that the grantee has really assumed the mortgage and promised to pay it. The mere fact that a conveyance of land is made subject to an outstanding mortgage, creates no personal liability on the part of the purchaser to pay it,² and the reciting and describing of the mortgage in the conveyance raises no presumption of a promise to pay, since a description of the mortgage may very properly be inserted to qualify the covenants as to title.³ The law does not raise such an obligation where none is in terms expressed, but, on the other hand, precise and formal words are unnecessary, and any language in the deed which imports a promise on the part of the grantee to pay the debt, will be sufficient to hold him. "As in all other cases of contract, the inquiry is, What was the intention of the parties?"⁴ And parol evidence is admissible to apply a covenant in the deed to the mortgage in order to effectuate the intention of the parties as where by mistake the mortgage is not in all details correctly described in the deed.⁵

§ 612. **The same defenses also exist** against such covenants as against other promises. Thus, where an administrator of an in-

¹ Flagg v. Munger, 9 N. Y. (5 Seld.) 483; Judson v. Dada, 79 N. Y. 373.

² Hamil v. Gillespie, 48 N. Y. 556, 559; Fairchild v. Lynch, 42 Supr. Ct. (10 J. & S.) 265.

³ Minor v. Terry, 6 How. Pr. 208; 1 Code R. N. S. 384; Murray v. Smith, 1 Duer, 412; Tillotson v. Boyd, 4 Sand. 516; Binsse v. Paige, 1

Keyes, 87; Belmont v. Coman, 22 N. Y. 438; Collins v. Rowe, 1 Abb. N. Cas. 97, and note at p. 98.

⁴ Per COMSTOCK, Ch. J., in Belmont v. Coman, 22 N. Y. 438, 439; Rawson, Adm'r, v. Copeland, 2 Sand. Ch. 251.

⁵ New York Life Ins. Co. v. Aitkin, 125 N. Y. 660; 26 N. E. 732.

testate who had assumed payment of a mortgage caused the usual publication of notice for proof of debts to be made, and, on failure to receive any notice of claim for the mortgage debt, distributed the personal estate, it was held that this was proper and that the administrator was not liable to any decree for deficiency.⁶

§ 613. **Covenant to assume inserted by fraud or mistake.**—The assuming clause contained in a conveyance is evidence of an agreement, but it is no more conclusive than other contracts which are put into writing and executed by parties under their seals. It may therefore be set aside for fraud, or corrected because it was inserted by mistake and does not express the real agreement of the parties. When the agreement is sought to be enforced in an action to foreclose the mortgage, it is proper to raise the question of fraud or mistake in defense. It was alleged in *Ricard v. Sanderson* (41 N. Y. 179), that the agreement on the part of the grantee was inserted in the deed by mistake, and although the plaintiff succeeded, there is no intimation that the defense was an improper one.

In *Kilmer v. Smith* (77 N. Y. 226), a contract of purchase was executed which did not contemplate any stipulation to assume the mortgage liens. In the deed which was tendered by the grantor, and received and accepted by the grantee, without inspection, was a covenant on the part of the grantee to pay the mortgage debts. The action was brought to have this clause stricken from the deed, which relief was granted. In affirming the judgment the court placed its decision upon the ground that inserting the covenant constituted a fraud. Numerous other cases also sustain the rule that a mortgagee can have no advantage from a covenant which is invalid between the parties to the deed because inserted by fraud or mistake.⁷

The fact that the covenant in the deed importing an agreement to assume is inserted in an unusual part of the instrument has been thought to be material to the question as to whether it was so inserted with the knowledge or approval of the grantee.⁸

⁶ Mutual Benefit Life Ins. Co. v. Howell, 32 N. J. Eq. 146.

⁷ Albany City Savings Institution v. Burdick, 87 N. Y. 40, rev'g 20 Hun, 104; Dey Ermand v. Chamberlain, 88 N. Y. 658; Smith v. Truslow, 84 N. Y. 660; Trustees of Northern Dispensatory of N. Y. v.

Merriam, 59 How. Pr. 226; Real Estate Trust Co. v. Balch, 45 Supr. Ct. (13 J. & S.) 528. See also Parker v. Jeaks, 36 N. J. Eq. 398; Randolph v. Wilson, 38 N. J. Eq. 28. ⁸ Bull v. Titworth, 29 N. J. Eq. 73; Culver v. Badger, 29 N. J. Eq. 74.

If the deed comes from the possession of the grantee, containing the agreement to assume the mortgage, this throws upon him the burden of proving that the clause was interpolated and that he did not, in fact, agree to pay the mortgage.⁹

An innocent purchaser for value before maturity of the mortgage and the indebtedness secured by it, has a right to rely upon a recital in a deed from the mortgagor to his grantee by which the latter "assumes and agrees to pay" the mortgage incumbrance, although such recital was in fact inserted by mistake and without the knowledge of the parties.¹⁰

§ 614. **Failure of consideration for covenant.**—Where a deed containing a covenant to assume a mortgage was set aside for fraud, and it was contended on the part of the grantee that such a judgment would leave him liable to the mortgagee, it was stated by the court that no such result would follow. The judgment declaring that there was no effectual contract, and therefore no valid assumption of the mortgage, would bind both parties and privies; and the mortgagee, who had no right except through the promise to the mortgagor and dependent wholly upon it, and could only claim through it, would be bound, if not by the judgment, at least by the effect of the judgment in annulling the whole transaction.¹¹ Upon a like principle, where a purchaser who had assumed a mortgage was ejected by a title paramount to that of his grantor, it was held that the judgment in ejectment determined that no title passed by the deed, that the land was not transferred, and, as a consequence, that no consideration for his promise to the grantor remained, and so he never became liable.¹²

So a contract whereby one agreed to purchase a mortgage and credit the mortgagor with any difference between the sum due and the purchase price, and to hold the mortgage until the mortgagor paid the purchase price, is void for lack of consideration if the mortgagor parted with no value and assumed no obligation not already binding upon him as mortgagor and there was not trust or agency between the parties.¹³

⁹ *Blyer v. Monholland*, 2 Sand. Ch. 478.

¹⁰ *Hayden v. Snow*, 9 Biss. (U. S. C. C.) 511.

¹¹ Per FINCH, J., in *Crowe v. Lewin*, 95 N. Y. 423, 427.

¹² *Dunning v. Leavitt*, 85 N. Y. 30; 39 Am. R. 617, rev'g *Dunning v. Fisher*, 20 Hun, 178.

¹³ *Jenkins v. Bishop*, 136 App. Div. 104; 120 N. Y. Supp. 825, modifying 62 Misc. R. 87; 115 N. Y. Supp. 1011.

§ 615. **Eviction by paramount title.**—A failure of title in the grantor will not be sufficient to constitute a defense to the grantee when sued by a mortgagee on a covenant to assume and pay a mortgage unless it can be shown that the grantee has been honestly and without collusion evicted from the land by a paramount title.¹⁴ This principle is analogous to that which holds a purchaser of land for the full purchase money, notwithstanding the title may be incumbered, unless the purchaser has been evicted or has discharged the incumbrance.¹⁵

Upon eviction under paramount title the consideration for a covenant to assume wholly fails, and covenants of title in the deed of the grantor cannot be regarded as a consideration for such a covenant.¹⁶

A decree of foreclosure and sale amounts to an eviction in equity; and so, where a grantor conveyed with warranty and a covenant for quiet enjoyment, and there was a mortgage on the property which was afterward foreclosed, it was held that the grantee could recover in assumpsit the money paid in discharging the mortgage.¹⁷

Where a conveyance recited an agreement to assume a mortgage, but omitted to describe the property intended to be conveyed, it was held that an action by the mortgagee to reform the conveyance could not be sustained, and no personal judgment could be obtained against the grantee on the covenant.¹⁸

§ 616. **Grantor may release from covenant to assume.**—It has been questioned as to whether, after a conveyance has been executed and delivered, in which the grantee assumes payment of the mortgage debt, the grantor may release the grantee from the personal obligation which he thus takes upon himself. In *Hartley v. Harrison* (24 N. Y. 170), land which was incumbered by three mortgages, two of which had been executed upon a usurious con-

¹⁴ *Dunning v. Fisher*, 20 Hun, 178, rev'g 85 N. Y. 30 on another point.

¹⁵ *York v. Allen*, 30 N. Y. 104; *Curtis v. Bush*, 39 Barb. 661; *Sandford v. Travers*, 7 Bosw. 498; *Bumpus v. Platner*, 1 Johns. Ch. 218; *Abbott v. Allen*, 2 John. Ch. 519; *Gouverneur v. Elmendorf*, 5 John. Ch. 79; *Grant v. Tallman*, 20 N. Y. 191.

¹⁶ *Dunning v. Leavitt*, 85 N. Y.

30, 34, rev'g 20 Hun, 178; *Tallmadge v. Wallace*, 25 Wend. 117. See also *Knapp v. Lee*, 3 Pick. (Mass.) 452; *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Trask v. Vinson*, 20 Pick. (Mass.) 105.

¹⁷ *Hunt v. Amidon*, 4 Hill, 345; 40 Am. Dec. 283; *Cowdrey v. Coit*, 44 N. Y. 382.

¹⁸ *Talbot v. Berkshire Co.*, 80 Ind. 434.

sideration for a loan of money, was conveyed subject to said mortgages, and the grantee also assumed and agreed to pay them. An action was commenced to foreclose these mortgages, in which the defense of usury was interposed. After issue was joined in the cause, the grantor and grantee exchanged releases to each other of the covenants made by them respectively, and also covenanted that the agreement contained in the deed in respect to the mortgages was annulled, and that such conveyance should have the same effect as if such agreement was not contained therein. It was held both at the General Term and in the Court of Appeals that this release did not operate to allow the defendants to interpose the defense of usury and thereby relieve the land from the lien of the mortgages. The General Term also held that the release was effectual to discharge the defendant from his covenant to assume, but the Court of Appeals expressly disclaimed any intention to pass upon this question. MASON, J., contended that the liability when once created could not be released by any one except the mortgagee, and COMSTOCK, Ch. J., in a dissenting opinion took the opposite view.

In *Stephens v. Casbacker* (8 Hun, 116), the same question was presented, and the General Term of the Fourth Department affirmed the right of the grantor to release his grantee from his agreement so far as his personal liability was concerned.¹⁹

In *Devlin v. Murphy* (56 How. Pr. 326; 5 Abb. N. Cas. 242), a release executed by the grantor in pursuance of an agreement contemporaneous with the giving of the deed containing the covenant to assume, was held to be sufficient.²⁰

§ 617. Grantor may not release.—In *Douglas v. Wells* (18 Hun, 88), it was held by a divided court in the Third Department, in the face of the above decision, that where the grantee by an absolute conveyance of land assumes and agrees to pay a mortgage thereon given by his grantor, an absolute and irrevocable obligation is thereby created in favor of the mortgagee which cannot be affected by any act or agreement of the mortgagor and grantor

¹⁹ Similar rule applied, *Carnahan v. Tousey*, 93 Ind. 561; *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496; *O'Neil v. Clark*, 33 N. J. Eq. 444; *Laing's Ex'r v. Byrne*, 34 N. J. Eq. 52.

²⁰ See also *Judson v. Dada*, 79 N. Y. 373; *Flagg v. Munger*, 9 N. Y. 583. See also *Gaffney v. Hicks*, 124 Mass. 301.

to which the mortgagee does not assent. A similar doctrine was also held in *Whiting v. Gearty* (14 Hun, 498), by a divided court in the First Department, and by the Superior Court at Special Term in *Ranney v. McMullen* (5 Abb. N. Cas. 246).²¹ In more recent cases decided in the Court of Appeals this doctrine may be said to be established.²²

§ 618. **Either side of this discussion** may have plausible reasons urged in its support. On the one hand it is argued that it is difficult to see on what principle, if the grantor and the grantee were competent to make such a contract, they were not likewise competent to change or rescind the same, and in reply it may be said that it is a curious proposition that after a cause of action has once been created in favor of one person, it may be released and discharged by another.

§ 619. **Rule in New Jersey as to release of covenant.**—In New Jersey it is held that an agreement to assume and pay a mortgage contained in a deed is cancelled by a reconveyance in which the original grantor again assumed the debt.²³ It is there determined that a stipulation in a deed of conveyance *inter partes* that the grantee shall assume and pay a mortgage on the premises, is a contract with the grantor simply for his indemnity and not a contract with the mortgagee; that the right of a mortgagee to a decree for the deficiency against a purchaser who has assumed the mortgage does not arise from any vested right in the mortgagee, by virtue of the stipulation of the grantee with the grantor, but that it rests merely on the doctrine of the courts of equity that a creditor is entitled to any security remaining in the hands of one who stands in the position of a surety for the debt, and that he may proceed directly against the person ultimately liable in order to avoid circuitry of action; and that the liability of the purchaser to the grantor having been extinguished by the reconveyance, the purchaser does not remain liable to the mortgagee. The contract of

²¹ Same rule applied, *Ellis v. Johnson*, Trustee, 96 Ind. 377; *Bassett v. Bradley*, 48 Conn. 224; *Bay v. Williams*, 112 Ill. 91; 54 Am. R. 209. See also as to this controversy, *Simson v. Brown*, 6 Hun, 251; *Kelly v. Roberts*, 40 N. Y. 432; *Durham v. Bischoff*, 47 Ind. 211.

²² *New York Life Ins. Co. v.*

Aitkin, 125 N. Y. 660; 26 N. E. 732; *Gifford v. Corrigan*, 117 N. Y. 257; 22 N. E. 756.

²³ *Laing v. Byrne*, 34 N. J. Eq. 52; *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital of St. Barnabas*, N. J. Eq. 650; *Young v. Trustees for the Support of Public Schools*, 31 N. J. Eq. 290.

indemnity having been extinguished without fraud by the parties to it, the mortgagee is adjudged not to be entitled to a decree for deficiency founded upon it.

So, in the same State, a *bona fide* release of an assumption of a mortgage verbally agreed upon between the mortgagor and his grantee, has been held to be sufficient to discharge the grantee from his personal liability, even though this was done after the commencement of a suit to foreclose the mortgage, the parties to the release not having knowledge of the existence of such suit and the consideration for the release being paid.²⁴ And where before the mortgage fell due the purchaser reconveyed to the mortgagor, who by his deed assumed the mortgage, the holder of the mortgage having become the owner of it before the covenant of assumption, without reliance upon it as part of his security, and his conduct not appearing to have been in the slightest degree influenced by it, this was held to operate as a release of the purchaser's liability under his covenant of assumption.²⁵

But a release of a grantee's assumption of a mortgage debt given by an insolvent grantor after notice of foreclosure without consideration, and for the sole and admitted purpose of defeating the mortgagee's claim for deficiency, is void in equity.²⁶

²⁴ O'Neil v. Clark, 33 N. J. Eq. 444.

²⁵ Crowell v. Currier, 27 N. J. Eq. 98.

²⁶ Trustees, etc., v. Anderson, 30 N. J. Eq. 366. See also New York Life Ins. Co. v. Aitkin, 125 N. Y. 660; 26 N. E. 732.

CHAPTER XV

MARRIED WOMEN

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POWER TO MORTGAGE THEIR LANDS PRIOR TO 1884¹

§ 620. At common law.—A married woman had, at common law, no capacity to make contracts. She could, indeed, possess no personal property with which to satisfy debts when created by her, and her rights in her real estate were exceedingly limited; the rents belonged to her husband during her life, and she had no power to convey by deed without his consent.² The rule in the courts of equity was different, and, in them, the right of a married woman to dispose of her own property was, through the medium of trusts, recognized and enforced. Trusts for the separate use of married women were a marked, although a beneficent, innovation upon the rules of the common law; but when courts of equity

¹ On account of statutory enactments, this discussion is now of historical interest only. For the present law see § 633.

² *McIlvaine v. Kadel*, 30 How. Pr. 193.

sustained their validity and recognized the wife's estate under them, it seemed to be a necessary result that she should have the power of disposition; and accordingly the power was conceded. The doctrine was, therefore, established that a married woman might dispose of or charge her estate in any manner not conflicting with the instrument under which she acquired it. She might be restrained by the provisions of the trust deed or instrument; but if not so restrained she acted as a *feme sole* in the disposition of her separate estate.³

§ 621. The usages and laws of the colony of the State of New York relaxed the harshness of the rules of the common law in its treatment of married women, and the tendency has been to enlarge their powers of disposition over their property.⁴ The statutes passed in this State "for the more effectual protection of the rights of married women,"⁵ did not remove their legal disability to contract, which remained as at common law; but a married woman might, as incidental to the perfect right of property and power of disposition which she took under the statutes, charge her estate for the purposes and to the extent which the rule of equity, before their passage, sanctioned in reference to separate estates.⁶ The primary purpose of those acts was to enable every married woman to hold property in her own right without the intervention of trusts or marriage settlements.⁷ To the extent which it was necessary for her to hold and enjoy her separate property, her acts, in relation to it, were binding upon her and upon it, but where a contract was made by a married woman which did not concern her separate estate, and was not upon its credit, it was void, just as it was at common law, except for the law of 1884.⁸

§ 622. By laws of 1849, Ch. 375, it was declared that any married woman might convey and devise real estate and personal property and any interest and estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she

³ Dyett v. Central Trust Co., 140 N. Y. 54; 35 N. E. 341; Yale v. Dederer, 18 N. Y. 265, 269.

⁴ The Albany Fire Ins. Co. v. Bay, 4 N. Y. (4 Comst.) 9.

⁵ Laws of 1848, c. 200; Laws of 1849, c. 375; Laws of 1860, c. 90; Laws of 1862, c. 172.

⁶ Dyett v. Central Trust Co., 140 N. Y. 54; 35 N. E. 341; Yale v. Dederer, 18 N. Y. 265, 271.

⁷ Yale v. Dederer, 18 N. Y. 272, 278; 22 N. Y. 451; Buckley v. Wells, 33 N. Y. 522.

⁸ See § 625.

were unmarried. Under this provision it was held that, not only might a married woman convey her property without her husband's consent, but also that her conveyance was valid without any private examination by the officer taking the acknowledgment,⁹ and that the same rule applied both to mortgages and to absolute conveyances.¹⁰

§ 623. Under these statutes where a charge was expressly created and imposed by a married woman upon her separate estate, though for a purpose not beneficial to her separate estate, or even for the sole benefit of her husband, aside from statute she was bound in equity by the obligation which she thus deliberately chooses to assume.¹¹

A mortgage executed by a wife on her separate estate to secure a debt of her husband for money embezzled by him was not void for duress, though executed to prevent his conviction and imprisonment.¹² And where a deed was in fact a mortgage, and the grantee upon payment of the amount secured, conveyed to the grantor's wife who in turn conveyed to her husband, the grantor, her conveyance to her husband was not rendered void by the common-law disability of a wife to convey land to her husband, because her conveyance was operative simply to discharge the mortgage lien of record.¹³ But an indorsement of a promissory note by a married woman by its terms charging her separate estate with its payment, was held not to be a mortgage in any sense, and did not create a specific lien.¹⁴

§ 624. Before act of 1860.—It was said in *Knapp v. Smith* (27 N. Y. 279), that a sale of real estate to a married woman would be valid if the vendor would take the risk of collecting the price,

⁹ *Yale v. Dederer*, 18 N. Y. 271; *Blood v. Humphrey*, 17 Barb. 660; *McIlvaine v. Kadel*, 30 How. Pr. 193; *Wiles v. Peck*, 26 N. Y. 42.

¹⁰ *Andrews v. Shaffer*, 12 How. Pr. 441; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. (4 Comst.) 9.

¹¹ *Yale v. Dederer*, 18 N. Y. 276, 283; 22 N. Y. 451; *Owen v. Cawley*, 36 N. Y. 600. See also *Matair v. Card*, 18 Fla. 761; *Herron v. Herron*, 91 Ind. 278; *Cartan v. David*, 18 Nev. 310; 4 Pac. 61; *Merchant v. Thompson*, 34 N. J. Eq. 73; *Ferdon v.*

Miller, 34 N. J. Eq. 10; *Moore v. Fuller*, 6 Oreg. 272; 25 Am. R. 524; *Contra Simms v. Kelly*, 70 Ala. 429; *Ashford v. Watkins*, 70 Ala. 156; *Hagenbuch v. Phillips*, 112 Pa. St. 284; 12 Atl. 788.

¹² *Mundy v. Whittemore*, 15 Neb. 647; 19 N. W. 694.

¹³ *Dean v. Metropolitan Elevated Ry. Co.*, 119 N. Y. 540; 23 N. E. 1054.

¹⁴ *Third National Bank v. Blake*, 73 N. Y. 260.

but that she could not bind herself generally for its payment. The proposition was sustained in *Draper v. Stouvenel* (35 N. Y. 507), where it was said that a *feme covert* could not bind herself personally upon a contract for payment of rent reserved upon a lease made to her, though the lease would be valid and the landlord might avail himself of the right of re-entry, reserved in case of a breach of the conditions. Both of these cases arose before the passage of the act of 1860 (ch. 90), and in *Draper v. Stouvenel* (*supra*), the court was careful to indicate that fact. By section 7 of that act, it was provided that "Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were sole." This changed the law as it previously existed, and rendered married women liable for the price of property purchased by them. The acquisition of a leasehold estate is substantially a purchase of the term for which the estate is created, and the rent reserved is its purchase price. Under the changes made by that act, a married woman could be sued, the same as an unmarried woman could be for any matter relating to her sole and separate property, or to property which she had acquired by grant or purchase.¹⁵

§ 625. Statute of 1860.—By section 3 of the act of 1860¹⁶ it was provided that "any married woman possessed of real estate as her separate property, may bargain, sell, and convey such property and enter into any contract with reference to the same, with the like effect in all respects as if she were unmarried, and she may in like manner enter into any such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them are broken."¹⁷

§ 626. Carrying on trade or business.—The statute of 1860 also provided that a married woman might carry on any trade or business, and perform any labor or services on her sole and separate account, and that the earnings therefrom should be her sole and separate property. The power of a married woman to make contracts relating to her separate business, is incident to her power to

¹⁵ *Westervelt v. Ackley*, 2 Hun, 258.

¹⁶ Laws of 1860, ch. 90.

¹⁷ *Sigel v. Johns*, 58 Barb. 620.

conduct it. It cannot be supposed that the legislature, while conferring the power upon a married woman to enter into trade or business on her own account, intended that her common-law disability should continue as to contracts made in carrying on the business in which she was permitted to engage. The power to engage in business would be a barren and useless one disconnected from the right to conduct it in the way and by the means usually employed. By the eighth section of the act of 1860, as amended in 1862 (Laws of 1862, ch. 172), the authority of a married woman to bind herself by executory contracts in relation to her separate business, was recognized in the provision which exempted the husband from liability thereon. The power to carry on a separate trade or business includes the power to borrow money and to purchase upon credit implements, fixtures, and real and personal estate necessary or convenient for the purpose of commencing it, as well as the power to contract debts in its prosecution after it has been established.¹⁸

§ 627. Statute of 1862.—By section 7 of chapter 172 of the Laws of 1862 it was provided that “a married woman may be sued in any of the courts of this State, and whenever a judgment shall be recorded against a married woman, the same may be enforced against her sole and separate estate in the same manner as if she were sole.” It was also enacted in section 1206 of the Code of Civil Procedure that “judgment for or against a married woman may be rendered and enforced, in a court of record, or not of record, as if she was single.”

This, in effect, changed the remedy against the estate of a married woman from an equitable charge upon her estate specifically to a legal claim against her property generally. Instead of a claim *in rem*, as it always had been when the only remedy was in equity, it became a claim *in personam*.¹⁹

So a married woman might be estopped by a certificate as to the validity of a mortgage on the faith of which a purchaser of the mortgage had acted.²⁰

¹⁸ Per ANDREWS, J., in *Frecking v. Rolland*, 53 N. Y. 422, citing *Chapman v. Foster*, 6 Allen (Mass.) 136.

¹⁹ *First Nat'l Bank of Canandaigua v. Garlinghouse*, 36 How. Pr. 369; 53 Barb. 615; *Ainsley v. Mead*,

3 Lans. 116; *Corn Exchange Bank v. Babcock*, 42 N. Y. 613; *Andrews v. Monilaws*, 8 Hun, 65.

²⁰ *Smyth v. Munroe*, 19 Hun, 550; *Payne v. Burnham*, 62 N. Y. 69.

§ 628. Various interesting questions arose where it was sought to charge a married woman for a deficiency on the foreclosure of a mortgage executed before the act of 1884. The specific lien created by her act charging the mortgaged premises being exhausted, the question in each case was as to whether the consideration for the debt and the nature or form of the obligation was such as to obligate her to apply her other separate estate to its payment. The lien of the mortgage might have been perfectly valid to the extent of the value of the property mortgaged, while the debt, so far as the remaining property of the obligor was concerned, might have been entirely void.²¹

§ 629. Where services were rendered or value of any kind was given for or to a married woman, by her procurement on the credit and for the benefit of her separate estate, there was an implied agreement or obligation springing from the nature of the consideration, which the courts enforced by charging the amount on her property as an equitable lien.²² Under this rule it was held at Special Term in *Brown v. Hermann* (14 Abb. 394), that a married woman could not be held for deficiency arising on the foreclosure of a mortgage which was upon property when she purchased it, and which she assumed as part of the purchase price. The ground of decision was, substantially, that the acquisition of property mortgaged for more than it was worth could not be for the benefit of her separate estate; or, in other terms, a married woman is held to bargains which turn out to be profitable, but is released from those which involve any loss. This principle has been repudiated by the courts, and in *Owen v. Cawley* (42 Barb. 105, aff'd 36 N. Y. 600), a married woman was compelled to pay for the services of an attorney in an action in which she was defeated, with costs. It was remarked by PORTER, J., in giving the opinion of the Court of Appeals in this case, that "the rule of equity under which the estate of a married woman is subject to a charge in respect of services rendered for its benefit, has reference to the subject-matter and nature of such services, and not to the contingent and ultimate gain or loss of the parties procuring them. A builder who, at the request of a *feme covert*, erects a dwelling on her land, performs a service for the benefit of the

²¹ *Kidd v. Conway*, 65 Barb. 158.

284; 22 N. Y. 460; *Owen v. Cawley*,

²² *Yale v. Dederer*, 18 N. Y. 282,

36 N. Y. 600.

estate within the meaning of the rule, and its nature would not be changed though the edifice should afterward be destroyed by fire. An employé who tills her land for hire has an equitable claim to compensation; and, if he discharges his duty faithfully, he has a remedy for his wages, though her fields should prove unproductive." In *Ballin v. Dillaye* (35 How. Pr. 216; N. Y. 35), the principle was applied to a bond and mortgage executed by a married woman as part of the purchase money of real estate; she was held for deficiency, and it was said by PARKER, J., that he did not understand how it could be said that a debt, contracted upon the purchase of property which the purchaser takes into possession and enjoys, and disposes of, is not a debt contracted for the benefit of the purchaser's estate. This decision was followed by *Flynn v. Powers* (35 How. Pr. 279; aff'd 36 How. Pr. 289),²³ and by *Vrooman v. Turner* (8 Hun, 78),²⁴ and by *Cashman v. Henry* (75 N. Y. 103), and in all of these cases it was held that the separate estate of a married woman was bound by a covenant to assume and pay a mortgage on property conveyed to her where such covenant constitutes a portion of the consideration for the conveyance.

§ 630. **Benefit of separate estate.**—Where money was loaned to a married woman and received by her, this was for the benefit of her separate estate, and it was held to be proper that a judgment should be rendered against her if upon a foreclosure of the mortgage given by her on procuring the loan there should be a deficiency;²⁵ but if money was obtained by and paid to her husband for his use, her separate estate could not be bound any further than she expressly charged the debt upon it, and a judgment against her upon her bond, for a deficiency, was not proper.²⁶

Where a lot belonging to a husband was mortgaged for \$1,500, and a lot belonging to his wife was mortgaged for \$2,200, and money was procured on their joint bond, secured by a mortgage on both lots to pay off both prior mortgages, and an action was brought to foreclose the new security, it was held that, as part of the money

²³ Reversed by Court of Appeals on another point *sub nom.* Walsh v. Powers, 43 N. Y. 23.

²⁴ Reversed by Court of Appeals on another point, 69 N. Y. 280; 15 Alb. L. J. 454.

²⁵ *Williamson v. Duffy*, 19 Hun,

²⁶ *Payne v. Burnham*, 62 N. Y. 69, rev'g 2 Hun, 143, and 4 N. Y. Supp. (T. & C.) 678; *Manhattan Brass & Mfg. Co. v. Thompson*, 58 N. Y. 80.

went for the benefit of her separate estate, a personal judgment for deficiency against the wife was proper.²⁷

A married woman was not liable on a covenant of guaranty given by her on the sale of a mortgage belonging to her, unless it was shown that the intention to charge her estate was contained in the contract of sale and guaranty, or that the consideration obtained upon the sale was for the direct benefit of her estate. In *White v. McNett* (33 N. Y. 371), where it was found as a fact that the entire consideration for the assignment and guaranty was received by the husband of the mortgagor and wholly appropriated to his own use, it was held that the mortgagor was not bound by the covenant of guaranty.

The law of 1860 gave a married woman the practical ownership of property. She had the power of dealing with it at pleasure, whether to pay her own debts or the debts of others. If the consideration of the debt went to the benefit of her separate estate, the presumption was that it was her intention to charge it, and if that intent appeared in any way in the instrument which constituted the evidence of the debt, even though she was an entire stranger to the benefits of the consideration, and without the designation of any specific property, the courts held this to be sufficient, and enforced the claim against her property.²⁸

§ 631. Burden of proof.—A personal obligation could not be enforced against a married woman unless it was made affirmatively to appear that there were reasons for holding her such as have already been mentioned.²⁹ Not only did the special facts have to be proved, but they had also to be alleged, and a judgment for deficiency could not be rendered against a married woman upon a complaint that alleged merely that she and her husband executed a bond.³⁰

A statement in a mortgage of a married woman, that she charged her separate estate with the amount, did not constitute a covenant to pay, and no such covenant could be implied from it.³¹

²⁷ *Jones v. Merritt*, 23 Hun, 184, 312.

²⁸ *The Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613.

²⁹ *Nash v. Mitchell*, 71 N. Y. 199.

³⁰ *Manhattan Life Ins. Co. v. Glover*, 14 Hun, 153. But see § 632.

³¹ *Mack v. Austin*, 29 Hun, 534.

POWER OF MARRIED WOMEN TO MORTGAGE THEIR LANDS.

§ 632. **Statute of 1884.**—By laws of 1884, ch. 381, the powers of a married woman to contract were made the same as if she were unmarried, and most, if not all, of the distinctions made in decisions under the previous acts became inapplicable to contracts of married women thereafter made. This statute was as follows: “A married woman may contract to the same extent, with like effect, and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate, or otherwise, and in no case shall a charge upon her separate estate be necessary. This act shall not apply to any contract that shall be made between husband and wife. This act shall take effect immediately.” The act was amended in 1892³² and again in 1896.³³

§ 633. **Present statutes.**—These statutes were taken over on the consolidation of 1909 and stand as follows: “Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband’s control or disposal nor liable for his debts.”³⁴

“A married woman has all the rights in respect to property, real or personal and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation and to exercise all powers and enjoy all rights in respect thereto, and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may

³² Laws of 1892, chap. 594.

³³ Laws of 1896, chap. 272.

³⁴ Domestic Relations Law, § 50.

confess a judgment specified in section one thousand two hundred and seventy-three of the code of civil procedure.”³⁵

“The acknowledgment or proof of a conveyance of real property, within the State, or of any other written instrument, may be made by a married woman the same as if unmarried.”³⁶

In the Code of Civil Procedure it is enacted “in an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of his wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation.”³⁷

§ 634. Rights as surety.—So far as the property mortgaged is concerned, the liability of a married woman is measured by the same rules as would control if she were single; and her rights as a surety, if she pledges her own property as security for the debt of her husband or any other person, will be the same as if the marriage relation did not exist.³⁸

So, where a married woman charges her lands to secure a debt of her husband, who also mortgages his own property for the same debt, his property should, in the first instance, be applied to satisfy the obligation.³⁹ And, in such a case, if the husband acquires the mortgage the lien will be discharged.⁴⁰ The mortgagee who releases the husband's land with notice that the wife's land is pledged as security for his debt, will release hers as well,

35 Domestic Relations Law, § 51.

36 Real Prop. Law, § 302.

37 Code Civ. Proc. 450.

38 The Bank of Albion v. Burns, 46 N. Y. 170; Smith v. Townsend, 25 N. Y. 479; Hawley v. Bradford, 9 Paige, 200. Fowler v. Wood, 78 Hun, 304; 28 N. Y. Supp. 976, aff'd 150 N. Y. 584. See also Darby v. Freedman's Savings, etc., Co., 3 MacA. (D. C.) 349; Burtis Adm'r v. Wait, 33 Kan.

478; 6 Pac. 783; Jenness v. Cutler, 12 Kan. 500; Offenheimer v. Wright, 106 Pa. St. 569; 2 Brown's P. C. 1; White & Tudor's Lead Cas. in Eq. Am. Notes p. 1938.

39 Loomer v. Wheelwright, 3 Sandf. Ch. 135; Wright v. Austin, 56 Barb. 13; Gahn v. Niemcewicz, 3 Paige, 614; 11 Wend. 312.

40 Fitch v. Cotheal, 2 Sand. Ch. 29.

though this effect will not result from knowledge merely of the marital relation.⁴¹

Where a husband and wife gave a mortgage on lands of both, the wife, however, as a surety only, and the husband used the money in putting buildings on the lands of both, it was held that, as against an execution creditor of the husband, the wife was a principal to the extent that the money was used in improving her property.⁴²

MORTGAGES FROM HUSBAND TO WIFE.

§ 635. Valid in equity if made direct from husband to wife.—

While a deed of conveyance from a husband directly to his wife was at one time held to be void, the doctrine was even then regarded as very technical, and was easily and frequently evaded, and it was uniformly held, even independent of our then existing statutes relative to the rights of married women, that such a conveyance might be sustained in equity where the wife was regarded as a person having a separate existence, separate rights, and a capability of holding separate property; and unless wholly without consideration, a conveyance defective in consequence of the common-law rule was upheld.⁴³

If no rights of creditors intervene, a mortgage may be made from a husband to his wife as a mere gift,⁴⁴ and a mortgage for a just consideration executed by a husband to his wife may be enforced in equity.⁴⁵

It was a rule of the common law that when a man married a woman to whom he was indebted, the debt was thereby released, because husband and wife made but one person in law, which unity of persons disabled the wife from suing the husband. In this State the Code and the acts of 1848 and 1849 completely swept away the common-law rule which gave the husband rights in and

⁴¹ Gahn v. Niemcewicz, 3 Paige, 614; Loomer v. Wheelwright, 3 Sandf. Ch. 135; 11 Wend. 312. See also Keller v. Orr, 106 Ind. 406; 7 N. E. 195.

⁴² Dickinson v. Codwise, 1 Sandf. Ch. 214; McFillan v. Hoffman, 35 N. J. Eq. 364.

⁴³ Meeker v. Wright, 76 N. Y. 262, rev'g s. c. 11 Hun, 533; s. c. 7 Abb. N. C. 299; Hunt v. Johnson, 44

N. Y. 27; Shepard v. Shepard, 7 Johns. Ch. 57.

For statute see § 633.

⁴⁴ Hunt v. Johnson, 44 N. Y. 27; Van Amburgh v. Kramer, 16 Hun, 205; Isenhardt v. Brown, 2 Edw. Ch. 341; Bucklin v. Bucklin, 1 Abb. App. Cas. 242.

⁴⁵ Mix v. Andes Ins. Co., 9 Hun, 397.

control over the property of the wife, and a mortgage executed by a man to a woman whom he afterward marries, is no longer affected by the marriage.⁴⁶

A wife having a valid mortgage on her husband's real estate, does not lose her lien by joining in a deed of the property for the purpose of passing her dower.⁴⁷ And a *bona fide* mortgage executed from a husband to his wife takes precedence of subsequently acquired liens of other creditors, though the husband was in failing circumstances and the purpose was to give the wife a preference.⁴⁸

RIGHT OF DOWER IN THE EQUITY OF REDEMPTION.

§ 636. **Dower allowed.**—In England, an equity of redemption is subject to curtesy if the wife is in possession of the land during coverture. A different rule, however, has prevailed in relation to dower. In general, dower is more favored in law than any other estate. A dowress is said to be in the care of the law and a favorite of the law,⁴⁹ and yet, in England, the mere circumstance of an estate being incumbered by a mortgage, has been held to preclude a widow from taking any share of it. Dower being there considered as a mere legal estate, equity follows the law and will not create an estate where it does not subsist at law.⁵⁰ In this State, however, from an early day, our courts, both of law and of equity, have allowed both curtesy and dower out of the equity of redemption of mortgaged estates.⁵¹ The same rule also prevails in other States.⁵²

As a mortgage no longer vests an estate in this jurisdiction, but is security merely, so "a widow shall not be endowered of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage."⁵³

⁴⁶ *Power v. Lester*, 23 N. Y. 529, aff'g 17 How. Pr. 413; *Meeker v. Wright*, 76 N. Y. 262.

⁴⁷ *Gillig v. Maas*, 28 N. Y. 191; *Power v. Lester*, 23 N. Y. 527; *Van Amburgh v. Kramer*, 16 Hun, 205.

⁴⁸ *Comer v. Allen*, 72 Ga. 1.

⁴⁹ *Story's Eq. Jur.* § 629.

⁵⁰ Chancellor KENT, in *Titus v. Neilson*, 5 Johns. Ch. 452.

⁵¹ 1 R. S. 740, §§ 4, 5; *Hitchcock v. Harrington*, 6 Johns. 290; *Collins v. Torry*, 7 Johns. 278; *Tabele v. Tabele*, 1 Johns. Ch. 45; *Titus v. Neilson*, 5

Johns. Ch. 452; *Coles v. Coles*, 15 Johns. 319; *Hawley v. Bradford*, 9 Paige, 200; *Van Dyne v. Thayre*, 14 Wend. 235.

⁵² *Cornog v. Cornog*, 3 Del. Ch. 407; *McMahon v. Russell*, 17 Fla. 698; *Thomas v. Hanson*, 44 Iowa 651; *Young v. Tarbell*, 37 Me. 509; *McCabe v. Bellows*, 7 Gray (Mass.) 148; *Unger v. Leiter*, 32 Ohio St. 210; *Carter v. Goodwin*, 3 Ohio St. 75.

⁵³ *Real Prop. Law*, § 195.

And this is so even when the mortgagee has gone into possession before his death. Such possession is not seizin but a mere incident and part of the security.⁵⁴

§ 637. **No dower as against purchase-money mortgagee.**—When the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor or a third person, to secure the purchase money in whole or in part, the wife cannot claim dower as against the mortgagee.⁵⁵ The ground upon which the decisions on this point have been placed is that, to the extent of the mortgage, the seizin of the husband is an instantaneous seizin only; that the estate passes into him and is drawn out of him by one and the same act. Or, as it has been said, “the seizin of the husband is for a transitory instant; that is to say, the same act which gives him the estate conveys it out of him again.”⁵⁶ The reason given for this rule has been regarded as rather fanciful,⁵⁷ but the rule itself is well established, and it extends as well to cases where the purchase-money mortgage, is made to a third person as to where it is made to the grantor.⁵⁸ It also extends to the case of the equitable lien of a vendor where no mortgage has been executed.⁵⁹

The provision in the statute⁶⁰ that the wife can make no claim for dower as against the mortgagee or those claiming under him, is not intended to limit her claims on the equity of redemption, and it does not render her an unnecessary party in an action to foreclose a purchase-money mortgage. Her rights are the same as they would be if the mortgage were not for the purchase money and she had joined in it.⁶¹ So if the mortgagee enters, the wife may redeem.⁶² Where a husband and wife convey lands as tenants

⁵⁴ Kortwright v. Cady, 21 N. Y. 343, 364.

⁵⁵ Real Prop. Law, § 193; 1 Rev. St. 740, § 5; McMichael v. Russell, 68 App. Div. 104; 74 N. Y. Supp. 212; 4 Kent's Com. 38; Welch v. Buckins, 9 Ohio St. 331; Culver v. Harper, 27 Ohio, 464.

⁵⁶ Park on Dower, 43; Stow v. Tift, 15 Johns. 458; Jackson v. DeWitt, 6 Cow. 316.

⁵⁷ Mills v. Van Voorhies, 20 N. Y. 412.

⁵⁸ Kittle v. Van Dyck, 1 Sandf. Ch. 76; Card v. Bird, 10 Paige, 426;

McGowan v. Smith, 44 Barb. 232. See also Clark v. Monroe, 14 Mass. 351.

⁵⁹ Warner v. Van Alstyne, 3 Paige, 513. See also Unger v. Leiter, 32 Ohio, 210.

⁶⁰ Real Prop. Law, § 193; 1 R. S. 740, § 5.

⁶¹ Mills v. Van Voorhies, 20 N. Y. 412.

⁶² Bell v. Mayor of New York, 10 Paige, 49; House v. House, 10 Paige, 158; Mills v. Van Voorhies, 20 N. Y. 412; McMichael v. Russell, 68 App. Div. 104; 74 N. Y. Supp. 212.

in common to accept a purchase-money mortgage payable to both they may be adjudged to be holding the mortgage jointly with a right of survivorship if such intention on their part is established by undisputed evidence.⁶³

Similarly where children desirous only of affording an income to their father whom they believe to be unmarried, convey premises to him to that end and at the same time take back from him a mortgage given to secure their rights in the premises the failure of his wife, by a valid common-law marriage, to join in the mortgage gives her no rights in the premises which she can assert, after his death, to the detriment of the children.⁶⁴

As a vendor has a lien for unpaid purchase money, so the widow of the vendee takes her dower subject to such lien,⁶⁵ which may be enforced against her by third persons.⁶⁶

Similarly the widow of a vendee has dower in the vendee's lien for advances towards the purchase price.⁶⁷

§ 638. Dower in surplus after foreclosure.—If a mortgage be foreclosed, the right of dower which attached to the equity of redemption will be transferred to the surplus money, and the widow of the mortgagor will be entitled to the income or interest of one-third of the surplus as her dower.⁶⁸ And where the mortgage is for purchase money, the same rule applies.⁶⁹ Where the sale and distribution take place before the death of the husband, it is customary to pay over to him all of the surplus after satisfying the mortgage foreclosed, and there is authority for holding that the wife has no claim upon it while her husband is living.⁷⁰ The inchoate right of dower, is however, as much entitled to protection as the perfected or vested right of the widow, and it has been held, it is believed with better reason, that a widow is entitled to her right of dower in surplus, though the foreclosure took

63 Matter of Kaupper, 141 App. Div. 54; 125 N. Y. Supp. 878, aff'd 201 N. Y. 534; 94 N. E. 1095.

64 Mead v. Mead, 27 Misc. R. 459; 59 N. Y. Supp. 444.

65 Warner v. Van Alstyne, 3 Paige, 513. See Villone v. Fernstein, 132 App. Div. 31.

66 Eterman v. Hyman, 192 N. Y. 113; Occidental Realty Co. v. Palmer, 117 App. Div. 505.

67 Matter of McKay, 5 Misc. R. 123.

68 Tabele v. Tabele, 1 Johns. Ch. 45; Titus v. Neilson, 5 Johns. Ch. 452.

69 Real Prop. Law, § 194; Brackett v. Baum, 50 N. Y. 8; Denton v. Nanny, 8 Barb. 618.

70 Titus v. Neilson, 5 Johns. Ch. 452; Hawley v. Bradford, 9 Paige, 200; Frost v. Peacock, 4 Edw. 678.

place in the lifetime of her husband,⁷¹ and that if the distribution takes place in his lifetime, one-third of the surplus should be invested and the interest only paid to her husband or his judgment creditors during the joint lives of her and her husband, and to her if she survives him.⁷²

If a wife joins with her husband in a mortgage on his property to secure his debt, she is, in a sense, his surety, for her inchoate right of dower is pledged to pay his debt. She is not, however, on this ground exempted from bearing her full share of the mortgage, and she cannot claim her full dower even though the mortgage should only consume an amount equal to her husband's interest. She can only claim dower, as against the heir of her husband's creditors, in the equity of redemption which is represented by the surplus.⁷³

§ 639. **The value of a widow's dower**, where the property was alienated by the husband in his lifetime, is to be estimated upon the value of land at the time of the alienation.⁷⁴

The rule for computing the present value of a wife's inchoate right of dower during the life of her husband, in case she elects to accept a gross sum, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value for her life, the value of a similar annuity depending upon the joint lives of herself and her husband, and the difference between those two sums will be the value of her contingent right of dower. The annuity tables furnish the means of making the computation.⁷⁵

§ 640. **Right of dowress to redeem.**—If the widow's dower be merely in the equity of redemption, she is bound to contribute her fair proportion to the payment of the mortgage by paying one-third of the interest during her life,⁷⁶ unless it can be shown that

⁷¹ Mathews v. Duryee, 4 Keyes, 525, aff'g 45 Barb. 69; 17 Abb. 256; 3 Abb. Ct. of App. Dec. 220.

⁷² Vartie v. Underwood, 18 Barb. 561. See also Jackson v. Edwards, 7 Paige, 386, 408; Denton v. Nanny, 8 Barb. 618; Blydenburgh v. Northrop, 13 How. Pr. 289.

⁷³ Hawley v. Bradford, 9 Paige, 200. See also McMahon v. Specht, 64 App. Div. 128; 71 N. Y. Supp. 806.

⁷⁴ Raynor v. Raynor, 21 Hun, 36.

⁷⁵ Jackson v. Edwards, 7 Paige, 408; Doty v. Baker, 11 Hun, 222; Smart v. Haring, 14 Hun, 276. See Rule 70.

⁷⁶ Lambert on Dower, 45; Graham v. Linden, 50 N. Y. 547; Leavenworth v. Cooney, 48 Barb. 570; Coates v. Cheever, 1 Cow. 461; Titus v. Nielson, 5 Johns. Ch. 452; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am.

some other person or fund is primarily chargeable with the payment of the whole mortgage debt.⁷⁷

If the mortgagee insists upon the payment of the principal, the widow may redeem from the mortgage and obtain an assignment of it, and the security will be good in her hands to all except her proportion of the debt—that is, to all except the interest on one-third during her life.⁷⁸ On the same principle, if a grantee of the husband alone, purchases an outstanding mortgage executed by husband and wife, he will be *pro tanto* protected, and the wife must, on redeeming, contribute her part of the mortgage.⁷⁹ The share of the principal sum with which the widow is chargeable when the mortgage is required to be paid off, is such a sum as will be equal at the time of payment to the then value of an annuity of the amount of one-third of the interest upon the sum unpaid at her husband's death for the residue of her life.⁸⁰

A widow may redeem from a mortgage in which she joined, and thus acquire rights paramount to a purchaser under the foreclosure of a second mortgage in which she did not join.⁸¹

A wife who is not made a party to a foreclosure of a mortgage on premises owned by her husband may, by reason of her inchoate right of dower, redeem them after a sale and during his lifetime and may maintain an action against the purchaser for that purpose.⁸²

§ 641. As against all persons except the mortgagee the widow is entitled to dower in the entire mortgaged estate.⁸³ Thus when

Dec. 318; Evertson v. Tappen, 5 Johns. Ch. 497; Collins v. Torrey, 7 Johns. 278; Russell v. Austin, 1 Paige, 195; Bell v. Mayor of New York, 10 Paige, 49. See also Pollard v. Noyes, 60 N. H. 184; Woods v. Wallace, 30 N. H. 384; Norris v. Morrison, 45 N. H. 490.

⁷⁷ Hitchcock v. Harrington, 6 Johns. 290; Pollard v. Noyes, 60 N. H. 184.

⁷⁸ Swaine v. Perine, 5 Johns. Ch. 491.

⁷⁹ Russell v. Austin, 1 Paige, 192. See *contra*, Coates v. Cheever, 1 Cow. 460.

⁸⁰ Bell v. The Mayor of New York, 10 Paige, 49; House v. House, 10

Paige, 158; Rayor v. Raynor, 21 Hun, 36.

⁸¹ McMahon v. Russell, 17 Fla. 698.

⁸² Mackkenna v. Fidelity Trust Co., 184 N. Y. 411; 77 N. E. 721, modifying 98 App. Div. 480; 90 N. Y. Supp. 493, and holding that a modification of a decree requiring the plaintiff as a condition of redemption to pay to the purchaser the amount of a deficiency judgment obtained by him in another foreclosure relating to other property, or to deduct the amount from the sum to be paid if she elected to accept the value of her inchoate right of dower, is erroneous.

⁸³ King v. Ballantine, 40 Ohio St.

the mortgagor, or the owner of mortgaged premises, pays the mortgage debt, or appropriates property for its payment,⁸⁴ the mortgage cannot afterward be set up as against the claim of the wife for dower.

So, where a purchaser from the mortgagor purchases the mortgage, this operates as an extinguishment of the mortgage and lets the widow in to dower.⁸⁵

But where the owner of the equity of redemption of mortgaged property released to the mortgagee, his wife who did not join in the deed of release was held to be entitled to dower only in the equity.⁸⁶

A widow of the owner of the equity of redemption cannot be required to contribute toward any part of the mortgage debt which was paid by her husband during his lifetime.⁸⁷

If the mortgagee elects to waive the enforcement of his lien as against the inchoate dower of the wife by omitting her as a party from his suit to foreclose, it is said that a judgment creditor of the husband cannot have any redress either against the mortgagee or the wife of the mortgagor.⁸⁸

In this connection it has been decided that a widow in possession may sell, transfer or mortgage her right of dower in her husband's realty since such right, although it does not give her a legal estate in the land, gives her a legal interest which constitutes property.⁸⁹

§ 642. **Barring right of dower.**—By joining with her husband in a conveyance or mortgage a wife will bar her right of dower, and a foreclosure of such mortgage will extinguish her claims.⁹⁰ But the joining in one mortgage will not preclude her from claiming dower as against other mortgagees in whose mortgages she has not joined.⁹¹ Joining in an absolute conveyance will, however, preclude the wife from thereafter gaining any advantage from

391; *Ketchum v. Shaw*, 28 Ohio St. 503.

⁸⁴ *Holmes v. Holmes*, 3 Paige, 363.

⁸⁵ *Coates v. Cheever*, 1 Cow. 460.

⁸⁶ *Jackson v. DeWitt*, 6 Cow. 316.

⁸⁷ *Newton v. Sly*, 15 Mich. 391.

⁸⁸ *De Armond v. Preachers' Aid Soc.*, 94 Ind. 59; *Leary v. Schaffer*, 79 Ind. 567; *Medsker v. Parker*, 70 Ind. 509.

⁸⁹ *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; 24 N. E. 177.

⁹⁰ *Durnherr v. Rau*, 135 N. Y. 219; 32 N. E. 49; *Payne v. Becker*, 87 N. Y. 153; *Hinchliffe v. Shea*, 34 Hun, 365; *Freiot v. La Fountaine*, 16 Misc. R. 153; 38 N. Y. Supp. 832.

⁹¹ *Sheldon v. Patterson*, 55 Ill. 507; *Niles v. Nye*, 54 Mass. (13 Metc.) 135.

the fact that she did not join in prior mortgages, even as against a purchaser under one of such mortgages.⁹²

The joining of a married woman with her husband in a deed or mortgage of his lands does not operate as to her by way of passing an estate, but inures simply as a release to the grantee of the husband of her future contingent right of dower in the granted or mortgaged premises in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband, and concludes her from afterward claiming dower in the premises from the grantee or mortgagee so long as there remains a subsisting title or interest created by his conveyance. But it is the generally recognized doctrine that when the husband's deed is avoided or ceases to operate, as when it is set aside at the instance of creditors, or is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance⁹³ except as against a subsequent mortgagee in good faith from the grantee.⁹⁴ In short, the law regards the act of the wife in joining in the deed or mortgage not as an alienation of an estate, but as a renunciation of her inchoate right of dower in favor of the grantee or mortgagee of her husband in and of the title or interest created by his conveyance. It follows, therefore, that her act in joining in the conveyance becomes a nullity whenever the title or interest to which the renunciation is incident is itself defeated. The wife's deed or mortgage of her husband's lands cannot stand independently of the deed of her husband when not executed in aid thereof, nor can she, by joining with her husband in a deed of lands to a stranger in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right.⁹⁵

§ 643. **Examples.**—These principles were applied in favor of a wife who had joined with her husband in a mortgage so as to give

⁹² *Carter v. Walker*, 3 Ohio St. 339.

⁹³ *Hinchliffe v. Shea*, 103 N. Y. 153; 8 N. E. 477; 2 N. Y. St. Rep. 728, rev'g 34 Hun, 365; *Malloney v. Horan*, 49 N. Y. 111. See also *Robinson v. Bates*, 3 Metc. 40; *Littlefield v. Crocker*, 30 Me. 192; *Ketz-*

miller v. Van Rensselaer, 10 Ohio St. 63.

⁹⁴ *McMahon v. Specht*, 64 App. Div. 128; 71 N. Y. Supp. 806.

⁹⁵ Per *ANDREWS, J.*, in *Hinchliffe v. Shea*, 103 N. Y. 153; 8 N. E. 477; 2 N. Y. St. Rep. 728; *Marvin v. Smith*, 46 N. Y. 571.

her dower against a purchaser under a judgment against her husband which was prior to the mortgage.⁹⁶

In a proceeding at the suit of sundry mortgagees to foreclose their respective mortgages, it appeared that the wife of the mortgagor had united with her husband in the execution of only one of the mortgages, in which she had released her contingent right of dower. At the instance of the mortgagee holding such release the wife was made a party, and the premises were sold pursuant to an order, free of her contingent claim of dower. It was held that the mortgagee holding such release was entitled to receive the proportionate value of such inchoate right of dower, though the net proceeds of the sale were insufficient to satisfy the prior mortgages.⁹⁷

A married woman holding a mortgage on the land of her husband does not discharge such mortgage or transfer it by joining in a conveyance or junior mortgage to bar her dower, notwithstanding such conveyance or mortgage purports to convey all of the rights, titles, and interests of both the grantors.⁹⁸

An inchoate right of dower will not be lost by merger in a title which is adjudged fraudulent or void,¹ or which is cut off by foreclosure of a mortgage to which the wife was not a party,² or where there was collusion in connection with the foreclosure of which she had no knowledge or notice, actual or constructive.³

§ 644. *Costs.*—A dowress is a favorite with a court of equity, and probably for this reason she is exempted from paying costs in proceedings to distribute surplus, and is entitled to her costs out of the other two-thirds.⁴

Where money is in the hands of the court representing land in which a widow has a dower right, she may insist that one-third of it be invested for her benefit during her life. If she does this she will be charged with the expenses of making the investment and

⁹⁶ *Hinchliffe v. Shea*, 103 N. Y. 153; 8 N. E. 477; 2 N. Y. St. Rep. 728.

⁹⁷ *Black v. Kulhman*, 30 Ohio St. 196.

⁹⁸ *Van Amburgh v. Kramer*, 16 Hun, 205; *Power v. Lester*, 23 N. Y. 527; *Gillig v. Maas*, 28 N. Y. 191. See also *Kitchell v. Mudgett*, 37 Mich. 81.

¹ *Lowry v. Smith*, 9 Hun, 514; *Malloney v. Horan*, 49 N. Y. 111.

² *People v. Knickerbocker Life Ins. Co.*, 66 How. Pr. 115.

³ *Poillon v. Poillon*, 37 Misc. R. 729; 76 N. Y. Supp. 488.

⁴ *Tabele v. Tabele*, 1 Johns. Ch. 45; *Hawley v. Bradford*, 9 Paige, 200.

of receiving and paying over the income; but if she is willing and consents to accept a gross sum in lieu of such income for her life, the same must be estimated according to the then value of an annuity of five per cent. on the principal sum during her probable life, according to the Carlisle Table of Mortality.⁵

5 Rule 70.

CHAPTER XVI

INTEREST AND USURY

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INTEREST.

§ 645. *Rate of interest.*—Where a bond or note secured by mortgage calls for interest without naming the rate, the rate fixed by law at the date of the instrument will be chargeable.¹

By the decided weight of authority in this State, where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract and thereafter as damages for the breach of the contract.² And such is the rule as laid down by the Federal Supreme Court.³ The same authorities show that after the maturity of such a contract, the interest is to be computed as damages according to the rate prescribed by law, and not according to the rate prescribed by the contract, if that be more or less.⁴

Where the mortgage provides for a certain rate “until the aforesaid principal sum shall be paid” that rate prevails up to the date of the entry of judgment.⁵

After judgment, interest will run according to the legal rate, and not according to the rate specified in the contract, if that be different.⁶ In case of an agreement to give a new mortgage in place of a prior invalid one it will be presumed that the rate of interest will be the same as that provided for in the one replaced.⁷

A parol agreement made after maturity to pay a reduced rate of interest or an increased rate, up to the legal limit, or to pay semi-annually instead of annually, will bind the parties.⁸ And

¹ *Ackene v. Winston*, 22 N. J. Eq. 444.

² *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 Wend. 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 N. Y. 586; *Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180.

³ *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170; *Holden v. Trust Co.*, 100 U. S. 72.

⁴ *Ferris v. Hard*, 135 N. Y. 354; 32 N. E. 129; *O'Brien v. Young*, 95 N. Y. 428. *Contra*, *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren*

v. Van Gaasbeck, 4 Cow. 496; *Union Inst'n for Savings v. City of Boston*, 23 Alb. L. J. 130.

⁵ *Zimmerman v. Klauber*, 139 App. Div. 26; 123 N. Y. Supp. 642.

⁶ *Taylor v. Wing*, 84 N. Y. 471, rev'g 23 Hun, 233; *Watson v. Fuller*, 6 Johns. 284; *Sayre v. Austin*, 3 Wend. 496; *Wernwag v. Brown*, 3 Blackf. (Ind.) 457; 26 Am. Dec. 433.

⁷ *Roberge v. Winne*, 144 N. Y. 709; 39 N. E. 631.

⁸ *Sharp v. Wyckoff*, 39 N. J. Eq. 376; *Hill v. Howell*, 36 N. J. Eq. 25, and note; *Momo v. Perkins*, 9 Pick. (Mass.) 298.

the mere acceptance by the mortgagee of a lower rate of interest does not release a surety where there is no consideration for such agreement.⁹ Where property is transferred to secure an indebtedness which has been liquidated, interest may be recovered on the debt though there is no express provision therefor.¹⁰

§ 646. **Interest since the act of 1879.**—By Ch. 538 of the Laws of 1879 it was enacted that the rate of interest upon a loan or forbearance of money, notes or things in action, should be six dollars upon \$100 for one year, and after that rate for a greater or less sum or for a longer or shorter time; but nothing in the act contained was to be construed so as to in any way affect any contract or obligation made before the passage of the act. This act took effect on January 1, 1880, and there was much discussion as to its effect. It was finally determined that on a mortgage executed before January 1, 1880, stipulating that the principal sum should bear interest at seven per cent. “until paid,” seven per cent. might be charged until the time of the entry of a judgment of foreclosure; but if that happened after January 1, 1880, six per cent. only could be collected thereafter.¹¹ If there was no special covenant in the contract as to payment of interest after maturity, interest at seven per cent. was computed up to January 1, 1880, and at six per cent. after that time,¹² and upon a judgment recorded prior to January 1, 1880, the plaintiff was entitled to collect seven per cent. interest up to that date, and six per cent. thereafter.¹³

The same provision as to rate of interest is included in the Consolidated Laws.¹⁴

§ 647. **Interest when partial payments have been made.**—In making up the account of a mortgagee, compound interest will not be allowed unless where there is the settlement of an account between the parties after the interest has become due, or there has been an agreement for that purpose subsequent to the original contract, or where the referee's report computing the sum due

⁹ Sanford v. Story, 15 Misc. R. 536; 38 N. Y. Supp. 104.

¹⁰ Chester v. Jumel, 125 N. Y. 237; 26 N. E. 297.

¹¹ Taylor v. Wing, 84 N. Y. 471, rev'g 23 Hun, 233; Siewart v. Hamel, 33 Hun, 44.

¹² Sanders v. The Lake Shore & Michigan Southern Railway Co., 94 N. Y. 641.

¹³ O'Brien v. Young, 95 N. Y. 428; Reese v. Rutherford, 90 N. Y. 644.

¹⁴ Gen. Bus. Law, § 370.

for principal and interest is confirmed, for it is then in the nature of a judgment.¹⁵ The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance, as aforesaid.¹⁶ But where neither principal nor interest has become due at the time of the payment, such payment, in the absence of any agreement as to the application, is to be applied to the extinguishment of principal and interest, ratably.¹⁷

§ 648. **Compound interest.**—An agreement made when the mortgage becomes due, to forbear in consideration of the payment of legal interest, if executed, will not be disturbed, nor will the excess of interest paid be applied as payment of the principal. It is like an executed agreement to pay interest on interest accrued, which is compound interest. An agreement to pay interest on interest thereafter, will not be enforced, but after it has been paid it cannot be recovered back,¹⁸ and by a parity of reason it will not be applied as a payment upon principal.¹⁹ There are many dealings among men in which interest is habitually charged and paid, when it could not be claimed on the ground of strict legal right. These transactions are regarded as fair and just between the parties, and they cannot be considered fraudulent as to others, and a mortgage given for a just debt is not rendered fraudulent as against creditors by including in it interest on the debt not

¹⁵ *Connecticut v. Jackson*, 1 Johns. Ch. 13, 16.

¹⁶ *Connecticut v. Jackson*, 1 Johns. Ch. 13, 17; *Jencks v. Alexander*, 11 Paige, 619, 625; *French v. Kennedy*, 7 Barb. 452; *Stone v. Seymour*, 15 Wend. 19, 24; *Bennett v. Cook*, 2

Hun, 526; 5 N. Y. Supp. (T. & C.) 134.

¹⁷ *Jencks v. Alexander*, 11 Paige, 619, 625; *Williams v. Houghtaling*, 3 Cow. 86.

¹⁸ *Mowry v. Bishop*, 5 Paige, 98.

¹⁹ *N. Y. Life Ins. & Trust Co. v. Manning*, 3 Sandf. Ch. 58.

collectible at law, where the allowance of interest is just and equitable.²⁰

USURY.

§ 649. **What contracts are usurious.**—The usury laws of this State prohibit the taking of more than six per cent., directly or indirectly, for the loan or forbearance of money, and declare to be void all contracts or securities whereupon or whereby a greater sum is taken, secured, or agreed to be paid.²¹ These laws reach indirect as well as direct agreements to obtain more than six per cent. for the loan or forbearance of money, and, in the administration of them, courts look not so much to the forms which usurious agreements may take, as to their substance and effect, and the intention of the parties to them. No covering which may be put upon them will be allowed to conceal their real features from the searching eye of a court of justice.²²

It has even been held that a tenant may in summary proceedings by his landlord to recover possession of the property, show that the lease is in fact a mortgage to secure the repayment of a usurious loan and is void.²³

A contract may be just and honest on its face and call only for lawful interest on the amount actually loaned and still be void if there is a parol agreement for usury not included in the writing, but constituting a part of the real contract of loan; and a demand for excessive interest made by the lender as being "due" upon the contract, acquiesced in by the borrower, will be sufficient evidence upon which to adjudge such invalidity.²⁴ But where the provisions of the statute under which an association was incorporated expressly render fines, monthly payments and premiums innocuous under the statute prohibiting usury, and there is no proof of usury in the interest provisions of the contract, a

²⁰ *Spencer v. Ayrault*, 10 N. Y. (6 Seld.) 202. See also as to compound interest, *Young v. Hill*, 67 N. Y. 162, and article in 16 Alb. L. J. 252.

²¹ Gen. Bus. Law, §§ 370, *et sequi*; 1 R. S. 772, Laws of 1837, c. 430; Laws of 1879, c. 538.

²² *Birdsall v. Patterson*, 51 N. Y. 43; *Crippen v. Heermance*, 9 Paige, 211; *Fiedler v. Darrin*, 50 N. Y. 437;

Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137; 7 Abb. N. C. 170, aff'g 13 Hun, 321. See also *De Wolf v. Johnson*, 10 Wheat. (U. S.) 385; *Fitzsimmons v. Bean*, 44 Pa. St. 32.

²³ *People ex rel. Ainslie*, 76 N. Y. 574, aff'g 13 Hun, 138.

²⁴ *Smith v. Hathorn*, 88 N. Y. 211, rev'g 25 Hun, 159.

defense that the bond and mortgage are void for usury is unsupported and untenable.²⁵

§ 650. Mistake does not constitute usury.—To constitute usury there must be a contract for the loan or forbearance of money; the borrower must, as a part of such contract of loan, agree to pay to the lender, as a compensation for such loan, interest at a rate exceeding that allowed by law, and the lender must, as a part of such contract, agree to receive such excessive interest.

A mere error will not render a transaction usurious,²⁶ and the fact that a mortgage bearing interest from date was given, a part of the consideration being notes at thirty days without interest, has been held not affected otherwise than to entitle the mortgagor to a rebate of interest.²⁷ So, where by mistake excessive interest for twenty days was computed, this was held not to be usurious, and the burden of proving that it was intended to be so was held to rest upon the defendant alleging the usury.²⁸

A mortgage drawn so as to call upon its face for usury may be corrected if it can be shown that it was so drawn by mistake.²⁹

The fact that a mortgage is executed for a larger sum than was actually advanced, does not thereby render it void in the absence of proof that the difference represented a usurious bonus.³⁰

An agreement to pay interest "semi-annually in advance" entered into in good faith without intent to evade the statute, is not usurious.³¹ The common practice of banks in discounting commercial paper is to deduct interest in advance, and this is not usurious.³² And it is not usurious to agree to pay interest at more frequent times than annually.³³

§ 651. Optional payment not usury.—To make a loan of money usurious there must be, within the very language of the statute, an agreement, either expressed or implied, to pay more than the

²⁵ *Preston v. Rockey*, 185 N. Y. 186; 77 N. E. 1156. See *Mutual Benefit L. & B. Co., v. Lynch*, 54 App. Div. 559; 67 N. Y. Supp. 6.

²⁶ *Marvine v. Hymers*, 12 N. Y. 223; *Fiedler v. Darrin*, 50 N. Y. 443; *Gibson v. Stearns*, 3 N. H. 185.

²⁷ *Brown v. Champlin*, 66 N. Y. 214.

²⁸ *Bevier v. Covell*, 87 N. Y. 50.

²⁹ *Griffin v. N. J. Oil Co.*, 11 N. J. Eq. 49.

³⁰ *Adm'r of Auble v. Trimmer*, 17 N. J. Eq. 242; *Brown v. Champlin*, 66 N. Y. 214.

³¹ *Bloomer v. McInerney*, 30 Hun, 201.

³² *Bank of Utica v. Wager*, 2 Cow. 712; *Marvine v. Hymers*, 12 N. Y. 227.

³³ *Mowry v. Bishop*, 5 Paige, 98; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384.

legal rate of interest, such an agreement as might be enforced by the creditor if it were not unlawful under the prohibition of the statute. For this reason a payment of a sum of money as a mere gratuity, in the absence of any agreement or understanding by which there was any duty to make such payment on the part of the borrower, the payment being entirely optional, will not constitute usury.³⁴

§ 652. Compensation for services.—The fact that a sum is included in a mortgage for services rendered by the mortgagee does not render the instrument usurious, even if these services are rendered in procuring the money to be loaned,³⁵ but if an agreement to pay for trouble or services is made as a mere device to evade the usury law, the mortgage will be void.³⁶ The borrower may lawfully be required to pay the attorney of the mortgagor for examining his title and preparing the necessary papers.³⁷

§ 653. Extortion is not usury.—There is no usury in the absence of an agreement made by the borrower to pay excessive interest. If extortion is practiced under a false pretense of right which is submitted to by the borrower, this is not necessarily usury.³⁸

§ 654. The agreement to pay excessive interest must be made by the borrower.—The payment of usury, if it be properly so called, not by the borrower, but by a stranger to the contract, one not connected with the loan or liable on it, who voluntarily or from any motive advances the sum exacted or sustains the loss which the borrower is unwilling or declines to do, is not a circumstance of which the borrower can be permitted to take advantage for the purpose of having the contract declared inoperative and void for usury. So, where a person desiring to purchase a farm, for which the price was \$2,500 cash, applied for a loan for that amount on his note secured by a mortgage on the farm; and the plaintiff agreed to make the loan, but demanded \$30 bonus, which was paid by the person offering the farm for sale, the plaintiff thereupon receiving a note and mortgage for \$2,500 for

³⁴ *Bill v. Fish*, 1 N. Y. St. Repr. 473; *Home Ins. Co. v. Dunham*, 33 Hun, 415; *Clarke v. Sheehan*, 47 N. Y. 188.

³⁵ *Thurston v. Cornell*, 38 N. Y. 281.

³⁶ *Van Tassell v. Wood*, 12 Hun, 388.

³⁷ *Chesebro v. Tilden*, 21 W. Dig. 467.

³⁸ *Guggenheimer v. Geiszler*, 81 N. Y. 293; *Morton v. Thurber*, 85 N. Y. 550.

an actual outlay of only \$2,470, the transaction was held not to be usurious.³⁹

Where the owner of an undivided half of certain premises conveyed his interest for the agreed price of \$350, for which the purchaser was to give his note secured by a mortgage on the land; and, in anticipation of this trade, the vendor arranged with the plaintiff to sell him the note and mortgage for \$275 cash; and to save the trouble of transferring the note and security, the vendor requested the purchaser to make them directly to the plaintiff, which was done, it was held in an action to foreclose the mortgage that the transaction was not usurious, the evidence showing that it was not a contrivance to evade the usury law.⁴⁰

§ 655. Sales of mortgages at a discount.—A valid mortgage may lawfully be sold at a discount, and the purchaser will hold it as security for its full amount,⁴¹ but if the mortgage be made without consideration and sold at a discount, the transaction will be usurious and void, though the contract be in form such a one as the law does not condemn.⁴²

As soon as a mortgage has been delivered for a valuable and lawful consideration, it becomes a piece of property which its owner may sell for any price he sees fit, without any restraint from laws against usury. The vice, if it exists at all, is to be found in the contract which the lien is given to secure. Even if the mortgage was made in order that it should be sold at a discount, and if the intending purchaser advises with regard to the transaction, still he will not commit usury if the mortgage, as made, is a valid security between the parties to it. Thus, where on an application for a loan the intending borrower truthfully stated that he owed money to certain persons and proposed to make a mortgage to his creditors which they would sell at a discount, and this plan was adopted in order that the persons making the in-

39 *McArthur v. Schenck*, 31 Wis. 673; 11 Am. R. 643; *Phillips v. Mackellar*, 92 N. Y. 34; *Little v. White*, 8 N. H. 276; *Bearce v. Bars-ton*, 9 Mass. 45; *Lesley v. Johnson*, 41 Barb. 359.

40 *Armstrong v. Freeman*, 9 Neb. 11; 2 N. W. 353.

41 *White v. Turner*, 4 N. Y. Sup. (T. & C.) 693; 1 Hun, 623; *Rice v. Mather*, 3 Wend. 62; *Dowe v. Schutt*,

2 Den. 621; *Powell v. Waters*, 8 Cow. 669; *Cameron v. Chappell*, 24 Wend. 94; *Rosenbaum v. Silverman*, 22 Misc. R. 589; 50 N. Y. Supp. 860; *Cohen v. Waldron*, 17 Misc. R. 639; 40 N. Y. Supp. 31. See also *Sammis v. Matthews*, 19 Fla. 811; *Culver v. Bigelow*, 43 Vt. 249.

42 *Vickery v. Dickson*, 62 Barb. 272.

vestment might obtain a greater return from the use of his money than the rate allowed by statute for a loan, still the transaction was adjudged to be lawful and not within the condemnation of the law against usury.⁴³ The material point in this case was, that the mortgage secured an honest debt owing between the original parties to it, and was valid in the hands of the mortgagee. That it was executed after a previous understanding that it should be purchased at a sum less than its face, could not make the purchase usurious or convert the contract into a loan of money.⁴⁴ It would have been different if the mortgage had been executed without consideration, for then it would have had no vitality until a sale,⁴⁵ and the mortgage could be enforced only to the extent that it was valid in the hands of the mortgagee.⁴⁶

§ 656. *Sale of mortgage as a cover for usury.*—The question of the validity of a mortgage in the hands of the assignee depends frequently upon the point whether it had any “inception” before it was transferred. This depends upon the question as to whether an action could have been brought upon it before the transfer.⁴⁷

It must be noticed that in the cases where the purchase of a mortgage security at a discount has been held to be valid, the contract was one of purchase, and was made with the person owning the mortgage. A contract with a mortgagor to loan him a sum of money wherewith to pay the amount due on a mortgage, upon the security of an assignment of the mortgage, is a very different matter, and if made on usurious terms, the assignment will be void.⁴⁸

It is not competent for a purchaser of a mortgage at a discount to shut his eyes to facts which ought to satisfy him that in dealing

43 *Dunham v. Cudlipp*, 94 N. Y. 129; *Sickles v. Flanagan*, 79 N. Y. 224.

44 *Smith v. Cross*, 90 N. Y. 549; *Union Dime Savings Institution v. Wilmot*, 94 N. Y. 221; *Dunham v. Cudlipp*, 94 N. Y. 129; *Brooks v. Avery*, 4 N. Y. (4 Comst.) 225; *Sickles v. Flanagan*, 79 N. Y. 224.

45 *Dunham v. Cudlipp*, 94 N. Y. 129, 136.

46 *Verity v. Sternberger*, 62 App. Div. 112; 70 N. Y. Supp. 894, *aff'd*

172 N. Y. 633; 65 N. E. 1123; *Sickles v. Flanagan*, 79 N. Y. 224.

47 *Eastman v. Shaw*, 65 N. Y. 522, 527; *Munn v. Commission Co.*, 15 Johns. 44; *Powell v. Waters*, 8 Cow. 669; *Kent v. Walton*, 7 Wend. 256.

48 *Wyeth v. Branif*, 84 N. Y. 628, *rev'g* 14 Hun, 537; *Kellogg v. Adams*, 39 N. Y. 28; *Schroeppel v. Corning*, 5 Den. 236; *Johnson v. Bush*, 3 Barb. Ch. 207. See also *Donnington v. Meeker*, 11 N. J. Eq. 362.

with the mortgagee he is really contracting with the mortgagor for a loan of money; and in a case where there was deducted from the price of the mortgage, a large prior mortgage on the property, this fact was held notice to the purchaser of the real nature of the transaction.⁴⁹ So, the fact that the mortgagor negotiates the sale of the mortgage should put the purchaser upon inquiry.⁵⁰

So, if A applies to B for the loan of money, B may refuse to loan, and say to A that he must procure a valid mortgage which he can buy at a discount, and he may suggest to A that he might sell his real estate to C, and get a mortgage from C, and that he would then buy the mortgage at a discount. If A, in pursuance of the suggestion and scheme, actually sells his real estate to C, and takes a valid mortgage from C, that mortgage has a valid inception and is subject to sale and traffic like any other chose in action. Its purchase is not, in any sense, a loan of money, and the fact that the purchaser acquires a profit in excess of the rate established by law for interest on loans does not render the transaction usurious.⁵¹ But if the conveyance thus made is a mere form, and the grantee after the conveyance held the title for the grantor, and if the mortgage is executed simply for the purpose of raising money, and all this is done at the instigation of the person afterward purchasing the security at a discount, or if it is all known by him to be the actual state of facts, then it would be in effect a loan to the mortgagee under the pretense of a sale, the mortgage having no inception until it is assigned, and the mortgage, notwithstanding the form of its execution as a purchase-money mortgage, would be subject to the defense of usury.⁵²

§ 657. **Payment of discount by mortgagor.**—There can be no usury unconnected with the loan or forbearance of money, and a purchase of a debt by another at the instance of the debtor for less than its face, the debtor himself paying the creditors the discount, is not *per se* usury.⁵³ It may be very cogent evidence of usury, and under some circumstances, as, for example, where the transaction originated in an agreement for a loan by the alleged purchaser to the debtor, the conclusion that the form

⁴⁹ *Smithers v. Heather*, 25 Mich. 447. See *Gilbert v. Real Estate Co. of Brooklyn*.

⁵⁰ *Mullison's Appeal*, 68 Pa. St. 212.

⁵¹ *Per* EARL, J., in *Smith v. Cross*, 90 N. Y. 549, 553.

⁵² *Smith v. Cross*, 90 N. Y. 549, 553.

⁵³ *Siewart v. Hamel*, 91 N. Y. 199.

the transaction took was a mere device and cover for usury might be well-nigh irresistible.⁵⁴

And it has been held that a mortgage free from usury in the hands of the mortgagee is not rendered usurious by the payment of a premium to his assignee to induce him to purchase it.⁵⁵

§ 658. **Bonus exacted by agent on his own behalf.**—If the agent of the lender exacts from the borrower a sum of money for his own benefit, and which is understood by the borrower to be paid to and appropriated by the agent as an inducement on his part to make the loan, this does not necessarily make the contract usurious; the contract for excessive compensation being in form and in fact made with the agent individually for his benefit, and the contract for the loan being quite independent.⁵⁶

§ 659. **Bonus exacted by agent on behalf of principal.**—The decisions last cited are based upon the principle that the lender did not either expressly, impliedly, or apparently authorize the agent to do an illegal act or to violate the law; and hence, that he was not affected by the wrongful act of the agent in extorting from the borrower a bonus for himself, so long as the lender did not authorize, consent to, or participate in the extortion, and was seeking to enforce a security for the precise amount loaned with lawful interest. And it makes no difference in principle if the agent professed to take the bonus for the lenders, so long as he had no express, implied or apparent authority to do so, if the lenders have neither taken, assented to, nor participated in the usury.⁵⁷

So, where one of several trustees received a usurious bonus on a mortgage given on a loan by the estate which he represented, it was held that the mortgage was not invalidated thereby unless it be shown that the same was received by the authority or with the

⁵⁴ Per ANDREWS, Ch. J., in *Siewart v. Hamel*, 91 N. Y. 199.

⁵⁵ *Conover v. Hobart*, 24 N. J. Eq. 120; *Kellogg v. Adams*, 39 N. Y. 28.

⁵⁶ *Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 N. Y. 165; *Fellows v. Commissioners of Loans of Oneida Co.*, 36 Barb. 655; *Mutual Life Ins. Co. v. Kashaw*, 66 N. Y. 544; *Philips v. Mackellar*, 92 N. Y. 34; *Terminal Bank v. Dulroff*, 66

Misc. R. 100; 120 N. Y. Supp. 609. See also *Manning v. Young*, 28 N. J. Eq. 568.

⁵⁷ *Estevez v. Purdy*, 66 N. Y. 446, 449, rev'g 6 Hun, 46; *Lee v. Chadsey*, 3 Abb. Ct. of App. Dec. 43; 2 Keyes, 543; *Stout v. Rider*, 12 Hun, 574; *Gray v. Van Blarcom*, 29 N. J. Eq. 454; *Spring v. Reed*, 28 N. J. Eq. 345; *Manning v. Young*, 28 N. J. Eq. 568.

knowledge of the other trustees.⁵⁸ And where the guardian of an infant loaned money belonging to his ward, receiving securities for the amount loaned with lawful interest; but as an inducement to make the loan received a bonus for his own benefit from the borrower, who paid the same with knowledge as to the title of the moneys loaned, this did not make the transaction usurious. The guardian is not a lender of the trust fund within the meaning attached to that term by our statutes relating to usury.⁵⁹

In *Algur v. Gardner* (54 N. Y. 360) the court below had charged the jury that if the usurious premium had been paid to the agent, on a contract between the borrower and the agent, the plaintiff might still recover. The Commission of Appeals decided that such a charge was improper, because there was no evidence of any such separate agreement. They also thought that there was strong evidence in favor of the theory that the plaintiff had authorized the exacting of the usury, and they held that it was error not to have submitted that question to the jury.⁶⁰ And where a husband acting for his wife negotiated a loan and took an usurious bonus without telling his wife it was held that she was bound by the usury and could not plead ignorance of her agent's acts.⁶¹

If the usurious bonus is received and retained by the principal with knowledge of the facts, this will constitute a ratification of the usury; but to have this effect he must know that it was received on the very transaction; and where a lender received a sum of money from his attorney with the understanding that it was paid to him on another contract, this will not constitute such ratification, notwithstanding a finding by the court that it had been paid for usury; but in such a case he will be required to credit the amount upon the loan.⁶²

§ 660. Purging a contract of usury.—If the usurious premium be returned before the delivery of the mortgage, the usury will be purged and the mortgage will be valid.⁶³ So, where a usurious contract is mutually abandoned by the parties, and the securities

⁵⁸ *Van Wyck v. Walters*, 16 Hun, 209, aff'd 81 N. Y. 352.

⁵⁹ *Fellows v. Longyor*, 91 N. Y. 324.

⁶⁰ See *Estevez v. Purdy*, 66 N. Y. 446, 451.

⁶¹ *Bliss v. Sherrill*, 24 App. Div. 280; 49 N. Y. Supp. 561.

⁶² *Bliven v. Lydecker*, 130 N. Y. 102; 28 N. E. 625; *Philips v. Mackellar*, 92 N. Y. 34.

⁶³ *Brackett v. Barney*, 28 N. Y. 333.

given therefor cancelled and destroyed, a subsequent promise by the borrower to pay the money actually loaned is not tainted by the original usury and can be enforced.⁶⁴

Such purgation of usury between the parties to the contract will not affect the right of an existing junior lienor, although it will bind all parties claiming subsequent to the forgiveness of the usury.⁶⁵ And the holder of a usurious mortgage cannot, even with the assent of the mortgagor, apply partial payments to the unsound parts of his mortgage for the purpose of keeping alive that part which is valid, to the prejudice of a subsequent mortgagee.⁶⁶

§ 661. Usury as controlled by place of contract.—The question as to whether a contract is usurious or not is quite independent of where the land which is pledged to secure the debt is located. It is possible for parties in this State to make a contract of loan with such reference to a foreign law, that the latter will govern its construction and legal effect; but this rule does not mean that parties by a mere mental operation can import the law of another State into this, for the purpose of altering the character of a loan made here, and to be returned, without any undertaking or duty to use the money anywhere else, or any undertaking that in respect to the use or repayment of the money the loan shall differ from any other. Although the debt be secured by a mortgage on land in a State where the contract is valid, still, if neither the bond nor mortgage name any place of payment, and the parties reside here, it is payable here, and the validity of the debt must be judged by the laws of this State.⁶⁷ So, in a proper case, the Supreme Court of this State has power to decree a mortgage upon real estate void for usury, and to compel the party holding it to surrender it up to be cancelled, though the lands mortgaged lie in another State.⁶⁸

The same principle will control if the land mortgaged is in this State and the parties reside and contracted in another State. The law of the place where the contract is made will determine its validity.⁶⁹

⁶⁴ *Sheldon v. Haxtun*, 91 N. Y. 124.

⁶⁵ *Van Tassell v. Wood*, 12 Hun, 388; *Miller v. Hull*, 4 Den. 104; *Brackett v. Barney*, 28 N. Y. 333; *Warrick v. Dawes*, 26 N. J. Eq. 548.

⁶⁶ *Greene v. Tyler*, 39 Pa. St. 361.

⁶⁷ *Cope v. Wheeler*, 53 Barb. 350, aff'd 41 N. Y. 303.

⁶⁸ *Williams v. Ayrault*, 31 Barb. 364.

⁶⁹ *Dolman v. Cook*, 14 N. J. Eq.

So, where the parties to notes executed and payable in a foreign State were residents of that State, a mortgage upon lands in New York given to secure their payment is enforceable if valid according to law of the State where the principal transaction took place.⁷⁰

And a note drawn, dated, signed, delivered, made payable, and first used in the State of New York, but given for a precedent debt arising in and owing to a resident of Dakota, is to be governed by the usury laws of New York and not those of Dakota.⁷¹

The meaning and intent of the usury laws is that the validity of a mortgage is determined by the validity of the agreement of the parties and that such agreement is governed by the law of the place where it is made.⁷²

§ 662. **Substituted securities.**—If a security is tainted with usury in its creation, it will be void even in the hands of a *bona fide* holder.⁷³ Any new security given to the lender in exchange for such usurious security, or into which the latter enters as a consideration, is also infected with the usury and is void,⁷⁴ even though the new security is given by a third person, a stranger, if it is without any new consideration,⁷⁵ and the original taint attaches to every such successive security however remote.⁷⁶

But if the usurious obligation be transferred to an innocent holder and he receives directly from the debtor a new one in its stead, such new obligation cannot be impeached for usury in the original.⁷⁷ And the fact that a mortgagee who before maturity desires the debt reduced demands and receives compensa-

56. A mortgage on real estate in Michigan executed to secure a note payable in New York, with ten per cent. interest, is valid under the laws of Michigan. *Fitch v. Remer*, 1 Bissell, 337.

70 *Manhattan Life*, 188 N. Y. 108; 80 N. E. 658, aff'd 115 App. Div. 429; 101 N. Y. Supp. 65.

71 *Mechanics' Nat. Bk. of St. Paul v. Southwick*, 67 How. Pr. 324.

72 *Manhattan Life Ins. Co. v. Johnson*, 188 N. Y. 106; 80 N. E. 658.

73 *Thompson v. Berry*, 3 Johns. Ch. 395, aff'd 17 Johns. 436.

74 *Jack v. Nichols*, 5 N. Y. (1 Seld.) 178; *McCraney v. Alden*, 46

Barb. 272; *sub nom. Cope v. Wheeler*, 41 N. Y. 303.

75 *Tuthill v. Davis*, 20 Johns. 285; *Vickery v. Dickson*, 35 Barb. 96; *Bell v. Lent*, 24 Wend. 230.

76 *Dunning v. Merrill, Clarke Ch.* 252.

77 *Kilner v. O'Brien*, 14 Hun, 414; *Cuthbert v. Haley*, 8 J. R. 390; *Jackson v. Henry*, 10 Johns. 185; *Powell v. Waters*, 8 Cow. 669, 691, 696; *Kent v. Walton*, 7 Wend. 256; *Holmes v. Williams*, 10 Paige, 326; *Aldrich v. Reynolds*, 1 Barb. Ch. 43; *Smedberg v. Simpson*, 2 Sandf. Sup. Ct. 85; *Sherwood v. Archer*, 10 Hun, 73.

tion before he will accept an offer partly of cash and partly of a mortgage on other property will not render the transaction void for usury.⁷⁸

Where part of the money included in a usurious mortgage is used in taking an assignment of a prior valid security, the purchaser may recover on such assigned security.⁷⁹

A mortgage made to secure two independent obligations, one of which is valid and the other of which is void for usury, may be enforced to the extent of the valid one.⁸⁰

§ 663. New security for usurious debt.—When a new security is given to the same lender, to secure a usurious debt previously contracted, it will partake of the taint of the original debt, even though given by a third person, if there is no other consideration than the original usurious indebtedness.⁸¹ But there is no rule of law which prohibits the loaning of money to a person intending to use it to pay a usurious debt, and the fact that the money was so used would not taint the contract with the person who made the new and valid loan.⁸²

§ 664. Who may avail themselves of the defense of usury.—The defense of usury is said to be a personal defense, and it is available only to the borrower or his privies in blood, representation, or estate. It cannot be set up by a stranger to the original transaction,⁸³ and it is available only to those persons who are bound by the original contract to pay the sum borrowed, or who have received the estate upon which the debt is charged as a lien. The statute having declared the usurious security void, the owner of the premises has the right to sell his property or to mortgage it, as though such void mortgage had never existed; and the purchaser in such case necessarily acquires all the rights of his vendor to question the validity of the original security, for if the original mortgagor had not that right, the premises would, to a certain extent, be rendered inalienable in his hands, notwithstanding the security was absolutely void as to him.⁸⁴ The right to insist

⁷⁸ Meaker v. Fiero, 145 N. Y. 165; 37 N. E. 714.

⁷⁹ Allison v. Schmetz, 31 Hun, 106.

⁸⁰ Carradine v. Wilson, 61 Miss. 573.

⁸¹ Vickery v. Dickson, 35 Barb. 96; Bell v. Lent, 24 Wend. 230.

⁸² Wilson v. Harvey, 4 Lans. 507.

⁸³ Ohio & Mississippi R. R. Co. v. Kasson, 37 N. Y. 218; Williams v. Buck, 2 Transcript App. 133; *sub nom.* Williams v. Tilt, 36 N. Y. 319; Stoney v. The American Life Ins. Co., 11 Paige, 635, rev'g 4 Edw. Ch. 332.

⁸⁴ Shufelt v. Shufelt, 9 Paige, 137; Post v. Dart, 8 Paige, 639; Brooks v.

upon the usurious character of the security passes to the heir or devisee of the mortgagor, and, to the extent of his claims upon the land, it also belongs to the subsequent judgment creditor of the mortgagor, or to a purchaser under such judgment,⁸⁵ or to a subsequent mortgagee of the mortgaged premises,⁸⁶ or to the purchaser at a sale under the foreclosure of a mechanic's lien upon the same premises,⁸⁷ or to a person who is assignee of the mortgagor's property for the benefit of his creditors,⁸⁸ provided the assignment be not by its terms made for the purpose of paying, among other debts, the one infected with usury, in which case, neither the assignee nor any other creditor claiming under the assignment, can set up the usury.⁸⁹

§ 665. **Right to allege usury cannot be transferred.**—The borrower cannot transfer to another the right he has to allege and prove a demand to be usurious. The only way a third person can avail himself of usury, is by purchasing property charged with a lien or incumbrance which is usurious, and then only in protection of his title.⁹⁰ Where property is so purchased it is essential in order to estop a grantee from contesting the validity of a mortgage on the ground of usury that it should appear that the conveyance of the grantor's interest was made subject to the mortgage or that he assumed some personal liability.⁹¹

One who is the owner of the equity of redemption without notice

Avery, 4 N. Y. (4 Comst.) 225; Bullard v. Raynor, 30 N. Y. 197; Matthews v. Coe, 56 Barb. 430.

⁸⁵ Dix v. Van Wyck, 2 Hill, 522; Schroeppel v. Corning, 5 Den. 236; Thompson v. Van Vechten, 27 N. Y. 568, 585; Mason v. Lord, 40 N. Y. 476; Merchants' Ex. Bank v. Commercial Warehouse Co., 49 N. Y. 636; Carow v. Kelly, 59 Barb. 239; Jackson v. Tuttle, 9 Cow. 233; Knickerbocker Life Ins. Co. v. Hill, 6 N. Y. Sup. Co. (T. & C.) 285; 3 Hun, 577.

⁸⁶ Mutual Life Ins. Co. v. Bowen, 47 Barb. 618; Union Dime Savings Institution v. Wilmot, 94 N. Y. 221, 228. See also Cole v. Bausemer, 26 Ind. 94; Hutchison v. Abbott, 33 N. J. Eq. 379.

⁸⁷ Knickerbocker Life Ins. Co. v. Hill, 6 Thom. & C., 285; 3 Hun, 577;

16 Abb. Prac. N. S. 321, citing Williams v. Tilt, 36 N. Y. 325; Mason v. Lord, 40 N. Y. 488; Merchants' Exch. Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 643.

⁸⁸ Pearsall v. Kingsland, 3 Edw. 195.

⁸⁹ Murray v. Judson, 9 N. Y. (5 Seld.) 73; Pratt v. Adams, 7 Paige, 615, 639.

⁹⁰ Bullard v. Raynor, 30 N. Y. 197; Boughton v. Smith, 26 Barb. 635; Post v. The Bank of Utica, 7 Hill, 391; Rexford v. Widger, 2 N. Y. (2 Comst.) 131.

⁹¹ Devlin v. Shannon, 65 How. Pr. 148, citing Hetfield v. Newton, 3 Sandf. Ch. 565; Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 152; Schemerhorn v. Tallman, 14 N. Y. 93; Hartley v. Harrison, 24 N. Y. 170.

of a usurious contract, and without personal liability thereupon, is regarded as a privy in estate, who may attack or defend the security given by his grantor.⁹²

§ 666. When mortgagor is estopped from setting up usury against assignee of mortgage.—As between the parties to a usurious contract the defense given by the statute is always available and no subtlety of language or apparent honesty in the form in which the transaction is veiled will serve to shield the usurer.⁹³ The same principle will apply after the transfer of the rights of the lender to a person who accepts an assignment upon the faith of the appearance of the transaction or the statements of the assignor, since the assignee of a non-negotiable right of action takes it subject to all defenses between the original parties to it.⁹⁴ But where a mortgagor, by his acts or statements, leads an intending purchaser to believe that the mortgage was given to secure an honest debt and is free from usury, and such purchaser, relying on the mortgagor's acts and statements, pays a valuable consideration and receives an assignment, neither the mortgagor nor any other person thereafter claiming under him can impugn the validity of the security, even though it was specially contrived to be sold as a means for borrowing money at a greater rate than that allowed by law.⁹⁵ No mere form will work an estoppel, and if the person relying upon an estoppel of the mortgagor by reason of a statement by him,⁹⁶ or his agent in the special transaction⁹⁷ have knowledge of the facts, such statement, though made for the pur-

⁹² *Devlin v. Shannon*, 65 How. Pr. 148, citing *Dix v. Van Wyck*, 2 Hill, 522; *Mason v. Lord*, 40 N. Y. 476.

⁹³ *Birdsall v. Patterson*, 51 N. Y. 43; *Fiedler v. Darrin*, 50 N. Y. 437; *Crippen v. Heermance*, 9 Paige, 211.

⁹⁴ *Bliven v. Lydecker*, 130 N. Y. 102; 28 N. E. 625; *Mason v. Lord*, 40 N. Y. 476; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Livingston v. Dean*, 2 Johns. Ch. 479; *James v. Morey*, 2 Cow. 246; *Davies v. Austin*, 1 Ves. 247.

⁹⁵ *Weyh v. Boylan*, 85 N. Y. 394; *Mason v. Anthony*, 3 Keyes, 609; *Real Estate Trust Co. v. Seagreave*, 49 How. Pr. 489; *L'Amoreaux v.*

Vischer, 2 N. Y. (2 Comst.) 278; *Nichols v. Nussbaum*, 10 Hun, 214; *Smyth v. Lombardo*, 15 Hun, 415; *Smyth v. Knickerbocker Life Ins. Co.*, 21 Hun, 241; *Smyth v. Monroe*, 19 Hun, 550; *Barnett v. Zacharias*, 24 Hun, 304; *Fleischman v. Stern*, 24 Hun, 265; *Weyh v. Boylan*, 85 N. Y. 394; *Platt v. Newcomb*, 27 Hun, 186; *Weil v. Fisher*, 42 N. Y. Super. (10 J. & S.) 32.

⁹⁶ *Shapley v. Abbott*, 42 N. Y. 443; *Kneettle v. Newcomb*, 31 Barb. 169.

⁹⁷ *Hutchins v. Hebbard*, 34 N. Y. 24; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 394; *Lawrence v. Brown*, 5 N. Y. (1 Seld.) 401.

pose of affording him legal protection, will be valueless for that purpose.

An estoppel will not operate to enable a purchaser of a mortgage to make a speculation out of the falsehood of the mortgagor, and it will protect him only to the extent of the amount actually advanced by him upon the faith of the mortgagor's statement as to the validity of the security with legal interest.⁹⁸

This subject is more fully discussed in another part of this work under the head "Assignment of Mortgages."¹

§ 667. Strangers to usurious contract.—A surety cannot avail himself of usury paid by his principal to which he was not a party.² And where a mortgagee assigned the mortgage as collateral for a debt of his own, and the assignee took usurious interest from the assignor, the mortgagor cannot set up this usury against the assignee.³ On a like principle, in a suit by a surety to enforce a mortgage given to him for his indemnity as indorser of a note, the maker of the note and mortgagor cannot allege usury in the note as a defense, when the surety was not a party to the usurious agreement.⁴

Nor can a purchaser of mortgaged premises who has obtained an extension of time of payment in consideration of his promise to pay the principal sum due with interest, defend upon the ground of usury between the original parties, where he was a stranger to the original mortgage and there is no claim of usury between himself and the plaintiff.⁵

§ 668. Previous adjudication.—If a person has the right to interpose the defense of usury against a mortgage as an incident to his estate, and for its protection, it can make no difference as to him, that in an action at law upon the bond, subsequent to the vesting of his rights in the property, the mortgagor had set up the defense of usury and had been defeated.⁶ But a judgment entered either upon consent or otherwise between the mortgagor and mort-

⁹⁸ *Payne v. Burnham*, 62 N. Y. 69, rev'g 2 Hun, 143; 4 N. Y. Sup. (T. & C.) 678; *Miller v. Zeimer*, 111 N. Y. 441; 18 N. E. 716.

¹ See *ante*, §§ 348 to 356.

² *Lamoille Co. Nat. Bk. v. Bingham*, 50 Vt. 105.

³ *Stevens v. Reeves*, 33 N. J. Eq. 427.

⁴ *Turman v. Looper*, 42 Ala. 500.

⁵ *Preston v. Cuneo*, 140 App. Div. 144; 124 N. Y. Supp. 1031.

⁶ *Berdan v. Sedgwick*, 40 Barb. 359, aff'd 44 N. Y. 626.

gagee prior to the vesting of the rights of the third person, will bind him.⁷

§ 669. **Conveyances expressly subject to mortgages.**—The purchaser of a mere equity of redemption in mortgaged premises incumbered by a usurious mortgage, who, by the terms of his conveyance, takes the premises subject to the lien and payment of such mortgage, cannot set up the defense of usury, and thus obtain an interest in the land which the mortgagor never agreed or intended to transfer to him.⁸ Even if by the conveyance from the mortgagor the premises are declared to be “subject to any indebtedness from the mortgagor to the mortgagee,” the grantee will not be allowed to show that the mortgage was void because of usury.⁹ So, too, a purchaser at a master’s sale of property for a certain price “over and above all incumbrances and liens thereon” cannot defend against a prior incumbrance on the ground of usury.¹⁰

§ 670. **Reason of the rule.**—The rule under which the defense of usury is denied to one who has purchased the mortgaged premises from the mortgagor, subject to the mortgage, is founded upon the supposition that on the purchase an allowance was made out of the purchase money with which to redeem the property purchased from the incumbrance; and that the purchaser ought not, under such circumstances, to avail himself of a statute not intended for his benefit.¹¹

If the subsequent purchaser of the equity of redemption were allowed to set up usury as against the mortgage, it would hold out

⁷ French v. Shotwell, 5 Johns. Ch. 55.

⁸ Post v. Dart, 8 Paige, 639; Post v. Bank of Utica, 7 Hill, 391; Mechanics’ Bank v. Edwards, 1 Barb. 278; Green v. Morse, 4 Barb. 332; Morris v. Floyd, 5 Barb. 137; Rexford v. Widger, 2 N. Y. (2 Comst.) 131; James v. Oakley, 1 Abb. 324; Chamberlain v. Dempsey, 13 Abb. 61; 14 Abb. 241; 9 Bosw. 212, 540; Beecher v. Ackerman, 1 Abb. N. S. 141; 1 Rob. 30; Hardin v. Hyde, 40 Barb. 435; Freeman v. Auld, 44 N. Y. 50; Bullard v. Raynor, 30 N. Y. 206; Hartley v. Harrison, 24 N. Y.

172; Barthet v. Elias, 2 Abb. N. C. 364; Smith v. Cross, 16 Hun, 487. See also De Wolf v. Johnson, 10 Wheat. (U. S.) 367; Reading v. Weston, 7 Conn. 413; Bridge v. Hubbard, 15 Mass. 103; Given v. Kemp, 13 Mass. 515; 7 Am. Dec. 169; Pinnell v. Boyd, 33 N. J. Eq. 109; Cramer v. Leffen, 26 Ohio St. 59; Reed v. Eastman, 50 Vt. 67.

⁹ Murray v. Barney, 34 Barb. 336.

¹⁰ Wells v. Chapman, 4 Sandf. Ch. 312, aff’d 13 Barb. 561.

¹¹ Smith v. Cross, 16 Hun, 487; Morris v. Floyd, 5 Barb. 130; Cole v. Savage, 10 Paige, 583.

no relief to the borrower, but would only be transferring his money from the pocket of the lender to the pocket of the holder of the equity of redemption, and that too in open violation of his own valid contract.¹² Having taken his assignment or grant from the borrower, subject to a lien on the property tainted with usury, then, as to so much of the property as is necessary to satisfy such lien, he is not in privity with the borrower, for so much of the property is not assigned or granted to him.¹³

§ 671. Pleading by plaintiff to exclude defense of usury.—When the defense of usury is interposed to the foreclosure of a mortgage by the purchaser of the equity of redemption, the complainant cannot overcome it by proof that the lands were conveyed subject to the mortgage, unless his bill of complaint sets forth the execution and terms of such conveyance.¹⁴

§ 672. Permitting defense after grant subject to mortgage.—Where the property has been transferred subject to a usurious mortgage, it operates as an appropriation of the land in payment of the debt, which the borrower is unable afterward to retract, and the mortgagee acquires a vested interest in the land to the extent of his lien, which it is not in the power of the mortgagor to release or discharge.¹⁵ If the grantee has also assumed payment of the debt, it has been held that he may be relieved by his grantor from his personal liability,¹⁶ though as to this there may still be some question.¹⁷

§ 673. Mortgagor's defense after conveyance.—Although the mortgagor may have conveyed the equity of redemption, and his grantees, while the title remained in them, were precluded from availing themselves of the usury, still, on a reconveyance of the property being made to the mortgagor, he would not be restrained by any rule from making a full defense.¹⁸

It is competent for the mortgagor to insist upon his defense of

¹² *De Wolf v. Johnson*, 10 Wheat. (U. S.) 392; *Sands v. Church*, 6 N. Y. (2 Seld.) 347.

¹³ See the valuable note of Judge Jones, to *Merchants' Ex. Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. 643.

¹⁴ *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137; 7 Abb. N. C.

170; *Hetfield v. Newton*, 3 Sand. Ch. 615.

¹⁵ *Hartley v. Harrison*, 24 N. Y. 170.

¹⁶ *Stephens v. Casbacker*, 8 Hun, 116.

¹⁷ See *ante*, §§ 616 to 619.

¹⁸ *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137; 7 Abb. N. C. 170, *aff'd* 13 Hun, 321.

usury, even though, after the joining of issue, he has conveyed the estate and has been adjudged a bankrupt, and the plaintiff waives any personal claim against him.¹⁹

§ 674. **Judgment where only a lienor defends.**—When the holder of a usurious bond and mortgage commences an action to enforce the same against the land, and makes a subsequent judgment creditor or mortgagee a party for the purpose of depriving him of his legal lien upon the premises, such judgment creditor or mortgagee may avail himself of the defense of usury to the full extent of his legal lien. This, however, will not prevent the usual decree of foreclosure of the mortgagor himself, and a decree over against him for the deficiency, if he does not think proper to contest the plaintiff's right. And the only effect of the defense in such a case, will be to have the complaint dismissed as to the person defending; and the purchaser under the decree will take the title subject to the lien of the judgment or mortgage, if it should not be collected out of other property of the judgment creditor or mortgagor.²⁰

§ 675. **Right of defense to mortgage reserved in deed.**—A mortgagor has the right to satisfy or to provide for the satisfaction of a usurious mortgage, and where he merely sells the equity of redemption he is presumed to have made an application of the balance of the property for the purpose of satisfying the lien, which he is not afterward allowed to retract. But it is competent for the mortgagor to indicate in the conveyance, or by his agreement, that he desires the purchaser to defeat the mortgage, and thus to rebut the presumption of his contrary intention. Where, as part of his contract with the purchaser, he undertakes to indemnify the purchaser as against the mortgage, if the defense of usury fail, this furnishes no cause for restricting the right of defense of the purchaser, and cannot operate in any way for the benefit of the mortgagee.²¹

§ 676. **Usurious debt in assignment for creditors.**—A borrower may himself pay a usurious debt or transfer property for the pur-

¹⁹ Devlin v. Shannon, 65 How. Pr. 148.

²⁰ Post v. Dart, 8 Paige, 639; Van Tassell v. Wood, 12 Hun, 388; Dix v. Van Wyck, 2 Hill, 522; Thompson

v. Van Vechten, 27 N. Y. 568; Mason v. Lord, 40 N. Y. 476, 486.

²¹ Berdan v. Sedgwick, 40 Barb. 359, aff'd 44 N. Y. 626.

pose of providing for its payment, and an assignee of property in trust to pay certain specified debts cannot resist their payment on the ground of usury, and the bare fact that such an assignment provides for the payment of a usurious debt will not of itself alone render the assignment usurious and void, and neither the trustee nor those who come as *cestuis que trust* can object to the legality of the assignment and the validity of the trusts therein contained.²²

So, where a mortgagor in an assignment for the benefit of his creditors made specific provision for the payment of a bond secured by mortgage, it was held that he could not thereafter defeat the mortgage debt because of usury, and that the mortgagee to the extent of the money actually loaned, with legal interest thereon, was entitled to the benefit of the assignment, and that the fact that the mortgagee was also assignee was immaterial.²³

§ 677. Usury as a defense for the guarantor of the mortgage debt.—A person who assigns a mortgage impliedly warrants its legal soundness and validity, and if there are any exceptions to this rule they do not arise out of the vendor's own dealing with or in relation to the security. If, therefore, the mortgage be in its inception usurious, whether the assignor shall have guaranteed its payment or not, he will not be suffered to defend on the ground of usury in the mortgage.²⁴ The exception to this rule would be where the assignment was colorable merely, as part of a contrivance to cover a usurious loan, the purchaser of the mortgage having knowledge of the true nature of the transaction and being a party to it. It may be, too, that an accommodation guarantor could defend on the ground of usury.²⁵

§ 678. Guaranty of a mortgage sold at a discount.—If a valid mortgage be sold at a discount, an absolute guaranty of payment would not convert the sale of the mortgage into a loan of money upon the security and render the transaction usurious, but in such a case the guarantor would only be liable for the actual amount paid for the assignment, with interest thereon. In such cases the

²² Green v. Morse, 4 Barb. 332; Murray v. Judson, 9 N. Y. (5 Seld.) 73; Pratt v. Adams, 7 Paige, 615, 639.

²³ Chapin v. Thompson, 89 N. Y.

270; Matter of Thompson, 30 Hun, 197.

²⁴ Morford v. Davis, 28 N. Y. 481; Hoeffler v. Westcott, 15 Hun, 243.

²⁵ Parshall v. Lamoreaux, 37 Barb. 189.

courts have gone behind the contracts of the parties, and have received evidence of the consideration of the agreements in order to limit the liability of the contracting parties and uphold the transactions. The contract in such a case is upon its face for the payment by the guarantor of the whole amount secured to be paid by the instrument negotiated, but the courts hold that the recovery should nevertheless be limited to the amount actually paid as a consideration for the undertaking, thus to some extent varying the terms of the contract.²⁶

§ 679. The usurer cannot avail himself of the statute.—It does not lie in the mouth of the usurer himself to set up his own illegal conduct, and allege that a bargain which he has made is void on that ground. It is the victim of the usury, and not the usurer himself, that can set up against a contract that it is usurious and void. He will not be permitted to show that a bond and mortgage are usurious and void so as to revive a judgment in payment for which they were given;²⁷ nor that a conveyance made in payment of a valid mortgage was by way of usurious security, and therefore void;²⁸ nor that an agreement to extend the time of payment of the mortgage debt by which the surety would be discharged is usurious and void;²⁹ nor that the mortgage assigned by him with guaranty of payment was usurious, in order to escape from his liability as guarantor.³⁰

And those who are parties to the usury cannot avail themselves of an alleged estoppel induced for the sake of giving apparent validity to the transaction.³¹

§ 680. Defense of usury by corporations.—A corporation is not allowed to interpose the defense of usury, and the prohibition extends to associations and joint stock companies having any corpo-

26 Goldsmith v. Brown, 35 Barb. 484; Cobb v. Titus, 10 N. Y. (6 Seld.) 198; Jones v. Stienbergh, 1 Barb. Ch. 250; Munn v. The Commission Company, 15 Johns. 44; Bra-man v. Hess, 13 Johns. 52; Brown v. Mott, 7 Johns. 361; Rapelye v. Anderson, 4 Hill, 472; Cram v. Hendricks, 7 Wend. 569; Mazuzan v. Mead, 21 Wend. 285; Sutherland v. Woodruff, 26 Hun, 411.

27 La Farge v. Herter, 4 Barb. 346, aff'd 9 N. Y. (5 Seld.) 241.

28 Miller v. Kerr, Bayley's South Carolina R. 4.

29 Draper v. Trescott, 29 Barb. 401; Billington v. Wagoner, 33 N. Y. 31.

30 Morford v. Davis, 28 N. Y. 481; Elwell v. Chamberlin, 4 Bosw. 320; aff'd 31 N. Y. 611.

31 Merwin v. Romanelli, 141 App. Div. 711; 126 N. Y. Supp. 549.

rate powers or privileges not possessed by individuals or partnerships.³² The courts have interpreted the word defense, as used in this statute, to mean more than the resistance of an action by a reliance on the usury laws, and to mean any position or attitude in which a corporation seeks to avoid its own contract by showing that it is usurious. This interpretation was adopted because the contrary would defeat, it was said, all of the beneficial aims of the act, and because the courts were constrained to do so to save the purpose of it.³³ But there is nothing in the statute which forbids the assertion by a corporation of a right of action to which it has rightfully succeeded, and which is dependent upon the provisions of the usury law, and a corporation which succeeds to the legal rights of a party who might avail himself of usury, is not precluded by this statute from setting up that right.³⁴

An accommodation indorser for a corporation cannot defend on the ground of usury.³⁵

§ 681. Pleading usury as a defense.—The defense of usury must, in order to be available, be properly pleaded, and this is especially the case where a contract or other cause of action, valid on its face, has been assigned, since the defendant should not be permitted to defeat the plaintiff's claim on the ground that the contract was void in its inception by reason of fraud, illegality, or the like, without apprising him specifically of the facts relied on to establish such defense.³⁶ Facts sufficient to show usury must be clearly alleged.³⁷

An answer setting up the defense of usury must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made, and that the agreement was corrupt.³⁸

32 Gen. Bus. Law, § 374; Laws of 1850, c. 172, p. 334.

33 *Curtis v. Leavitt*, 15 N. Y. 9; *Southern L. I. & T. Co. v. Packer*, 17 N. Y. 51; *Rosa v. Butterfield*, 33 N. Y. 665; *Butterworth v. O'Brien*, 23 N. Y. 275; *Merchants' Ex. Nat. Bank v. Commercial W. Co.*, 49 N. Y. 635, 641.

34 *Merchants' Ex. Nat. Bank v. Commercial W. Co.*, 49 N. Y. 635.

35 *Stewart v. Bramhall*, 11 Hun, 139.

36 *Fay v. Grimstead*, 10 Barb. 321; *Gould v. Horner*, 12 Barb. 601; *Watson v. Bailey*, 2 Duer, 509; *Scott v. Johnson*, 5 Bosw. 213, 224; *Mechanics' Bank of Williamsburgh v. Foster*, 44 Barb. 87; *Haywood v. Jones*, 10 Hun, 500.

37 *Myers v. Wheeler*, 24 App. Div. 327; 48 N. Y. Supp. 611, aff'd 161 N. Y. 637; 57 N. E. 1118.

38 *Manning v. Tyler*, 21 N. Y. 567; *Fay v. Grimstead*, 10 Barb. 321; *Gould v. Horner*, 12 Barb. 601;

Such an answer is sufficient if it alleges the facts with such precision and certainty as to make out on the face of the pleading that a usurious contract has been entered into.³⁹ Where the complaint in an action to foreclose securities which are void for usury sets forth the original indebtedness which is not denied by the answer, a personal judgment for the amount thereof with legal interest may be granted.⁴⁰ The defendant, in an action to foreclose, may plead usury as a defense and may also ask in his answer that the mortgage be cancelled of record as void and a cloud on title.⁴¹

Usury must be strictly proved as alleged, and any variance is fatal.⁴² Thus, where the answer charged that the plaintiff took \$2,900 in excess of legal interest for the loan or forbearance of the mortgage debt of \$50,000, and the proof showed that the total amount received by the plaintiff was \$2,125, this was held fatal to the defense.⁴³

The onus of proving usury rests upon the defendant alleging it, and the appellate court will not in a doubtful case reverse the finding of the trial court holding the transaction to be valid.⁴⁴

§ 682. Affirmative relief in equity against usurious mortgages.—Independent of our statute, if a borrower comes into a court of equity seeking relief against a usurious contract, the only terms upon which the court will interfere are, that the plaintiff will pay the defendant what is really and *bona fide* due to him, deducting the usurious interest, and if the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed.⁴⁵ The plaintiff asking equity will be compelled to do equity.

But a statute of this State provides that "Whenever any borrower of money, goods or things in action, shall begin an action for the

Banks v. Van Antwerp, 5 Abb. 411; Smalley v. Doughtey, 6 Bosw. 66; Nat'l Bk. of Metropolis v. Orcutt, 48 Barb. 256.

39 National Bank v. Lewis, 75 N. Y. 516, rev'g 10 Hun, 468; Fiedler v. Darrin, 50 N. Y. 437; Merchants' Ex. Nat. Bk. v. Commercial Warehouse Co., 49 N. Y. 635. See also Reinback v. Crabtree, 77 Ill. 182, 188.

40 Troy Carriage Co. v. Simson, 15 Misc. R. 424; 37 N. Y. Supp. 846.

41 Myers v. Wheeler, 24 App. Div. 327; 48 N. Y. Supp. 611, aff'd 161 N. Y. 637; 57 N. E. 1118.

42 Hetfield v. Newton, 3 Sand. Ch. 564.

43 Wheaton v. Voorhis, 53 How. Pr. 319.

44 Haughwout v. Garrison, 69 N. Y. 339.

45 Fanning v. Dunham, 5 Johns. Ch. 142; Story's Eq. Jur., § 301.

recovery of the money, goods or things in action taken in violation of the foregoing provisions of this article, it shall not be necessary for him to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief to the borrower in any case of usurious loans forbidden by the foregoing provisions of this article.”⁴⁶

The statute does not authorise the institution of an action in equity to annul a contract or instrument for usury, in any case in which such an action could not have been maintained before the passage of that act. It merely changes the terms upon which the “borrower” may obtain relief in a proper case.⁴⁷ As to the “borrower,” he may obtain relief without paying or offering to pay any part of the money loaned; but as to all other persons, the rule since the statute is the same as it was before its passage. In order to obtain equitable relief, all persons except the “borrower” must still do equity; but at law, any person who is in privity with the borrower, either in blood or estate, may set up the usury as an absolute bar and defense.⁴⁸

Where a bond and mortgage has been assigned to an employee of a bank as security for a loan, and the employee executed another assignment in blank and delivered it to the bank, both the trustee of the bankrupt assignor and the bank itself are necessary parties to a suit to cancel the bond and mortgage on the ground that they were usurious and void.⁴⁹

§ 683. Who must repay money borrowed as a condition for relief.—The court still retains power to compel all persons, the borrower included, to do equity as to everything except the repayment of money borrowed. When, therefore, the plaintiff asks that a mortgage be cancelled as a cloud upon the title to his lands, and that a court of equity shall so direct, in virtue of its power and its disposition to enforce his equitable rights, the court may not require that he pay a usurious debt, or any part thereof, or

⁴⁶ Gen. Bus. Law, § 377; 1 R. S. 772, § 8; Laws of 1837, c. 430, § 4.

⁴⁷ *Minturn v. Farmers' Trust Co.*, 3 N. Y. (3 Comst.) 498; *Allerton v. Belden*, 49 N. Y. 378.

⁴⁸ *Hubbard v. Tod*, 171 U. S. 474;

Bissell v. Kellogg, 60 Barb. 617, aff'd 65 N. Y. 432; note of JONES, J., to *Merchants' Ex. Nat. Bank v. Commercial W. Co.*, 49 N. Y. 642.

⁴⁹ *Slade v. Squier*, 133 App. Div. 666; 118 N. Y. Supp. 278.

any interest thereon, but it may require the performance of any other duty which is just to the adverse party, unembarrassed by the statutes in question.⁵⁰

If any one but the borrower apply to a court of equity for relief as against a usurious security, he must in his complaint offer to repay the money actually loaned. If he fails to do this, his complaint will be fatally defective, and a demurrer will be sustained on that ground.⁵¹ But if the defendant omits to demur, the relief will be granted and the payment of the money justly due will be imposed as a condition for such relief in the decree.⁵²

§ 684. Who is a "borrower" within the meaning of the statute.

—The term "borrower" used in this statute has been construed to mean any person who was bound by the original contract to pay the original sum borrowed.⁵³ This would include the heir, devisee, and personal representative of the borrower, for though not immediate direct parties to the original contract, they are bound by it when they succeed to the estate of the testator or intestate.⁵⁴

It has been said that a surety, being a party upon the original contract, and liable upon it equally with the principal who borrows the money, is a "borrower" within the meaning of the act,⁵⁵ but the more recent cases hold that he is not a "borrower," and that he does not come within the exemption created by the statute.⁵⁶ The purchaser at a sheriff's sale of premises covered by a usurious mortgage is not a "borrower" of the money loaned to the mortgagor, and cannot maintain an action to cancel the mortgage without paying the money loaned and interest;⁵⁷ nor is the person whose property is pledged for the payment of a usuri-

50 *Williams v. Fitzhugh*, 37 N. Y. 444.

51 *Post v. The Bank of Utica*, 7 Hill, 391; *Allerton v. Belden*, 49 N. Y. 373.

52 *Allerton v. Belden*, 49 N. Y. 373; *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93, 129; *Livingston v. Harris*, 3 Paige, 528; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Beecher v. Ackerman*, 1 Robt. 30; 1 Abb. N. S. 141; *Bissell v. Kellogg*, 65 N. Y. 432, aff'g 60 Barb. 617.

53 *Livingston v. Harris*, 11 Wend. 329.

54 *Post v. The Bank of Utica*, 7 Hill, 391; *Livingston v. Harris*, 11 Wend. 329, 336.

55 *Post v. The Bank of Utica*, 7 Hill, 391; *Perrine v. Striker*, 7 Paige, 602; *Livingston v. Harris*, 11 Wend. 336.

56 *Vilas v. Jones*, 1 N. Y. (1 Comst.) 274.

57 *Post v. The Bank of Utica*, 7 Hill, 391.

ous loan;⁵⁸ nor a person who purchases the property mortgaged from the mortgagor;⁵⁹ and this was held to apply to the mortgagor himself in a case where, having been adjudicated a bankrupt and having received a discharge from his debts, he purchased the property from his assignee in bankruptcy.⁶⁰ An assignee in bankruptcy of the mortgagor is not a "borrower,"⁶¹ neither is an assignee for the benefit of creditors,⁶² nor a devisee or executor of the mortgagor.⁶³ It has been said that the mortgagor ceases to be a "borrower" after a conveyance by him of the mortgaged property.⁶⁴

The equitable owner of land, for whose benefit and at whose request the person holding the legal title executes a bond and mortgage, is a "borrower," within the meaning of the statute, and may maintain an action to set aside a mortgage without repaying the money loaned, or he may set up such a right of action as a counter-claim in an action brought by the mortgagee to foreclose.⁶⁵ But if he desires to avail himself of such a counter-claim, he must call it a counter-claim in his answer and demand affirmative relief.⁶⁶

§ 685. Validity of an extension for a usurious consideration.—

Since an agreement to extend payment of a mortgage for a usurious consideration is void,⁶⁷ the mortgagee may, notwithstanding such extension, forthwith commence an action to foreclose.⁶⁸ And assuming that the agreement is binding at the election of the person paying the usury, he disaffirms it by insisting that the con-

58 *Beecher v. Ackerman*, 1 Robt. 30; 1 Abb. N. S. 141; *O'Brien v. Ferguson*, 37 Hun, 368.

59 *Allerton v. Belden*, 49 N. Y. 373; *Chamberlain v. Dempsey*, 36 N. Y. 144, 149; *Schermerhorn v. Talman*, 14 N. Y. 93; *Rexford v. Widger*, 3 Barb. Ch. 640; 2 N. Y. (2 Comst.) 131; *Post v. The Bank of Utica*, 7 Hill, 391; *Cole v. Savage*, Clarke, 482, rev'd 10 Paige, 583, but approved in 7 Hill, 391, and the decision reversing it pronounced the better doctrine.

60 *Schermerhorn v. Talman*, 14 N. Y. 93.

61 *Wheelock v. Lee*, 64 N. Y. 242.

62 *Wright v. Clapp*, 28 Hun, 7.

63 *Marsh v. House*, 13 Hun, 126; *Buckingham v. Corning*, 91 N. Y. 525, aff'g 64 How. Pr. 503.

64 *Smith v. Cross*, 16 Hun, 487.

65 *Equitable Life Ass. Soc. v. Cuyler*, 12 Hun, 247.

66 *Equitable Life Ass. Soc. v. Cuyler*, 12 Hun, 247; *Burrall v. De Groot*, 5 Duer, 379; *Bates v. Rosekrans*, 23 How. Pr. 98.

67 *Ganz v. Lancaster*, 169 N. Y. 357; 62 N. E. 413, rev'g 50 App. Div. 204; 63 N. Y. Supp. 800.

68 *Church v. Maloy*, 70 N. Y. 63; *Jones v. Trusdell*, 23 N. J. Eq. 555; N. J. Eq. 121; *Vilas v. Jones*, 1 N. Y. (1 Comst.) 274.

sideration paid should be credited on the mortgage, and having received the credit he is not entitled to the benefit of the extension.⁶⁹

Where the consideration for the extension is a mere promise to pay usury in the future, the extension is more clearly void than it is where the money is paid and the borrower desires to abide by the contract.⁷⁰

If the extension be made upon a usurious consideration, it will, nevertheless, operate to extinguish claims against a surety. It is not competent for the usurer to claim an advantage from the illegal character of his contract.⁷¹

§ 686. Sales under powers contained in usurious mortgages.—A purchaser at a sale of mortgaged premises under a power of sale contained in a usurious mortgage, with notice of the usury, acquires no title,⁷² but a *bona fide* purchaser is protected.⁷³

§ 687. Effect of usurious contracts upon prior valid obligations.—It is well settled that when a valid debt exists and a usurious security is taken for it, the avoidance of the usurious security revives the debt,⁷⁴ and the transfer of the usurious security, though in form limited to that, must be deemed to carry with it all the rights of the party in respect to the debt which was its basis, including the right to enforce the old security in case the new one is avoided.⁷⁵ So, where a valid contract is made for the sale of lands, but the bond and mortgage given for the unpaid purchase money is void for usury, the vendor will still retain his equitable lien.⁷⁶

§ 688. Usurious bonus paid for extension of time.—On a similar principle, a usurious agreement made to extend the time for the payment of a valid mortgage does not operate to extinguish the original obligation. The usury simply avoids the agreement for

69 Church v. Maloy, 70 N. Y. 63.

70 Jones v. Trusdell, 23 N. J. Eq. 554.

71 Billington v. Wagoner, 33 N. Y. 31; Draper v. Trescott, 29 Barb. 401; Miller v. McCan, 7 Paige, 451; Vilas v. Jones, 10 Paige, 76.

72 Jackson v. Dominick, 14 Johns. 435; Bissell v. Kellogg, 65 N. Y. 432, aff'd 60 Barb. 617; McLoughlin v. Cosgrove, 99 Mass. 4.

73 Jackson v. Henry, 10 Johns. 185; Elliott v. Wood, 53 Barb. 285.

74 Cook v. Barnes, 36 N. Y. 520; Winsted Bank v. Webb, 39 N. Y. 325; 330.

75 Gerwig v. Shetterly, 64 Barb. 620, aff'd 56 N. Y. 214.

76 Crippen v. Heermance, 9 Paige, 211.

further forbearance. It renders that invalid without annulling the original debt or the securities given for its payment.⁷⁷ Where a payment is made by the borrower as a consideration for such extension, over and above the legal interest, this will be treated as a payment on account of the original obligation.⁷⁸ The right of the debtor to have the usurious bonus applied to reduce his indebtedness, is not dependent upon the statutory provision which allows the recovery by the debtor of usurious premiums paid by him, provided they be sued for within one year. It arises out of the equities of the transaction, which justly apply the money received by the creditor, as the consideration of a usurious agreement for the extension of the credit, in part payment of the debt. The agreement being void, no other disposition can equitably be made of the money paid by the debtor under it.⁷⁹

§ 689. Usury in one contract not applied upon a different contract.—In order to require the application of a usurious bonus upon a mortgage debt it must appear that the excessive payment was made upon that debt and upon no other. Thus, where a mortgagor of three mortgages to the same mortgagee, had paid the first two with usurious interest, it was held that he was not entitled to have the usury applied upon the third mortgage.⁸⁰

77 *Real Estate Trust Co. v. Keech*, 7 Hun, 253, aff'd 69 N. Y. 250; *The Winsted Bank v. Webb*, 39 N. Y. 325; *Crippen v. Heermance*, 9 Paige, 211; *Bush v. Livingston*, 2 Cal. Cas. 66; *Williams v. Allen*, 7 Cow. 316; *Carrson v. Ingalls*, 33 Barb. 657; *Lesley v. Johnson*, 41 Barb. 359; *Williams v. Fitzhugh*, 44 Barb. 322.

78 *Real Estate Trust Co. v. Keech*, 7 Hun, 253, aff'd 69 N. Y. 250; *Crane v. Hubbel*, 7 Paige, 413, 417; *Judd v. Seaver*, 8 Paige, 548; *Abrahams v. Claussen*, 52 How. Pr. 241; *Langdon v. Gray*, 52 How. Pr. 387; *Church v. Maloy*, 70 N. Y. 63, aff'd 9 Hun, 148; *Earle v. Hammond*, 2

Abb. N. C. 368; *Langdon v. Gray*, 52 How. Pr. 387; *Real Estate Trust Co. v. Rader*, 53 How. Pr. 231. See also *Patterson v. Clark*, 28 Ga. 526; *Smith v. Myers*, 41 Md. 425; *Maryland Perm. L. & B. Soc. v. Smith*, 41 Md. 516; *Nightingale v. Meginnis*, 34 N. J. L. 461; *Terhune v. Taylor*, 27 N. J. Eq. 80; *Laing v. Martin*, 26 N. J. Eq. 93.

79 *Real Estate Trust Co. v. Keech*, 7 Hun, 253, aff'd 69 N. Y. 250.

80 *Carriage Co. v. Kinsella*, 31 Conn. 272; *Dickey v. Land Co.*, 63 Md. 170; *Freedman v. Gamble*, 26 N. J. Eq. 494.

CHAPTER XVII

REDEMPTION

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§ 690. Nature of the right to redeem.—The estate of the mortgagor is commonly spoken of as an *equity* of redemption. This is not strictly correct until the estate has become forfeited at law by the non-payment at the time appointed, of the money secured by the mortgage, since, prior to a breach of the condition, the right to redeem is a *legal* right; it is only after the remedy of the mortgagor is gone at law, that he may properly be said to have only an *equity* of redemption in the land.¹ There is but little if any difference in this State, between the rights of the mortgagor before and after the time when the covenant secured by the mortgage ought to be performed, and, while his estate might, perhaps, be better termed a right of redemption, the phrase equity of redemption need not be misunderstood.

¹ Bouvier's Law Dic., tit. Equity of Redemption.

The right to redeem is the right to pay the debt and to have the lien discharged, and it therefore follows that, until the debt is due and payable, no redemption can be had.² But it may not be left to the mortgagee to elect that the debt is either due or not, as he prefers, and a mortgage payable on or before a specified date may be redeemed at any time.³

Redemption can be effected only by a satisfaction of the debt secured.⁴ In a case where a mortgagee has been in possession of the property, complicated questions of account may arise, which are considered in another part of this work.⁵

§ 691. The right of redemption is a legal incident to every mortgage, and is guarded most jealously to prevent fraud or oppression. If the contract or transaction is in reality a mortgage, or security for debt, whatever may be the form in which it is expressed, the legal incidents of the right of redemption are thereby attached to it and cannot be controlled by agreements.⁶ The rule "once a mortgage, always a mortgage" is inflexible,⁷ and every agreement intended to destroy the right to redeem will be disregarded and treated as null. As Lord ELTON observed: "You shall not, by special terms, alter what this court says are the special terms of that contract."⁸ So, a provision in a defeasance intended to limit the right of redemption to the mortgagor personally, has been held to be void.⁹ And a provision that the conveyance be absolute if redemption be not made within a specified time, would also be void.¹⁰ The same rule would govern a contract on the part of the mortgagor contemporaneous with the mortgage, that he would, upon default, forthwith release his equity of redemption.¹¹

² Abbe v. Goodwin, 7 Conn. 377.

³ In re John and Cherry Sts., 19 Wend. 659.

⁴ Fogal v. Pirro, 17 Abb. Pr. 113.

⁵ Chapter VIII, *ante*.

⁶ Finn v. Lally, 1 App. Div. 411; 37 N. Y. Supp. 437, rev'g 13 Misc. R. 532; 35 N. Y. Supp. 533; Henry v. Clark, 7 Johns. Ch. 40, aff'd Clark v. Henry, 2 Cow. 324; Holridge v. Gillespie, 2 Johns. Ch. 30. See also Bailey v. Bailey, 5 Gray (Mass.) 510; Peugh v. Davis, 96 U. S. 332; *supra*, §§ 9, 15.

⁷ Newcomb v. Bonham, 1 Vern. 8; Simon v. Schmidt, 2 N. Y. S. Repr. 388. See § 9 herein.

⁸ Seton v. Slade, 7 Ves. Jun. 273; Toomes v. Conset, 3 Atk. 261; Floyer v. Livingston, 1 P. Wms. 268.

⁹ Johnston v. Gray, 16 S. & R. (Pa.) 301; Howard v. Harris, 1 Vern. 33; Spurgeon v. Collier, 1 Eden, 55.

¹⁰ Stove v. Bounds, 1 Ohio St. 107.

¹¹ Clark v. Henry, 2 Cow. 324, aff'g 7 Johns. Ch. 40.

Even if the mortgage is in the form of an absolute conveyance, with a parol of defeasance, the terms of the understanding entered into at the time of the execution of the deed, will not be merged in any subsequent written agreement, and no subsequent agreement can convert it into a mortgage, unless on a sufficient consideration, and fairly done.¹² A grantor in a deed absolute upon its face, but intended as a mortgage, may maintain a suit for redemption against the grantee, or the beneficiaries under his will, if the estate has been distributed and the executor discharged, notwithstanding the land is beyond reach because it has been conveyed to a *bona fide* purchaser, and that an action to recover for money had and received would be barred by the Statute of Limitations; and the court, in order to bring about an equitable result and prevent the wrongdoer from making a profit out of his own wrong, will substitute a judgment of redemption in money, representing the value of the land at the time of the trial, for a judgment of redemption in land.¹³

§ 692. Who is entitled to redeem.—The right to redeem belongs to the mortgagor and to all persons entitled to any interest in any part¹⁴ of the mortgaged estate under him. On the other hand, it may also be said that, in general, no person can come into a court of equity for a redemption of a mortgage, but he who is entitled to the legal estate of the mortgagor, or who claims a subsisting interest under him.¹⁵ The owner of a leasehold interest in a part of the mortgaged premises may redeem,¹⁶ as also may a person in possession of the land, or any part of it, under a parol contract for the purchase of it.¹⁷ So, too, a second mortgagee, or a judgment creditor, or a person holding a lien or charge upon the mortgaged premises, which he would lose by a foreclosure of the mortgage, may redeem for the protection of his interest.¹⁸

¹² Brownlee v. Martin, 21 S. C. 392; Brick v. Brick, 98 U. S. 514; Peugh v. Davis, 96 U. S. 332; Morgan v. Shinn, 15 Wall. (U. S.) 105.

¹³ Mooney v. Byrne, 163 N. Y. 86; 57 N. E. 163.

¹⁴ Finn v. Lally, 1 App. Div. 411; 37 N. Y. Supp. 437, rev'g 13 Misc. R. 532; 35 N. Y. Supp. 533; Boquet v. Coburn, 27 Barb. 230.

¹⁵ Minton v. New York Elevated R. R. Co., 130 N. Y. 332; 29 N. E.

319; Grant v. Duane, 9 Johns. 611. See also Holden v. Risan & Co., 77 Ala. 515.

¹⁶ Averil v. Taylor, 8 N. Y. (4 Seld.) 44.

¹⁷ Lowry v. Tew, 3 Barb. Ch. 407.

¹⁸ Haines v. Beach, 3 Johns. Ch. 460; Norton v. Warner, 3 Edw. 106; Roosevelt v. The Bank of Niagara, 1 Hopk. 582; King v. McVickar, 3 Sandf. Ch. 199; Brainard v. Cooper, 10 N. Y. (6 Seld.) 356; Averil v.

A judgment creditor whose judgment is a lien upon the equity of redemption, may redeem without first issuing an execution.¹⁹

A person having an interest in or lien upon the estate, has a clear right to disengage the property from all incumbrances in order to make his own claim beneficial or available.²⁰ But a mere creditor of the mortgagor, who has no interest in or lien upon the mortgaged estate, apart from his general claim as against all of the assets of the mortgagor, cannot, on his own behalf, redeem from the mortgage.²¹

§ 693. **Analogous right of surety.**—If the right to redeem from the mortgage, and by such redemption to stand in the place of the mortgagee, and hold his interest in the land, is treated as identical with the right to make payment, then his right may be said to belong to every surety for the mortgage debt, even if he has no interest in or lien upon the mortgaged estate; for, upon the equitable principle of subrogation, a surety who has satisfied a demand is entitled to hold the securities of the creditor and to enforce them as against the person and the fund primarily liable.²²

§ 694. **Methods of extinguishing the right to redeem.**—It is the right of the mortgagee to have the land appropriated for the payment of his debt, and this right may be enforced by foreclosure or by a sale; it is the right of the mortgagor to retain the land upon satisfying the claims which the mortgage is intended to secure, and the process of cancelling the rights of the mortgagor by payment is termed “redemption.” The right to redeem accompanies every mortgage;²³ it is guarded most jealously by the courts in order to prevent injustice and oppression,²⁴ and it can only be extinguished by the free act of the mortgagor for a valuable consideration,²⁵ evidenced by a grant under seal, by the judgment of a court or proceedings out of court, which are the statutory equivalent of such a judgment, or by the neglect of the mortgagor to

Taylor, 8 N. Y. (4 Seld.) 44; Quin v. Brittain, Hoff. 353; Dings v. Parrishall, 7 Hun, 522. See also May v. Gates, 137 Mass. 389; Chandler v. Dyer, 37 Vt. 345.

¹⁹ Brainard v. Cooper, 10 N. Y. 356; Van Buren v. Olmstead, 5 Paige, 9.

²⁰ Story's Eq. Jur. § 1023.

²¹ Grant v. Duane, 9 Johns. 611;

Story's Eq. Jur. § 1023; Coote on Mortg. 538.

²² Averil v. Taylor, 8 N. Y. (4 Seld.) 44, 51.

²³ Henry v. Davis, 7 Johns. Ch. 40, aff'd 2 Cow. 324.

²⁴ Holridge v. Gillespie, 2 Johns. Ch. 30.

²⁵ Odell v. Montross, 68 N. Y. 499, rev'g 6 Hun, 155.

assert it for such a length of time that he is presumed by law to have relinquished it.²⁶

§ 695. **Sale of equity of redemption to mortgagee.**—The most common way to dissolve the relation of mortgagor and mortgagee, is to call upon the mortgagor to redeem or be foreclosed, and to compel such redemption or foreclosure by some legal means.²⁷ But it is quite competent for either party to assign and transfer his rights to the other; and while the courts will not permit a mortgagee to take any undue advantage of the mortgagor, there is nothing to prevent the former, by a new and subsequent agreement, from acquiring the equity of redemption in good faith and upon a good consideration.²⁸

A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. It will be sustained only when *bona fide*—that is, when in all respects fair and for an adequate consideration.²⁹

§ 696. **If the original mortgage is in form an absolute deed,** and the evidence of the right to redeem is contained in a separate instrument, or is by parol preserved only in the recollection of the parties, this circumstance does not vary the rights of the parties, or create any new rule by which their positions with reference to each other and to the property can be changed. The grantor is still only a mortgagor, and has an estate in the land subject only to the lien thereon held by the grantee. In such a case the grantor having, notwithstanding his conveyance, a legal estate in fee, he can only be divested of it, except by way of estoppel, by some instrument which will be valid under the statute of frauds, and in

²⁶ See *supra*, § 710.

²⁷ *Case v. Carroll*, 35 N. Y. 385; *Stoddard v. Whiting*, 46 N. Y. 627.

²⁸ *Odell v. Montross*, 68 N. Y. 499, rev'g 6 Hun, 155; *Remsen v. Hay*, 2 Edw. 535; *Falls v. Conway Ins. Co.*, 7 Allen, 46; *Braun v. Vollmer*, 89 App. Div. 43; 85 N. Y. Supp. 319. See also *Green v. Butler*, 26 Cal. 595; *Wynkoop v. Cowing*, 21 Ill. 570; *Vernum v. Babcock*, 3 Iowa, 194; *Harrison v. Trustees*, 12 Mass. 456; *Trull v. Skinner*, 17 Pick.

(Mass.) 213; *Falls v. Conway Ins. Co.*, 7 Allen (Mass.) 46.

²⁹ *Odell v. Montross*, 68 N. Y. 499; *Remsen v. Hay*, 2 Edw. Ch. 535; *Holridge v. Gillespie*, 2 Johns. Ch. 30. See also *Villa v. Rodriguez*, 12 Wall. (U. S.) 323; *Patterson v. Yeaton*, 47 Me. 306; *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Barnes v. Brown*, 71 N. C. 507; *Ford v. Olden*, L. R. 3, Eq. Cas. 461; *Wash. on Real Prop.* Ch. 16, § 1.

compliance with the statute prescribing the mode and manner of conveying lands.

These two statutes together require that the evidence of such a transfer must be in writing, and shall be subscribed and sealed by the person making the grant, or his lawful agent.³⁰

In *Odell v. Montross* (68 N. Y. 499, rev'g 6 Hun, 155) the defeasance was by parol, and the grantor acknowledged in writing the receipt of \$50 "in full satisfaction for all claims and demands whatsoever as to the conveyance of property or otherwise"; it was found as a fact that the purpose of the transaction was to constitute a full settlement of all claims of plaintiff to the lands, and of all claims to any reconveyance thereof, but it was nevertheless determined that the equity of redemption of the grantor was not thereby released or affected. It was, however, remarked by the court that if the grantee had, acting upon the faith of the transaction, entered into possession of the premises and incurred expenses, and substantially changed his situation so that he could not be placed in the same position in which he was before, it might have estopped the plaintiff from taking shelter under the statute of frauds, or alleging the insufficiency of the written instrument to carry out the agreement and intent of the parties.³¹ It was also said that if the paper had, in itself, evidenced an intent to grant the estate of the grantor, and a seal only had been wanting to make the instrument valid for the purpose intended, the court might have compelled the sealing.³²

If the mortgage be, upon its face, an absolute deed, and the mortgagee be in possession, a *bona fide* purchaser from the mortgagee will take the estate discharged from the right of redemption, and the mortgagee's remedy will be against the mortgagor.³³

Where a mortgagee, to whom a deed is delivered which is absolute upon its face, gives back a separate defeasance agreement providing for a reconveyance upon certain conditions, the deed is to be construed as a mortgage and another provision in such agreement making time of the essence thereof is ineffectual to cut off the right of redemption. This result is the more easily

³⁰ *Odell v. Montross*, 68 N. Y. 499, rev'g 6 Hun, 155; 2 R. S. 135, § 8; 1 R. S. 738, § 137; *contra*, *Green v. Butler*, 26 Cal. 595; *West v. Reed*, 55 Ill. 242; *Harrison v.*

Trustees, 12 Mass. 456. See *ante* § 18.

³¹ 68 N. Y. 505.

³² 68 N. Y. 506.

³³ *Whittick v. Kane*, 1 Paige, 202.

reached, the property is worth more than the amount of the indebtedness and it is expressly admitted that the deed was intended as security.³⁴

In an action to redeem real property and to have deeds and other conveyances under which defendant claimed title declared mortgages and for an accounting with respect to the use and occupation of the lands, the fact that the defendant went into possession wrongfully and as a mere trespasser does not authorize the court to direct the computation of interest upon the yearly value of the use and occupation.³⁵

§ 697. The mortgagee is entitled to hold the entire pledge until he receives payment of the entire debt which it was created to secure.³⁶ The court cannot require the surrender of a part of the lien on payment of a part of the debt, even for the purpose of doing manifest equity to persons holding divided interests in the estate subject to the mortgage,³⁷ it being said that the holder of a mortgage cannot be required to take a sum less than the whole amount due and, upon the basis of an apportionment, to release a portion of the premises from the lien of his mortgage.³⁸

So, where tenants in common united in a joint mortgage for a joint and several debt, one of them has no equity to compel the mortgagee to receive half the debt, and to proceed against his co-tenant's moiety for the collection of the other half, although he tenders a sufficient bond of indemnity against eventual loss.³⁹ It has been held that a tenant in common with the mortgagee of mortgaged premises, cannot redeem from his co-tenant without paying the whole amount due upon the mortgage.⁴⁰

A grantee of a portion of the mortgaged property,⁴¹ or a judgment creditor of the owner of a portion of it,⁴² or a junior lienor

³⁴ *Mooney v. Byrne*, 163 N. Y. 86; 57 N. E. 163.

³⁵ *Shelley v. Cody*, 187 N. Y. 166; 79 N. E. 997.

³⁶ *Lamb v. Montague*, 112 Mass. 352; *Merritt v. Hosmer*, 11 Gray (Mass.) 276.

³⁷ *Shearer v. Field*, 6 Misc. 189; 27 N. Y. Supp. 29; *Johnson v. Candage*, 31 Me. 28; *Smith v. Kelley*, 27 Me. 237; *Mullanphy v. Simpson*, 4 Mo. 319.

³⁸ *Coffin v. Parker*, 127 N. Y. 117;

28 N. E. 814; *Shearer v. Field*, 6 Misc. R. 189; 27 N. Y. Supp. 29.

³⁹ *Frost v. Bevins*, 3 Sand. Ch. 188. See also *Lyon v. Robbins*, 45 Conn. 513; *Crofts v. Crofts*, 79 Mass. (13 Gray) 360.

⁴⁰ *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276.

⁴¹ *Boquet v. Coburn*, 27 Barb. 230. See also *Andreas v. Hubbard*, 50 Conn. 351; *Smith v. Kelley*, 27 Me. 237; 46 Am. Dec. 595.

⁴² *Franklin v. Gorham*, 2 Day (Conn.) 142; 2 Am. Dec. 86.

by mortgage of a portion of it,⁴³ must pay the entire debt in order to redeem if the mortgagee requires such payment.

Where one purchases land incumbered by two mortgages, each on an undivided half, and assumes both as part of the purchase money, he cannot redeem one without redeeming the other, because such an agreement consolidates the mortgages.⁴⁴ Where, however, the owners of a mortgage covering several parcels of land, have acted collusively and fraudulently with others in procuring a foreclosure of prior mortgages upon some of the parcels, for the purpose of destroying the lien of the later mortgage upon them, a judgment authorizing the redemption upon payment of the balance due less the proportionate share chargeable to the parcels sold, is proper.⁴⁵

§ 698. Mortgagee protected against redemption of entire estate.

—The rule which requires the entire debt to be paid as a condition for the release of any part of the mortgaged premises from the lien of the mortgage is for the protection of the mortgagee. It may be waived by him, and by his voluntary release he may discharge his lien from any part of the property if he will, as against the other parties in interest, deduct from his claims an amount which, under the special facts of the case, is adjudged to be equitable.⁴⁶ And if the mortgagee has any equities which require for their protection that he shall resist redemption as to any part of the mortgaged estate, he may enforce the mortgage as against the balance for its equitable share, or he can defeat an attempt on the part of the owner or subsequent lienor on a part of the property to redeem from the whole lien. Thus, where the mortgagee also holds by grant or estoppel an interest in the equity of redemption, he may require that only the specific portion of the estate owned by the person seeking redemption shall be discharged of the lien on payment of an equitable portion of the debt. Where several persons were entitled to redeem, but the rights of some of them were barred by the statute of limitations, those whose rights were not barred were permitted to redeem their shares by paying their proportion of the debt secured by the mortgage.⁴⁷ So, the owner of

⁴³ *Dick v. Livingston*, 2 How. N. S. 10. See also *Spurgin v. Adamson*, 62 Iowa, 661; 18 N. W. 293; *Street v. Beal*, 16 Iowa, 68.

⁴⁴ *Wells v. Tucker*, 57 Vt. 223.

⁴⁵ *Coffin v. Parker*, 127 N. Y. 117; 28 N. E. 814.

⁴⁶ See *ante*, §§ 401 to 408.

⁴⁷ *Fogal v. Pirro*, 17 Abb. 113; 10 Bosw. 100.

a portion of the mortgaged property, not made a party to a foreclosure under which the mortgagee purchased the balance, was held entitled to redeem his land by paying a fair share of the debt.⁴⁸ And the same principle has been applied where a junior mortgagee of a part of the estate has sought to redeem from the previous mortgage, and the mortgagee elected to require that only that part be redeemed.⁴⁹ And where the mortgagee has foreclosed a portion of the premises and acquired title to it, he can insist that the owner of the remainder shall redeem his land only, by paying the amount of the debt with which he is equitably chargeable.⁵⁰

§ 699. Other claims of mortgagee.—Where the mortgagee has expended moneys in protecting the property against prior incumbrances, redemption can only be made by paying these disbursements in addition to the original debt.⁵¹

But where the mortgagee holds another debt of the mortgagor, not secured by lien upon the property, he cannot require payment of this as a condition for permitting redemption from the mortgage.⁵² And a mortgage lien may be discharged without paying junior liens on the same premises also held by the mortgagee.⁵³

We have already seen that the English doctrine of "tacking" has never been approved in this State, and that it has been held to be inconsistent with our recording acts.⁵⁴

§ 700. Remedy of a part owner.—A person who has redeemed an entire estate to protect an interest in only a part of it, will be subrogated to the rights of the mortgagee for his indemnity, and may enforce the lien as against the persons and property who ought equitably to contribute. The mortgage will then be apportioned as

⁴⁸ Green v. Dixon, 9 Wis. 532.

⁴⁹ Kirkham v. Dupont, 14 Cal. 559; Grattan v. Wiggins, 23 Cal. 16; Funk v. Murphy, 21 Cal. 108; Martin v. Kelley, 59 Miss. 652.

⁵⁰ Fogal v. Pirro, 10 Bosw. 100; Dukes v. Turner, 44 Iowa, 575; Dooley v. Potter, 140 Mass. 49; 2 N. E. 935; George v. Wood, 11 Allen (Mass.) 41.

⁵¹ Madison Av. Bap. Ch. v. Oliver St. Bap. Ch., 73 N. Y. 82, 95; Benedict v. Gilman, 4 Paige, 58; Bell v. The Mayor, etc., 10 Paige, 49. See

also McSorley v. Larissa, 100 Mass. 270; Davis v. Winn, 2 Allen (Mass.) 111; Harper's Appeal, 64 Pa. St. 315; Morrison v. Robinson, 31 Pa. St. 159; Rose v. Watson, 10 H. L. Cas. 672; 1 White & Tud. Lead Cas. (5th Ed.) 362, 366; Saunders v. Hooper, 6 Beav. 246.

⁵² Burnet v. Denniston, 5 Johns. Ch. 35. See also Bacon v. Cottrell, 13 Minn. 194; ante, § 385.

⁵³ Haines v. Beach, 3 Johns. Ch. 459, 466.

⁵⁴ Ante, § 292.

justice may require.⁵⁵ This may be done without any formal assignment, but an assignment will sometimes be required from the mortgagee.⁵⁶

§ 701. **Contribution among parties entitled to redeem.**—Where two persons purchase separate parcels of a lot of land previously mortgaged, and one of them afterward pays more than his share of the mortgage money, he may call on the other for contribution for his share.⁵⁷ In computing the amount that each share should bear of the common burden, the value of each part as of the date of the mortgage, exclusive of improvements since added by either party, is the controlling test.⁵⁸

The numerous cases where the holders of portions of the equity of redemption are not equitably bound in equal degrees to discharge the lien, have been considered in another chapter of this work.⁵⁹

· § 702. **Who is entitled to an assignment.**—Where the person redeeming from the mortgage is not primarily liable for the payment of the mortgage debt, and where he redeems either because of his liability as surety, or because he holds an interest in the mortgaged premises which the foreclosure of the mortgage would destroy, he is entitled to be subrogated to the rights and to occupy the position of the creditor from whom he redeems.⁶⁰ A person so redeeming may enforce the security against the person and the fund primarily liable without any assignment,⁶¹ but there are cases where an assignment is necessary in order to furnish complete protection to the person who advances the money due upon the mortgage. Such a case would arise where payment of a mortgage is made by the holder of a junior incumbrance,⁶² for the rights of the person redeeming would be likely to be divested by the sale of the property to a *bona fide* purchaser if the mortgage were cancelled upon the record.

⁵⁵ *Andreas v. Hubbard*, 50 Conn. 351; *Lyon v. Robbins*, 45 Conn. 513; *Smith v. Kelley*, 27 Me. 237; *Allen v. Clark*, 17 Pick. (Mass.) 47; *Gibson v. Crahere*, 5 Pick (Mass.) 152; *Tillinghast v. Frye*, 1 R. J. 53.

⁵⁶ See *supra*, §§ 702 to 707.

⁵⁷ *Sawyer v. Lyon*, 10 Johns. 32; *Stevens v. Cooper*, 1 Johns. Ch. 425.

⁵⁸ *Stevens v. Cooper*, 1 Johns. Ch. 425.

⁵⁹ *Ante*, Chap. IX.

⁶⁰ *Averill v. Taylor*, 8 N. Y. (4 Seld.) 44. See *supra*, § 472.

⁶¹ *Brainard v. Cooper*, 10 N. Y. (6 Seld.) 356; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Dale v. McEvers*, 2 Cow. 118; *McLean v. Towle*, 3 Sandf. Ch. 119; *Burnet v. Denniston*, 5 Johns. Ch. 35.

⁶² *Lamb v. Jeffrey*, 41 Mich. 719; 3 N. W. 204.

In such cases, that is to say, where a party in a position or with an interest which gives him a right to redeem a mortgage, is also in effect surety, or can be regarded as surety for the mortgage debt, then, on paying the mortgage debt, he is entitled to an assignment, not only of the mortgage, but also of any bond or other instrument evidencing the debt, provided that the person redeeming has some right or equity which will not be entirely protected without such assignment.⁶³

§ 703. *Examples.*—A purchaser of the equity of redemption from a husband by a conveyance in which the wife did not join, is entitled upon paying the mortgage to an assignment to protect him from the inchoate right of dower of the wife,⁶⁴ and a dowress in the equity of redemption is also entitled to an assignment which will protect her from the inequitable demands of the heir.⁶⁵

Where it was made to appear that the equity of redemption belonged to a wife who had tendered the debt and costs with a demand for an assignment, and that the mortgage was being foreclosed in the interest of her husband, between whom and her various suits were pending in relation to the property, the action to foreclose was stayed upon a motion.⁶⁶

A junior lienor has a right to an assignment of a prior mortgage which is being enforced to his prejudice, on paying the amount due upon it, and the mortgagor cannot tack still later liens.⁶⁷

The offer of a junior lienor to pay, coupled with a demand for an assignment, does not discharge the lien of the mortgage. Such a tender must be absolute and unconditional, and cannot be made by any one other than the owner of the equity of redemption.⁶⁸ If

63 *Pardee v. Van Anken*, 3 Barb. 534; *Johnson v. Zink*, 51 N. Y. 333, aff'g 52 Barb. 396; *Cherry v. Monro*, 2 Barb. Ch. 618; *Speiglemeyer v. Crawford*, 6 Paige, 257; *Rosevelt v. Bank of Niagara, Hopk.* 579, aff'd 9 Cow. 409; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Tompkins v. Seely*, 29 Barb. 212; *Brainard v. Cooper*, 10 N. Y. (6 Seld.) 356; *McLean v. Tompkins*, 18 Abb. 24; *Dauchy v. Bennett*, 7 How. Pr. 375; *Jenkins v. The Continental Ins. Co.*, 12 How. Pr. 66; *Averill v. Taylor*, 8 N. Y. (4 Seld.)

44; *Cole v. Malcolm*, 66 N. Y. 363; *Twombly v. Cassidy*, 82 N. Y. 155; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Welling v. Ryerson*, 94 N. Y. 98.

64 *Platt v. Brick*, 35 Hun. 121.

65 *Bayles v. Husted*, 40 Hun. 376.

66 *Foster v. Hughes*, 51 How. Pr. 20; *Bayles v. Husted*, 40 Hun. 376.

67 *Frost v. Yonkers Savings Bank*, 70 N. Y. 553.

68 *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Day v. Strong*, 29 Hun. 505.

the person desiring the assignment wishes to escape payment of interest, he must bring the money tendered into court.⁶⁹

The assignment may properly be ordered to be made not directly to the person whose rights are to be protected by it, but to a person nominated by him.⁷⁰

§ 704. *Distinction between redemption and subrogation.*—It was said by GRIDLEY, J., in *Pardee v. Van Anken* (3 Barb. 534), that the right to an assignment springs directly from the right of redemption, but this statement has been sharply criticised.⁷¹ Indeed, in strictness, the right of redemption and of subrogation by law is inconsistent with the right to an assignment of the debt, and of the evidence of the debt, so far or inasmuch as the assignment assumes the continued existence of the debt, and the subrogation by law assumes its payment.⁷² The right to an assignment springs rather from the necessity of the assignment to the protection of some right of the person redeeming, and it does not necessarily follow that a person has the right to an assignment because he has the right to redeem.⁷³

§ 705. *When assignment may be refused.*—The right to compel the holder of a mortgage to accept or receive payment of it after it is due and payable, does not carry with it the right, upon such redemption, to an assignment of the mortgage and of the bond or other instrument evidencing the mortgage debt, or of either, unless the redeeming party has the position of surety, or can be regarded as surety for the mortgage debt.⁷⁴ A mortgagor who still owns the mortgaged premises, could not demand an assignment of the mortgage to aid him in defeating the claims of a junior incumbrancer. So, too, where the land is the primary fund for the payment of the mortgage debt, a person who has acquired the equity of redemption may redeem, but he has no right to demand an as-

⁶⁹ *Day v. Strong*, 29 Hun, 505; *Tuthill v. Morris*, 81 N. Y. 94. See *supra*, § 400.

⁷⁰ *Twombly v. Cassidy*, '82 N. Y. 155; *Johnson v. Zink*, 51 N. Y. 333, aff'g 52 Barb. 396.

⁷¹ *Dauchy v. Bennett*, 7 How. Pr. 375; *Ellsworth v. Lockwood*, 42 N. Y. 89.

⁷² Per SUTHERLAND, J., in *Ellsworth v. Lockwood*, 42 N. Y. 89, 97.

⁷³ *Dauchy v. Bennett*, 7 How. Pr. 375; *Jenkins v. The Continental Ins. Co.*, 12 How. Pr. 66; *Vandercook v. The Cohoes Savings Institution*, 5 Hun, 641; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553, rev'g 8 Hun, 26.

⁷⁴ *Ellsworth v. Lockwood*, 42 N. Y. 89, 99.

signment.⁷⁵ But a mortgagor who has conveyed the mortgaged premises subject to the mortgage, and who is afterward compelled to pay the debt, is entitled to be subrogated to the rights of the mortgagee, so that he may resort to a sale of the land for his own indemnity, and he may compel an assignment to himself or even to a third person, who would then become a trustee for him.⁷⁶

§ 706. The owner of a junior mortgage not yet due, who alleges nothing in his bill showing that it is in any manner necessary for his protection, or for the preservation of the security he holds, cannot compel an assignment of a prior mortgage. If the first mortgagee was requiring that his debt should be paid, or was proceeding to foreclose; or if he or the mortgagor, or both, were doing anything whatever, or were about to do anything, which could operate to make the second mortgage any less secure or available than it was at the moment the holder of the latter received it as security, he might with propriety and equity call upon the court not only to suffer him to redeem, but to compel an assignment of such first mortgage to him for his protection. Slight grounds to apprehend loss would be sufficient to warrant a prayer for an assignment; and if it appeared that the property was depreciating in value, or that it was not kept in repair, or that the junior mortgagee had received his mortgage without actual knowledge of the existence of the first mortgage, or upon an express agreement, or even a plain duty on the part of the mortgagor to pay off the first incumbrance when it became due, so as to render the second mortgage available for any ulterior purposes had in view at the time of its delivery, the court should, in any of these cases, as well as in others where it is necessary for the protection of the junior incumbrancer, grant him such relief. But, upon the merely naked statement that he holds a mortgage on the equity of redemption, conditioned for a future payment not yet due, he makes no case calling for the interference of a court of equity.⁷⁷ The subrogation and assignment are ordered to protect the junior incumbrancer, and not to enable him to persecute the mortgagor. Where

⁷⁵ *Dauchy v. Bennett*, 7 How. Pr. 375; *McKinstry v. Curtis*, 10 Paige, 503. See also *Handley v. Munsell*, 109 Ill. 362.

⁷⁶ *Johnson v. Zink*, 52 Barb. 396, aff'd 51 N. Y. 333; *Twombly v. Cassidy*, 82 N. Y. 155.

⁷⁷ Per *WOODRUFF, J.*, in *Jenkins v. The Continental Ins. Co.*, 12 How. Pr. 66, 71; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553. See also *Bigelow v. Cassidy*, 26 N. J. Eq. 557.

the holder of a junior recorded mortgage is not impleaded in foreclosure proceedings, the purchaser occupies towards him the position of a mortgagee in possession from whom the junior mortgagee is entitled to redeem.⁷⁸

§ 707. How the mortgagee may be compelled to execute an assignment.—If an assignment be desired on the payment of a mortgage, the party desiring such assignment should, in order to save costs, couple the demand for an assignment with a formal tender of the amount due, and merely saying that he will make the payment, and thereupon paying the money into court, will not stay the proceedings of the mortgagee or impair his claim for interest and costs.⁷⁹

Where the mortgage is being foreclosed, the application for an assignment may be made in the foreclosure proceedings without bringing a new action for that purpose.⁸⁰ In such a case the proper practice would be for the defendant to offer to pay the amount due upon the mortgage and such costs as he may think proper, and ask for an assignment. Upon refusal by the mortgagee to accept the amount, he may apply to the court upon motion, when the amount of costs will be fixed and determined. The right to costs in an equity suit is not absolute, and a formal tender cannot therefore be made after the commencement of an action, until the court has determined what they shall be.⁸¹

§ 708. Taxes paid by mortgagee.—The same general principle which protects a subsequent incumbrancer in paying a prior mortgage will also protect a mortgagee in paying taxes on the mortgaged premises, if such payment is necessary to preserve his security;⁸² or in paying a valid assessment for a public improvement;⁸³ or in paying rent on a perpetual lease in fee and to preserve his security;⁸⁴ or in satisfying an execution upon a prior judgment.⁸⁵

78 *Taylor v. Colville*, 20 App. Div. 151; 47 N. Y. Supp. 267.

79 *Hornby v. Cramer*, 12 How. Pr. 490.

80 *Twombly v. Cassidy*, 82 N. Y. 155; *Bayles v. Husted*, 40 Hun. 376.

81 *Bartow v. Cleveland*, 16 How. Pr. 364; *Pratt v. Ramsdell*, 16 How. Pr. 59; *Thurston v. Marsh*, 14 How. Pr. 572.

82 *Faure v. Winans*, Hopk. 283; *Burr v. Veeder*, 3 Wend. 412; *Eagle*

F. Ins. Co. v. Pell, 2 Edw. 631; *Kortright v. Cady*, 23 Barb. 490; *Robinson v. Ryan*, 25 N. Y. 320. See also *Plumb v. Robinson*, 13 Ohio St. 304.

83 *Rapelye v. Prince*, 4 Hill. 119; *Dale v. McEvers*, 2 Cow. 118; *Brevoort v. Randolph*, 7 How. Pr. 398.

84 *Robinson v. Ryan*, 25 N. Y. 320.

85 *Silver Lake Bank v. North*, 4 Johns. Ch. 370.

An assignment of either the tax, assessment, rent, or judgment is not necessary to enable the mortgagee to recover; in fact, if he should take an assignment, he could not recover for the amount paid, under the mortgage. If he should purchase at a tax sale, this would not be a payment of the tax so as to enable him to recover under a stipulation on the part of the mortgagor or on his general legal obligation, to repay any money *paid* for taxes. The mortgagee by such purchase would acquire a new lien upon the premises which he might enforce, but he would do so independent of his mortgage security.⁸⁶

§ 709. **Redemption after a defective foreclosure.**—The object of foreclosure is to extinguish the right of redemption, and if a person holding any interest in or lien upon the mortgagor's title has not been made a party to the foreclosure proceedings his right to redeem will remain;⁸⁷ and the purchaser, in such a case, will stand as to such person as the assignee of the mortgage, even though the purchase was made for a smaller sum.⁸⁸

If a junior mortgagee be not made a party to the foreclosure, he may either redeem or foreclose. If he elects to foreclose he must make the purchaser under the prior mortgage a party to his proceedings, and he may then have the property sold; the amount due on the prior mortgage would be paid to the purchaser, the junior mortgage would next be satisfied, and any surplus would be paid to the purchaser under the first foreclosure.⁸⁹ The junior mortgagee would not be obliged to pay the costs of the previous foreclosure if he should redeem, nor if he forecloses can those costs, as against him, be treated as a charge upon the land.⁹⁰

⁸⁶ Williams v. Townsend, 31 N. Y. 411.

By Laws of 1826, c. 524, a mortgagee was authorized to redeem from a sale under an execution. Upon such redemption he acquired the right of the original purchaser, or was substituted as a purchaser from any other creditor who had previously redeemed.

Laws of 1885, c. 427, § 76, as amended by Laws of 1870, c. 280. See Becker v. Howard, 66 N. Y. 5, aff'd 4 Hun, 359.

⁸⁷ Grandin v. Hernandez, 29 Hun, 399. See also Newell v. Pennick, 62

Iowa, 123; 17 N. W. 432; Hunt v. Makemson, 56 Tex. 9.

⁸⁸ Haines v. Beach, 3 Johns. Ch. 459; Jackson v. Bowen, 7 Cow. 13; Vroom v. Ditmas, 4 Paige, 526; Benedict v. Gilman, 4 Paige, 58; Vanderkemp v. Shelton, 11 Paige, 28; Robinson v. Ryan, 25 N. Y. 320; Gage v. Brewster, 31 N. Y. 218; Winslow v. Clark, 47 N. Y. 261; Winebrener v. Johnson, 7 Abb. N. S. 202; Collins v. Riggs, 14 Wall. (U. S.) 491.

⁸⁹ Vanderkemp v. Shelton, 11 Paige, 28.

⁹⁰ Gage v. Brewster, 31 N. Y. 218,

But he must pay costs of the action to redeem unless the defendant improperly resists.⁹¹

§ 710. When an action to redeem is barred by the statute of limitations.—The Code of Civil Procedure provides that an action to redeem real property from a mortgage with or without an account of rents and profits, may be maintained by the mortgagor or those claiming under him, against the mortgagee in possession or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage or the non-fulfillment of a covenant therein contained.⁹² Such possession must have been “adverse” in the ordinary sense in which that term is used in the Code, in order to limit the time in which to bring such an action. Apparently the statute does not begin to run while a mortgagee is lawfully in possession as such, but only when, by some act of his, he assumes to treat the land as his absolute property.⁹³ A mere taking possession under an assignment of a mortgage, without some visible and notorious act in hostility to the title of the mortgagor, is insufficient to show such an adverse possession.⁹⁴

Payments of interest by a grantee of a part of the premises who assumes the mortgage will not prevent the running of the statute as to the mortgagor and the remaining portion of the premises.⁹⁵ Where the owner of part of the equity of redemption is not made a party in foreclosure, he or his heirs have twenty years thereafter in which to bring their action to redeem.⁹⁶ The twenty year period may be extended not more than one year by reason of infancy nor more than five years by reason of insanity or imprisonment.⁹⁷

This was a change from the rule under the previous Code of Procedure, under which it was held that an action to redeem from

rev'g 30 Barb. 387; *Benedict v. Gilman*, 4 Paige, 58; *Vroom v. Ditmas*, 4 Paige, 526; *Belden v. Slade*, 26 Hun, 635.

⁹¹ *Belden v. Slade*, 26 Hun, 635; *Day v. Strong*, 29 Hun, 505.

⁹² Code of Civ. Proc. § 379.

⁹³ *Becker v. McCrea*, 193 N. Y. 423; 86 N. E. 463, rev'g 119 App. Div. 56; 135 N. Y. Supp. 704. See *Landon et al. v. Townshend*, 129 N.

Y. 166; 41 St. Rep. 419, aff'g 38 St. Rep. 714.

⁹⁴ *Maurhoffer v. Mitnacht*, 12 Misc. R. 585; 34 N. Y. Supp. 439; 24 Civ. Proc. R. 420.

⁹⁵ *Boughton v. Harder*, 46 App. Div. 352; 61 N. Y. Supp. 574.

⁹⁶ *Shriver v. Schriver*, 86 N. Y. 575, aff'g 12 Wkly. Dig. 328.

⁹⁷ *Messinger v. Foster*, 115 App. Div. 689; 101 N. Y. Supp. 387, decided under § 396, Code of Civ. Proc.

a mortgage was a purely equitable remedy, and that such an action must be commenced within ten years after the cause of action shall have accrued.⁹⁸

§ 711. **The right of action accrues**, and the statute of limitations begins to run, not when the money secured by the mortgage becomes due, but when the defendants or their grantors entered into possession claiming title.¹ Where a wife did not join in her husband's purchase-money mortgage and is not made a party to the foreclosure thereof, she is not entitled to dower upon his death, as against the mortgagee.² Her remedy is by an action to redeem and her right accrues when the foreclosure sale is made whether the husband is then living or not.³

It has been said that as against the right of a remainderman to redeem from a mortgagee who is in possession of the land under the owner of a precedent estate, the statute will not begin to run until the precedent estate is determined.⁴ Until that happens, the possession of the mortgagee is lawful independent of the mortgage.

§ 712. **Where several persons are entitled to redeem**, but the rights of some of them are barred by the statute of limitations, those whose rights are not barred may redeem their share by paying their proportion of the debt secured by the mortgage.⁵

Length of time is no bar to a fraud, or to redemption of a mortgage where the mortgagee has treated it all the time as a mortgage, or where it was originally agreed that he was to enter and keep possession until he was paid out of the profits.⁶ Nor will a mere constructive possession be sufficient. It is necessary that there shall be an actual and continued possession for the period named in the statute,⁷ and that, too, under a claim of absolute ownership.⁸

§ 713. **Admissions by mortgagee.**—If, during the time of his possession, the mortgagee has assigned his interest in the land, and

⁹⁸ Code of Procedure, § 97; *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 N. Y. 468; *Peabody v. Roberts*, 47 Barb. 91.

¹ *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 N. Y. 468. See *Peabody v. Roberts*, 47 Barb. 91.

² See *ante*, § 637.

³ *McMichael v. Russell*, 68 App. Div. 109; 74 N. Y. Supp. 212.

⁴ *Fogal v. Pirro*, 17 Abb. 113; 10 Bosw. 100.

⁵ *Fogal v. Pirro*, 17 Abb. 113; 10 Bosw. 100.

⁶ *Marks v. Pell*, 1 Johns. Ch. 594.

⁷ *Moore v. Cable*, 1 Johns. Ch. 385; *Slee v. Manhattan Co.*, 1 Paige, 48.

⁸ *Miner v. Beekman*, 50 N. Y. 337; *Demarest v. Wynkoop*, 3 Johns. Ch. 129.

has described it as a mortgage, this is evidence that the mortgage is redeemable; and, although the mortgagor was not a party to the transaction, he may avail himself of the evidence which it affords of the nature and extent of the mortgagee's interest and claim.⁹

The commencement of a proceeding to foreclose, whether by action or by a sale under a power, is an admission of the existence of a right of redemption, since it would be a contradiction in terms to undertake to bar or foreclose a right which has no existence. If a mortgagee, who, having held the possession of the mortgaged estate for so long that his possession has ripened into a title, give notice of a sale under the statute regulating foreclosures by advertisement, this amounts to an admission that he holds the land as mortgagee only, and as an invitation to the mortgagor and all other parties concerned to redeem. The object may be to perfect a title, but the thing actually done is a very direct invitation to the mortgagor to come forward and pay the debt, the amount of which must be stated in the notice. The mortgagor may accept the invitation, and if he tenders the money, the proceeding is at an end.¹⁰

§ 714. Action to remove mortgage as a cloud.—While a right in a mortgagor to redeem is barred after the mortgagee has been in possession twenty years claiming title, this rule does not apply where the mortgagor is in possession and the mortgage remains a cloud upon his title. It is an acknowledged branch of equity jurisprudence to remove clouds from titles at the suit of the owner of the fee; and while the owner of the fee continues liable to an action for the foreclosure of a mortgage, or for the payment of any incumbrance upon his land which is past due, he has a continuing right to the aid of equity to determine the amount, if uncertain, and to compel its discharge upon payment, and an action to enforce this continuing right cannot be barred by the statute of limitations.¹¹

§ 715. Right to redeem lost by laches.—Ordinarily the right to redeem will not be impaired or affected by any lapse of time short of the period fixed by the statute of limitations. Even where there has been a defective foreclosure and the purchaser has entered into

⁹ Borst v. Boyd, 3 Sandf. Ch. 501, 507.

aff'g 3 Barb. 305; Jackson v. Slater, 5 Wend. 295.

¹⁰ Calkins v. Isbell, 20 N. Y. 147,

¹¹ Miner v. Beekman, 50 N. Y. 337, 343.

possession, and has made expensive improvements, the person holding an interest, not cut off, which entitles him to redeem, may thereafter do so, though only on payment of an equivalent for the betterments put upon the estate.¹² But in cases where the regularity of the action or special proceeding under which the foreclosure is claimed is in dispute, the right to redeem may be seriously impaired by a lack of diligence in asserting it. Where the foreclosure is by action, and the court has acquired jurisdiction of the parties, the right to redeem will not survive the sale because of any mere irregularity, however gross, and the remedy must be sought with reasonable promptness by an application to the court in the suit.¹³ And where the foreclosure is by a sale under a power contained in the mortgage, the mortgagor, or those claiming under him, must assert their rights with diligence or they will lose them. In such a case the mortgagor has been said to stand in the position of a *cestui que trust*, who is not allowed to wait to see whether the sale is or is not an advantageous one before electing whether to set it aside;¹⁴ and as short a period of neglect as six years has been said to be sufficient to justify refusing the relief where the foreclosure was made with the knowledge and consent of the mortgagor.¹⁵ Sixteen years of neglect have been held to operate as a bar,¹⁶ as have also thirty-three years.¹⁷

12 *Mickles v. Dillaye*, 17 N. Y. (3 Smith) 80; *Wetmore v. Roberts*, 10 How. Pr. 51; *Fogal v. Pirro*, 17 Abb. 113; 10 Bosw. 100; *Chalmers v. Wright*, 5 Robt. 713; *Benedict v. Gilman*, 4 Paige, 58; *Putnam v. Ritchie*, 6 Paige, 390; *Miner v. Beekman*, 50 N. Y. 337.

13 *Brown v. Frost*, 10 Paige, 243, rev'g Hoff. Ch. 41.

14 *Bergen v. Bennett*, 1 Caine's Cas. 1, 20.

15 *Lants v. Crispe*, cited in *Bergen v. Bennett*, 1 Caine's Cas. 21.

16 *Bergen v. Bennett*, 1 Caine's Cas. 1; *Mulvey v. Gibbons*, 87 Ill. 367.

17 *McKechnie v. McKechnie*, 3 App. Div. 91; 39 N. Y. Supp. 402.

CHAPTER XVIII

ACTIONS TO REDEEM

- § 716. The proper remedy of the mortgagor.
- 717. Action to redeem purely equitable.
- 718. But if the mortgage be paid and discharged.
- 719. Parties plaintiff in actions to redeem.
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- 721. If an action be brought by a second or other subsequent mortgagee.
- 722. If the mortgagee, being in possession, has made a transfer.
- § 723. Where the mortgagor has conveyed only the equity of redemption.
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- 731. Fixing time for redemption.
- 732. The time allowed to redeem.
- 733. Effect of failure to redeem within the time limited.
- 734. Costs.

§ 716. The proper remedy of the mortgagor as against the mortgagee is by action in the nature of a suit in equity to redeem. If anything is due upon the mortgage, this is the only remedy of the mortgagor, for he has no rights as against the mortgagee, except the right to have his estate disincumbered from the lien on payment of the mortgage debt. If the mortgagee is in possession, he has a right to retain possession until his claims are entirely satisfied, either from the rents and profits or otherwise; and it is always proper for the mortgagor to call the mortgagee into court, so that an account may be taken and a redemption had. If there is a dispute between the parties as to whether any sum remains owing upon the mortgage, the mortgagor may allege it to be entirely paid, and may demand judgment that it be cancelled and discharged on that account, and also that he be allowed to redeem, if anything is found to be due upon it.¹ The authorities are decisive that ejectment will not lie by a mortgagor against a mort-

¹ *Beach v. Cooke*, 28 N. Y. 508.

gagee in possession if the mortgage be, at law, subsisting and unsatisfied.²

A mortgagor has no right to commence an action for the purpose of having his property sold. He can sell his equity of redemption without the interference of any court. If he comes into a court of equity with a complaint against the mortgagee, even when the latter is in possession, he must offer to redeem. He cannot ask to have the mortgagee turned out of possession and the property sold to pay the mortgage debt.³

§ 717. **Action to redeem purely equitable.**—It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee, is purely and exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption.⁴ But the necessity to resort to an account in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor.⁵ They are applied in equity as an equitable set-off to the amount due on the mortgage debt.⁶ The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value

2 Van Duyne v. Thayer, 14 Wend. 233; Phylfe v. Riley, 15 Wend. 248; Pell v. Ulmar, 18 N. Y. (4 Smith) 139; Chase v. Peck, 21 N. Y. 581.

3 Goldsmith v. Osborne, 1 Edw. Ch. 560.

4 2 Wash. on Real Prop., 161, 205; Parson v. Welles, 17 Mass. 419; Searer v. Durant, 39 Vt. 103.

5 2 Powell on Mortgs., 946 a; 2 Wash. on Real Prop., 205.

6 Ruckman v. Astor, 9 Paige, 517.

by reason thereof may be allowed him. So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or wilful default.⁷ In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of an agreement between the parties, there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage.⁸

§ 718. But if the mortgage be paid and discharged, so that it constitutes no lien at law, ejectment would doubtless be a proper remedy; and upon the ground that the mortgagee is only entitled to hold possession by virtue of his lien, and that the lien is destroyed by tender, it has been held that upon a tender, after default by a mortgagor, of the mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender possession.⁹

§ 719. Parties plaintiff in actions to redeem.—As in other equity actions, all parties interested in the controversy, and whose rights are sought to be affected by the judgment, must be brought before the court in an action to redeem from a mortgage. The plaintiff must have some interest in, or lien upon, the equity of redemption, or he must be surety for the mortgage debt.¹⁰ A general creditor of the mortgagor cannot redeem until his claims have ripened into a judgment, and have thus become a specific lien upon the property.¹¹

If the mortgagor be dead, his heir or his devisee, if the estate has been devised, is the proper party to redeem, if it be a mortgage of real estate;¹² and if it be a mortgage of a leasehold estate, then the personal representatives of the deceased are the

⁷ 2 Powell on Mortgs., 957, an.;
4 Kent, 185; 2 Wash. on Real Prop.,
218; Cameron v. Irwin, 5 Hill, 272;
Mickles v. Dillaye, 17 N. Y. 80.

⁸ Per ANDREWS, J., in Hubbell v.
Moulson, 53 N. Y. 225.

⁹ Edwards v. The Farmers' Fire

Ins. and Loan Co., 21 Wend. 467; 26
Wend. 541.

¹⁰ Grant v. Duane, 9 Johns. 611;
Sutherland v. Rose, 47 Barb. 144.

¹¹ 2 Barb. Ch. Pr. 196.

¹² Sutherland v. Rose, 47 Barb.
144.

proper parties.¹³ A junior mortgagee may file a bill in equity against the holder of a senior mortgage, to redeem and to compel an assignment of the senior mortgage, after tendering the amount due thereon, and demanding an assignment, where a satisfaction of the senior mortgage would not be as beneficial to the plaintiff as an assignment thereof.¹⁴

A special guardian, who, under an order of the Court of Chancery, became a mortgagee for the benefit of an infant, subject to a prior mortgage, was held to be a proper person to file a bill to redeem such prior mortgage, and to compel an assignment of it.¹⁵

§ 720. Parties defendant in actions to redeem.—If the action to redeem be brought by the mortgagor, and if there be no other outstanding interest under the mortgagee, the mortgagee is the only necessary or proper party defendant. So, also, if the action is brought by a person who owns only a part of the mortgaged premises, or who, for any other reason, is only a surety for the mortgage debt, or is himself equitably bound to pay only a portion of it, and the only relief sought is to compel an assignment of the mortgage, the mortgagee is the only person who need be made a defendant, for the rights of no one else will be impaired or affected by the judgment.¹⁶ A title insurance company which has insured a title derived under a sale or foreclosure, has no such interest in the property as will entitle it to be made a party defendant in an action to redeem the land from the mortgage which was foreclosed.¹⁷

§ 721. If an action be brought by a second or other subsequent mortgagee, or by any other person holding an interest in the estate, which gives him a right to redeem, but who is not the person who ought equitably to discharge the incumbrance, and if it be the object of such action to make a final determination of all controversies between the parties, all persons interested in the estate should be made parties. In such a case the court will, by a single judgment, dispose of the rights of all concerned; a re-

¹³ 2 Barb. Ch. Pr. 195; Story's Eq. Pl. 170.

¹⁴ Pardee v. Van Anken, 3 Barb. 534 (1848).

¹⁵ Pardee v. Van Anken, 3 Barb. 534.

¹⁶ Averill v. Taylor, 8 N. Y. (4 Seld.) 44.

¹⁷ Russ v. Stratton, 8 Misc. R. 6; 28 N. Y. Supp. 392.

demption will be adjudged in favor of the person asking for it, and those who ought to redeem from him will be compelled to do so or to stand foreclosed.¹⁸ Or if the interests of the parties require a sale of the property and a division of the proceeds, that will be proper, and the action will then partake of the double nature of a redemption by the plaintiff from one of the defendants, and an assignment of the mortgage to him, followed by a foreclosure against the other defendants.¹⁹

§ 722. If the mortgagee, being in possession, has made a transfer of some interest in the mortgage, or in his rights, to some other person, that person must be joined with him as a defendant.²⁰ Where a purchaser, under a defective foreclosure, enters into possession, his rights are those of an assignee of the mortgage. His grantees are to be treated in proportion to their interests in the land as the assignees of the mortgage, and the redemption money is to be divided in proportion to the purchase money paid by each, and in the order that the purchases were made.²¹

§ 723. Where the mortgagor has conveyed only the equity of redemption, the grantee may bring an action to redeem, without making the mortgagor a party. But if the mortgagor has conveyed the entire estate free from the mortgage, and has obligated himself to pay the mortgage debt, then the mortgagor should, or at least may, be made a party, in order to be bound by the decree, and to assist in taking the account.²²

So a grantee with warranty, on discovering a prior mortgage, which his grantor claims is paid, while the holder of it claims otherwise, may sue them both, to put an end to the controversy, and for a cancellation and discharge of the mortgage, upon payment by him of whatever may be found due upon it, and for judgment over against his grantor.²³

§ 724. Where the mortgage has been assigned absolutely, the original mortgagee and his mesne assignees are not necessary,

182 Barb. Ch. Pr. 196.

19 See Marsh v. Pike, 10 Paige, 595.

20 Dias v. Merle, 4 Paige, 259; Davis v. Duffie, 8 Bosw. 617; 3 Keyes, 606; 3 Trans. App. 54; 4 Abb. N. S. 478; Winslow v. Clark, 47 N. Y. 261; Hickock v. Scribner, 3 Johns.

Cas. 311. See also Brown v. Johnson, 53 Me. 246.

21 Davis v. Duffie, 8 Bosw. 617, aff'd 3 Keyes, 606; 3 Trans. App. 54; 4 Abb. N. S. 478.

22 2 Barb. Ch. Pr. 196.

23 Wandle v. Turney, 5 Duer, 661.

though they may be proper parties to the action.²⁴ But the assignee holding the title of the mortgage at the time of the commencement of the action is a necessary party,²⁵ as also is an assignor of the mortgage, who has assigned it merely by way of security, and still retains an interest in it. If the mortgagee and the successive assignees of the mortgage have been in possession, and an account of the rents is to be taken, all should be made parties.²⁶

If the mortgagee has assigned his interest upon certain trusts, as, for example, if the purchaser, under a defective foreclosure, and believing himself to be the owner, should convey or devise the estate in trust, all of the *cestuis que trust* should be made parties to an action to redeem.²⁷

If all necessary parties are not brought before the court in an action to redeem, this is an objection which may be taken by answer, and it will constitute a defense.²⁸

Where there are conflicting claims to the mortgage, the mortgagor may join all claimants and compel interpleader.²⁹

§ 725. Complaint in action to redeem.—The complaint in an action to redeem from a mortgage, should either allege a tender and refusal of the amount due,³⁰ or it should contain an offer to pay what may be found due on an account to be taken, or the prayer for relief should be that upon payment of what, if anything, is found to be due, in respect to principal and interest, the mortgagee may be decreed to deliver possession.³¹ It has even been said that these allegations, or one of them, are necessary, and that, if they be omitted, the defendant may demur,³² though if the objection be not taken by demurrer, the relief will be granted and the payment of the money justly due will be imposed as a condition for such relief in the decree.³³

²⁴ *Whitney v. McKinney*, 7 Johns. Ch. 144.

²⁵ *Yelverton v. Sheldon*, 2 Sandf. Ch. 481. See also *Hudson v. Kelly*, 70 Ala. 393.

²⁶ 2 Barb. Ch. Pr. 198.

²⁷ 2 Barb. Ch. Pr. 198.

²⁸ *Winslow v. Clark*, 47 N. Y. 261, 263; *Dias v. Merle*, 4 Paige, 259.

²⁹ *Crane v. McDonald*, 2 N. Y. St. Rep. 150.

³⁰ *Barton v. May*, 3 Sandf. Ch.

450. See *Doty v. Norton*, 133 App. Div. 106; 117 N. Y. Supp. 793 as to sufficiency of complaint.

³¹ *Quin v. Brittain*, Hoff. 353. See also *Adams v. Sayre*, 70 Ala. 318.

³² *Post v. Bank of Utica*, 7 Hill, 391; *Allerton v. Belden*, 49 N. Y. 373; *Silsbee v. Smith*, 60 Barb. 372; 41 How. Pr. 418.

³³ *Allerton v. Belden*, 49 N. Y. 373; *Schermerhorn v. Talman*, 14 N.

If the bill alleges a tender before suit brought, and prays for a conveyance and for general relief, and if the whole account is a mere matter of computation of interest, it will not be defective for want of an offer to pay what may be found to be due on an account to be taken.³⁴

§ 726. Offer to pay, material to question of costs.—The better opinion seems to be that a tender of payment is only important as it affects the question of costs, and that ordinarily it is not necessary for a plaintiff to aver willingness to pay in order to sustain his action.³⁵ The confusion in the authorities upon this point seems to have arisen from the fact that, under the former practice, when bills were filed to obtain discovery as well as relief, a bill to cancel a mortgage as usurious would not be entertained, unless the complainant, asking equity, offered to do equity. In such cases, unless the bill contained an offer to pay what was justly due, the defendant might demur; not because the court could not, if the facts were established, grant the relief to which the complainant was equitably entitled, but because a discovery would not be compelled without such offer.³⁶

§ 727. Demand for alternative relief.—Where a mortgagee has been in possession of the mortgaged premises, and in receipt of the rents and profits, the complaint may contain an allegation that the mortgage has been entirely paid and satisfied, and after an accounting is had, the judgment will settle the amount properly remaining due.³⁷ The questions which arise on such an accounting between the mortgagee in possession and the mortgagor are treated of in another part of this work.³⁸

Where an action was brought to have a certain deed executed by the plaintiff declared to be a mortgage for the security of a usurious loan of money, the plaintiff was permitted to redeem

Y. (4 Kern.) 93, 129; Beecher v. Ackerman, Robt. 30; 1 Abb. 141.

³⁴ Barton v. May, 3 Sandf. Ch. 450.

³⁵ Quin v. Brittain, Hoff. 353; Beach v. Cooke, 28 N. Y. 535; Miner v. Beekman, 42 How. Pr. 33.

³⁶ Schermerhorn v. Talman, 14 N. Y. (4 Kern.) 93, 129; Livingston v. Harris, 3 Paige, 528; Fanning v. Dunham, 5 Johns. Ch. 122.

³⁷ Brainard v. Cooper, 10 N. Y. (6 Seld.) 356; Calkins v. Isbell, 20 N. Y. (6 Smith) 147; Beach v. Cooke, 28 N. Y. 508. See also Fields v. Helms, 70 Ala. 460. But it is said that a bill cannot be filed to set aside a mortgage as void, or in the alternative for an accounting and redemption. Tatum Bros. v. Walker, 77 Ala. 563.

³⁸ See *ante*, §§ 263 to 282.

on paying the amount adjudged to be due, although no offer to pay was contained in the complaint. The omission in that respect was not allowed to defeat the plaintiff's rights, though it had the effect of subjecting him to the payment of the costs of the action, for, under our Code, where an issue of fact has been tried in an action, the plaintiff is to be adjudged such relief as may be consistent with the facts proved and embraced within the issue.³⁹

§ 728. **Redemption after defective foreclosure.**—Questions as to the rights of mortgagees in possession commonly arise where a mortgage has been defectively foreclosed and the purchaser enters into possession. Such purchaser stands as the assignee of the mortgage, and, upon redemption, is entitled to receive the full amount due upon the mortgage, irrespective of the price bid at the sale.⁴⁰ But a person whose rights are not affected by the defective foreclosure cannot be compelled to pay any of the costs which are incurred in it.⁴¹

A purchaser under a defective foreclosure stands as the owner of all rights in the property of all of the parties bound by the judgment. He is not only the assignee of the mortgage foreclosed,⁴² but he is also the grantee of the owner of the equity of redemption as against a lienor not made a party.⁴³ So, where a second mortgage was assigned as security for a smaller amount and the assignee was omitted from the foreclosure of the first mortgage, it was held in an action to redeem brought by such assignee that the plaintiff's entire claim was the amount due to him under the agreement pursuant to which the mortgage was assigned to him; that a sale of the premises subject to the prior mortgage was improper, the prior mortgage being merged in the title under the sale, and that the proper judgment was to give the plaintiff a right to redeem by paying all liens prior to his unless the purchaser elected to pay the amount due to him.⁴⁴

On redeeming from a purchaser under a defective foreclosure,

³⁹ *Marvin v. Prentice*, 49 How. Pr. 385.

⁴⁰ *Benedict v. Gilman*, 4 Paige, 58; *Robinson v. Ryan*, 25 N. Y. 320; *Gage v. Brewster*, 31 N. Y. 218; *Raynor v. Selmes*, 52 N. Y. 579.

⁴¹ *Gage v. Brewster*, 31 N. Y. 218.

⁴² *Hart v. Wandle*, 50 N. Y. 381;

Robinson v. Ryan, 25 N. Y. 320; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. 33; *Benedict v. Gilman*, 4 Paige, 59; *Smith v. Gardner*, 42 Barb. 356.

⁴³ *Vanderkemp v. Shelton*, 11 Paige, 28.

⁴⁴ *Salmon v. Allen*, 11 Hun, 29.

who has made substantial improvements, believing himself to be the owner, such improvements must be paid for.⁴⁵

§ 729. **Defenses to redemption.**—Where there has been no refusal to account by the mortgagee and there is no controversy as to the amount due on the mortgage, a bill in equity should not be maintained.⁴⁶

An incumbrancer with a right to redeem was held to be estopped from redeeming by having persuaded a person to purchase the estate and make valuable improvements by representing that the land was not worth more than the mortgage, and that he would not redeem.⁴⁷

The right of a junior incumbrancer to redeem a prior incumbrance, cannot be resisted on the ground that he has other sufficient securities for the debt,⁴⁸ or that the second mortgage is fraudulent as to the creditors of the mortgagor.⁴⁹

§ 730. **Judgment in action to redeem.**—If the mortgagor is permitted to redeem, the judgment directs a reference to ascertain and report the amount due for principal and interest, and orders the plaintiff to pay that amount within a specified time, together with costs; and that, upon his doing so, the mortgagee shall convey to him the mortgaged premises. And it directs that, upon the plaintiff's default, the complaint be dismissed with costs,⁵⁰ and that the plaintiff be foreclosed.⁵¹

In general, the redemption must be of the entire mortgage, and the owner of a portion of the mortgaged premises cannot compel the mortgagee to accept a portion of the debt and release a portion of the security.⁵² But in a case where a railroad company acquired a portion of the mortgaged premises for the purposes of its right of way, it was held to be entitled to redeem that portion,

⁴⁵ *Mickles v. Dillaye*, 17 N. Y. (3 Smith) 80; *Wetmore v. Roberts*, 10 How. Pr. 51, and cases cited; *Fogal v. Pirro*, 17 Abb. 113; 10 Bosw. 100; *Chalmers v. Wright*, 5 Robt. 713; *Benedict v. Gilman*, 4 Paige, 58; *Putnam v. Ritchie*, 6 Paige, 390; *Miner v. Beekman*, 50 N. Y. 337.

⁴⁶ *Brown v. Snell*, 46 Me. 690; *Eastman v. Thayer*, 60 N. H. 408; *Hall v. Hall*, 46 N. H. 240.

⁴⁷ *Fay v. Valentine*, 29 Mass. (12 Pick.) 40.

⁴⁸ *Fletcher v. Holmes*, 25 Ind. 458.

⁴⁹ *Crooker v. Holmes*, 65 Me. 195.

⁵⁰ 2 Barb. Ch. Pr. 199.

⁵¹ *Odell v. Montross*, 68 N. Y. 499, 507.

⁵² *Coffin v. Parker*, 127 N. Y. 117; 28 N. E. 814; *Shearer v. Field*, 6 Misc. 189; 27 N. Y. Supp. 29; 2 Barb. Ch. Pr. 194; *Palk v. Clinton*, 12 Ves. 59; *Calkins v. Munsell*, 2 Root's Rep. 333; *Cholmondeley v. Clinton*, 2 Jac. & W. 189.

by paying its full value to the mortgagee as of the date when they first entered upon it, and without satisfying the entire debt; the decision being placed upon the ground that the railroad company had the right to take the land upon paying the full value of it, as against both the mortgagor and the mortgagee, under the general railroad act.⁵³ And in an action to redeem brought by the owner of one of several lots covered by a mortgage, it was held, that a provision in the judgment was proper, adjudging that in case the owner of any one of the lots should fail to pay his share of the mortgage, upon redemption by the plaintiff, such lot should be sold and the share paid to plaintiffs, and directing a reference to ascertain the amount each of the lots should be charged for that purpose.⁵⁴

§ 731. **Fixing time for redemption.**—The judgment of the court having determined the amount due upon the mortgage, also fixes upon a time within which redemption may be made, and this time will not ordinarily be enlarged. By the bringing of the action, the mortgagor professes to be ready to redeem, and, in this respect, his position is different from what it would be if he were defendant in an action for strict foreclosure, for then he would redeem by compulsion. In an action for strict foreclosure, the time may be enlarged from time to time, upon terms and for good cause shown; but this will not ordinarily be done in an action brought by the mortgagor to redeem.⁵⁵

§ 732. **The time allowed to redeem** varies ordinarily from three to six months, but rests in the discretion of the court, and depends upon the special circumstances of each case;⁵⁶ and though it will not commonly be extended, the court has power to extend it in cases where such action seems equitable.⁵⁷

§ 733. **Effect of failure to redeem within the time limited.**—If the plaintiff neglects to avail himself of his right to redeem within the time granted by the judgment, the dismissal of his complaint as a consequence of such neglect will operate as a strict fore-

⁵³ Dows v. Congdon, 16 How. Pr. 571.

⁵⁴ Coffin v. Parker, 127 N. Y. 117; 27 N. E. 814.

⁵⁵ Brinkerhoff v. Lansing, 4 Johns. Ch. 65; Perine v. Dunn, 4 John. Ch. 140; Fisher on Morts. 606.

⁵⁶ Perine v. Dunn, 4 Johns. Ch. 140; Brinkerhoff v. Lansing, 4 John. Ch. 65.

⁵⁷ Sherwood v. Hooker, 1 Barb. Ch. 650.

closure of his rights, even though the judgment be not framed so as to declare this to be the consequence of a failure to redeem.⁵⁸

But the rights of the plaintiff will not be extinguished until a final order is obtained after the expiration of the time allowed to redeem. Until that order is obtained, the records of the court do not show which party has finally prevailed, and until then the plaintiff may apply to have the time to redeem extended.⁵⁹

In an action brought to redeem from a mortgage, or to cancel it, the defendant may in his answer ask for a foreclosure.⁶⁰

§ 734. Costs.—The general rule is, that a party who is allowed to redeem must also pay costs, even though he be successful.⁶¹ There are, however, exceptions to this rule; and where the mortgagee has set up an unconscionable defense, he has not only been refused his costs, but has been compelled to pay costs to the other party.⁶² When both parties are at fault, costs should be equally divided.⁶³

Where, before bringing an action to redeem, a plaintiff tendered the amount due upon the mortgage and any costs which had been incurred, costs were refused to both parties.⁶⁴ And a mortgagee who refused such a tender has been charged with costs.⁶⁵

58 *Perine v. Dunn*, 4 Johns. Ch. 140; *Sherwood v. Hooker*, 1 Barb. Ch. 650; *Beach v. Cooke*, 28 N. Y. 535; *Bolles v. Duff*, 43 N. Y. 474; *Coote on Mortg.* 570. See also *Stevens v. Miner*, 110 Mass. 57.

59 *Bolles v. Duff*, 43 N. Y. 469; *Sherwood v. Hooker*, 1 Barb. Ch. 650.

60 *Darvin v. Hatfield*, 5 Sand. 469; *Sutherland v. Rose*, 47 Barb. 144.

61 *Slee v. Manhattan Co.*, 1 Paige, 48, 81; *Brockway v. Wells*, 1 Paige, 617; *Benedict v. Gilman*, 4 Paige, 58; *Vroom v. Ditmas*, 4 Paige, 526; *Bellden v. Slade*, 26 Hun, 635; *Shearer*

v. Field, 6 Misc. R. 189; 27 N. Y. Supp. 29.

62 *Naylor v. Colville*, 20 App. Div. 581; 47 N. Y. Supp. 267; *Henry v. Davis*, 7 Johns. Ch. 40; *Slee v. Manhattan Co.*, 1 Paige, 48, 81; *Van Buren v. Olmstead*, 5 Paige, 9; *Davis v. Duffie*, 18 Abb. 360; *Barton v. May*, 3 Sandf. Ch. 450.

63 *Hudson v. Kelly*, 70 Ala. 393.

64 *King v. Duntz*, 11 Barb. 191; *Van Buren v. Olmstead*, 5 Paige, 9.

65 *Grugeon v. Gerrard*, 4 Y. & C. Exch. Ca. 128; *Harmer v. Priestly*, 16 Beav. 569.

CHAPTER XIX

ACTIONS TO FORECLOSE MORTGAGES

NATURE OF THE ACTION.

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NATURE OF THE ACTION.

§ 735. Foreclosure.—It is the right of the mortgagee upon the maturity of the debt, or upon the breach of some covenant in the mortgage,¹ to have the mortgaged property applied to the satisfaction of the debt, either directly by a proceeding from which the mortgagee emerges the owner of the pledge in fee simple² or, indirectly, by a proceeding in which the premises are sold and the proceeds, or so much thereof as may be necessary, are applied to that purpose. In either case the mortgagor is barred or *foreclosed* of his right to redeem.³

¹ § 240 *ante*.

² *Breed v. Ruoff*, 173 N. Y. 340; 66 N. E. 5.

³ See *ante*, § 694.

This application of the fund may be brought about in various ways. Where the mortgagee is in possession a court of equity may decree a strict foreclosure, but the direct application of the mortgaged estate to the payment of the debt, without the intervention of a sale, is not in harmony with the lien theory of the nature of mortgages, and has been decreed in this jurisdiction in rare instances.⁴ And the practice in this State has always been to sell the property in the enforcement of the lien, and not to foreclose the equity of redemption.⁵ The mortgagee's right to a judicial sale of the mortgaged premises in case of default in order to obtain a payment of the mortgage debt is, here, an incident of the contract.⁶

Foreclosure "by entry and possession" is an ancient form, now entirely abandoned in this jurisdiction. Under a writ of entry the mortgagee took possession of the property, its rents and profits being collected by him and applied to the mortgage debt. If the mortgagor failed to redeem within a period specified in the conditional judgment, the estate of the mortgagee was freed from the equity of redemption. As the proceeding was at law it had to be based on the mortgagee's legal estate in the land. This no longer exists in New York. A variation of this method, called foreclosure *in pais* by entry and possession is found where the mortgagee enters without the assistance of a writ, collects the rents and profits, applies them to the mortgage debt, and, by the lapse of time, the right of the mortgagor to redeem becomes automatically barred. This form still exists in other jurisdictions, and is regulated by statute in several States.

In this jurisdiction foreclosure by advertisement⁷ has been very nearly abandoned and practically all mortgages are now enforced by means of the statutory "action to foreclose" treated in sections 1626 to 1637 of the Code of Civil Procedure.

§ 736. The Revised Statutes provided that whenever a bill should be filed for the foreclosure and enforcement of a mortgage, the court shall have power to decree a sale of the mortgaged premises, or such part thereof as might be sufficient, to discharge the amount due on the mortgage, and the costs of suit.⁸

⁴ See post. chap. 32.

⁵ Mills v. Dennis, 3 Johns. Ch. 367.

⁶ Moulton v. Cornish, 138 N. Y.

133; 33 N. E. 842.

⁷ Post, chap. 33.

⁸ 2 R. S. 191, § 151.

The Code of Civil Procedure substitute for this provision is in section 1626, and is as follows: "In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action."

The enactment was, however, declaratory of the law.⁹ The action therefore is not, properly speaking, an action to foreclose, but rather, as the statute expresses it, to enforce the mortgage.

On the other hand it is not an action to recover the mortgage debt from the mortgagor personally, but to collect it out of the land by enforcing the lien of the mortgage.¹⁰ It is governed by the general rules of practice under the Code, the consideration of the most of which does not properly fall within the scope of this work, it being intended to discuss only those rules which especially concern the rights and remedies of parties to mortgages.

§ 737. Where a third party guarantees, by a separate instrument, the payment of a bond and mortgage, the mortgagees have three remedies: First, they may proceed upon the bond and guaranty alone against the guarantor or the bondsmen and guarantor, and, if the judgment obtained in that action be unsatisfied, foreclose the mortgage for the purpose of having the real estate sold and applied to the satisfaction of the deficiency; second, they may bring an action of foreclosure making both the mortgagor and the guarantor parties, and by asking such relief in the complaint obtain a judgment for any deficiency remaining after the foreclosure sale; or third, they may foreclose the mortgage as against those in possession of the property and then, with leave of the court, obtained pursuant to section 1628 of the Code of Civil Procedure, bring an action upon the guaranty to recover any deficiency resulting from the foreclosure sale.¹¹

§ 738. Remedy as affected by agreement.—The parties to a mortgage of property situated wholly within the State cannot, by agreement between themselves, deprive the courts of the juris-

⁹ Bolles v. Duff, 43 N. Y. 469.

¹⁰ Reichert v. Stillwell, 172 N. Y. 83; 64 N. E. 790, affirming 57 App. Div. 480; 67 N. Y. Supp. 1062; Hanselt v. Patterson, 124 N. Y. 349; 26 N. E. 937.

¹¹ Shipman v. Miles, 75 App. Div. 451; 78 N. Y. Supp. 440, affirmed without opinion Webb v. Miles, 177 N. Y. 527.

diction they would otherwise have to enforce rights acquired under the mortgage. They may, however, by agreement, provide the method for the enforcement of their rights where the mortgaged property is situate out of the State and beyond the jurisdiction of its courts, unless contrary to some statutory regulation upon the subject.¹² The parties to an agreement for a building loan may stipulate that the mortgagee shall be at liberty to foreclose the mortgage at any time if the completion of the building is unreasonably delayed. Such a stipulation is binding not only upon the parties thereto but upon others who, with notice of its existence, subsequently acquire an interest in the property.¹³

And where by the terms of a mortgage to secure the payment of money on demand, the mortgagor is to erect certain buildings on the mortgaged premises "forthwith" and the mortgagee is to advance the money in specified amounts during the progress of the work and to make no demand for payment where the mortgagor has proceeded with the work so as to be entitled to each advance, until ninety days after he has become entitled to the last advance, if he repudiates further performance of the contract the mortgagee is discharged from all obligation to either advance money or delay foreclosure and may enforce his security for the money already advanced, since his agreement is dependent upon the performance by the mortgagor to erect the buildings as stipulated. And in such a case a previous demand of payment is not essential to a cause of action.¹⁴

A mortgage executed to indemnify sureties upon an undertaking entered into to procure the discharge of their principal from arrest, which recites that it is given as security "for the payment of such sums of money as" the mortgagees, shall be compelled to pay, suffer or forfeit by reason of, the undertaking in question, may be foreclosed for failure to reimburse the sureties for necessary expenses incurred by them in procuring the principal's arrest and surrender after he had absconded.¹⁵

Where applications to the court to compel a plaintiff to pro-

¹² *Farmers' Loan & Trust Co. v. Bankers' & Merchants' Telegraph Co.*, 44 Hun, 400; N. Y. Supp., citing *Elliott v. Wood*, 45 N. Y. 71.

¹³ *Metropolitan Life Ins. Co. v. Hall*, 10 N. Y. Supp. 196.

¹⁴ *Ferris v. Spooner*, 102 N. Y. 10.

¹⁵ *Milk v. Waite*, 18 Abb. N. C. 236.

ceed with a foreclosure suit rested upon written agreements entered into between the mortgagor, the plaintiff who was first mortgagee, and subsequent mortgagees or lienors and such agreements were special and peculiar it was held that all the parties thereto should be before the court upon the applications and that notice to them all was necessary.¹⁶

Where a purchaser of premises subject to a mortgage, assumes payment of certain taxes and assessments upon the agreement by the mortgagee that he will refrain from foreclosing his mortgage, unless default is made in the payments provided for in the agreement, in which case he shall be at liberty to foreclose the mortgage as though such agreement had not been made, such mortgagee is not obliged, where the purchaser subsequently fails to keep his agreement as to the payments, to make an election to sue either for breach of contract or to foreclose, but may pursue both remedies.¹⁷

WHEN THE RIGHT ACCRUES.

§ 739. Right generally to foreclose.—It is sufficient to entitle a plaintiff who is an assignee of a mortgage to maintain an action to foreclose it, that he obtained a title to the land and mortgage, valid and legal upon its face, which will protect the mortgagors upon payment from any other claim by the assignor.¹⁸

The power to foreclose and sell may be exercised by one owning only a part of the mortgage debt and if he claim too much it does not render the sale void.¹⁹

The right of tenants in common is to have their shares set off or the land sold in partition suit; and that of judgment creditors is to an execution sale, and neither has any right or equity to have a prior general mortgage foreclosed, because it may be deemed more convenient to deal with the surplus moneys arising on the sale, than with the land itself.²⁰

¹⁶ *Wandell v. Romeyn*, 36 App. Div. 623; 54 N. Y. Supp. 1065.

¹⁷ *Cook v. Adams*, 32 App. Div. 385; 53 N. Y. Supp. 120.

¹⁸ *American Guild of Richmond v. Damon*, 107 App. Div. 140; 94 N. Y. Supp. 985 holding that the defendant in such an action is not entitled to attack the honesty of the transfer

from the original mortgagee or avail himself of any fraud as against creditors which may have infected it.

¹⁹ *Batterman v. Albright*, 6 N. Y. St. R. 334, aff'd 122 N. Y. 484; 25 N. E. 856, and citing *Klock v. Cronkhite*, 1 Hill, 107.

²⁰ *De Forest v. Peck*, 84 Hun, 299; 32 N. Y. Supp. 413.

An agreement founded upon a new and good consideration and entered into subsequent to the execution of a bond and mortgage, is incorporated into the latter *pro tanto* and is controlling upon the rights of a mortgagee to bring an action to foreclose.²¹

An action to foreclose a mortgage may be maintained, upon a breach of a condition thereof, although there is no covenant therein, or in some accompanying instrument to pay the debt thereby secured.²²

Where a trustee under a will is bequeathed a bond and mortgage, with a power of sale, he may, after foreclosing the mortgage and buying in the property, sell the same, as he could have sold the bond and mortgage.²³

§ 740. **Need not accept surrender of premises.**—Where the debt secured by the mortgage has become due, the mortgagee has the right to have the premises sold by the court towards the satisfaction of his claim. He is not obliged to accept a surrender of the mortgaged premises, and an offer to surrender by the owner of the equity of redemption will not affect the right of the mortgagee to maintain an action of foreclosure.²⁴

Where parties holding a trust fund for another, to whom they are to pay the interest thereof during the latter's life, loan to the latter the amount of such fund for the purpose of buying property, and take a bond and mortgage thereon conditioned in substance that the use and occupation of the property by such person shall be taken as interest on the mortgage during his life, and that at his death the heirs may accept a discharge of the mortgage as payment of the principal, or the trustees may foreclose and make the principal by sale of the premises, there can be no foreclosure of the mortgage so long as such person remains in possession of the land and has its use and occupation, as in such case neither the interest or the principal has become payable.²⁵

§ 741. **The mortgagor must be in default before an action to**

²¹ Clapp v. Hawley, 69 N. Y. 625.

²² Heburn v. Reynolds, 73 Misc. R. 73; 132 N. Y. Supp. 460, citing Hulbert v. Clark, 128 N. Y. 295, and distinguishing Borst v. Corey, 15 N. Y. 505. See *ante*, § 104.

²³ Sweet v. Schlieman, 95 App. Div. 266; 88 N. Y. Supp. 916.

²⁴ Merritt v. Youmans, 21 App. Div. 256; 47 N. Y. Supp. 664.

²⁵ Baldwin v. Isham, 25 Hun, 560.

foreclose the property may be maintained. And in an early case it is decided that though the mortgagee is not only a trustee, but a surety for the debt, and though the mortgaged premises are in a state of ruin and decay, in consequence of storms, and the security thereby impaired, and rendered precarious, he is not, therefore, entitled to have the property sold before the debt is due or the debtor is in default.²⁶

§ 742. Demand unnecessary.—A previous demand of payment is not essential to an action by the mortgagee to foreclose a mortgage.²⁷

So, where the debt which the mortgage was given to secure, is payable on demand, it is due immediately, and the mortgagee has a right to foreclose at any time, without making any previous demand, other than the commencement of their suit.²⁸

§ 743. Where a mortgage specifies the contingencies upon which the principal sum shall become due and payable, it will become so due and payable only when the contingency designated has occurred. So, where a mortgage provided that, upon the happening of certain events, the mortgagee might take possession of the mortgaged property and sell the same, and that in the event of such taking of possession or in the event of any such sale "then and in either such case, the whole principal sum of each and all of said bonds then outstanding and unpaid, and intended to be hereby secured, shall thereupon forthwith become due and payable," it was held that a failure to make an interest payment when due, did not entitle the mortgagee to maintain an action to foreclose for the principal sum.²⁹

Where by the terms of a mortgage given by a corporation, the amount loaned is to become due in the event of the corporation ceasing, it is not essential to the right of the mortgagee to foreclose that the corporation should be formally dissolved. The action may be maintained after a demand for and refusal of

²⁶ *Campbell v. Macomb*, 4 Johns. Ch. 534. See *Ferris v. Spooner*, 102 N. Y. 10; 5 N. E. 773.

²⁷ *Ferris v. Spooner*, 102 N. Y. 10, citing *Gillett v. Balcolm*, 6 Barb. 370; *Neal v. Brown*, 34 Misc. R. 759; 71 N. Y. Supp. 1143; *Harris v. Mullock*, 9 How. Pr. 402.

²⁸ *Gillett v. Balcolm*, 6 Barb. 370.

See *Hills v. Place*, 48 N. Y. 50; *Caldwell v. Cassidy*, 8 Cow. 271; *Bank of Niagara v. McCracken*, 18 Johns. 492; *Wolcott v. Van Santvoord*, 17 Johns. 247; *Huxtun v. Bishop*, 3 Wend. 16.

²⁹ *Farmers' Loan & Trust Co. v. Bankers' & Merchants' Telegraph Co.*, 44 Hun, 400.

payment, where the land has been sold under the foreclosure of a subsequent mortgage, the corporation has ceased to exercise the franchise conferred upon it by the act under which it was incorporated, and no longer has the means to enable it further to perform the duties devolving upon it.³⁰

Where a mortgage does not contain the usual "interest clause" that upon failure to pay any instalment of interest the whole principal thereupon becomes due, a cause of action does not accrue to recover the principal sum upon default in payment of the first interest item, but arises at the time fixed in the bond and mortgage as the natural maturity thereof. In such a case the statute of limitations begins to run from the latter date.³¹

Where a bond, secured by a second mortgage, contains a covenant on the part of the mortgagor to pay the first mortgage "without default or delay, promptly," such a stipulation is a condition subsequent and in the nature of a penalty. Where the breach of such a condition was highly technical in its nature and the second mortgagee had in no way been injured thereby, the court relieved the mortgagor from the forfeiture and declared the foreclosure would be inequitable.³²

Where a mortgage contains covenants which are absolute and independent, the mortgagee may foreclose for the entire amount of the debt secured, upon a default in either of them.³³

Under a general power in the mortgage "to sell the premises in the manner prescribed by law," foreclosure may be maintained and the facts that the mortgage does not contain the customary default in interest clause, or the customary provision that upon payment of the debt the estate of the mortgagee shall cease, and is not sealed do not necessitate the reformation of the instrument in equity, or any special or different remedy other than foreclosure.³⁴

The presence of a power of sale in a mortgage does not exclude

30 Trustees of the Canandaigua Academy v. McKechnie, 90 N. Y. 618.

31 Heburn v. Reynolds, 73 Misc. R. 73; 132 N. Y. Supp. 460, citing Quackenbush v. Mapes, 123 App. Div. 242; 107 N. Y. Supp. 1047.

32 Gilbert v. Shaw, 63 Hun, 148; 17 N. Y. Supp. 621.

33 New York City Baptist Mission Society v. Tabernacle Baptist Church, 17 Misc. R. 699.

34 Heburn v. Reynolds, 73 Misc. R. 73; 132 N. Y. Supp. 460. See Sweet v. Schliemann, 95 App. Div. 266; 88 N. Y. Supp. 916.

other modes of foreclosure, provided by law, but is in addition to them.³⁵

§ 744. Where a deed absolute in form is, in fact, a mortgage, the relations between the parties thereto is that of mortgagor and mortgagee and their rights are measured by the rules of law applicable to mortgagors and mortgagees. The conveyance may be foreclosed as if it were a mortgage, and until the grantee, or mortgagee, has foreclosed the equity of redemption of the grantor, or mortgagor, he cannot maintain ejectment against him.³⁶ As the grantor, or mortgagor, is entitled to redeem, so the grantee, or mortgagee, is entitled to a return of the money loaned, with interest, and the grantor is held to be obligated to make up a deficiency realized upon a sale of the property in foreclosure, once the debt is established.³⁷

§ 745. Where property in possession of person claiming under adverse title.—Where at the time of the execution of a mortgage the property is in the actual possession of one who claims under an adverse title, an action to foreclose the mortgage cannot be maintained until such time as the mortgagor, or his representative, has actually recovered possession. Until this occurs his only remedy is by an action upon the bond.³⁸

This decision is based on section 225 of the Real Property Law of 1906, which stated as does our present statute,³⁹ that a mortgage of lands held adversely, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, implying that such a mortgage does not bind the property previous to such possession. This was an amendment of the ancient acts against champerty embodied in the first part of the section quoted and by which grants of lands held adversely are absolutely void. It was inserted by the Revisers as a compromise with the harsh rule theretofore prevailing. In these notes⁴⁰ they expressly state that it was their desire "to enable a claimant to mortgage lands held adversely."

³⁵ Farmers' Loan & Trust Co. v. Bankers' & Merchants' Telegraph Co., 44 Hun, 400.

³⁶ Faulkner v. Cody, 45 Misc. R. 64; 91 N. Y. Supp. 633.

³⁷ Boocock v. Phipard, 5 N. Y. Supp. 228, and cases there cited.

³⁸ Hopkins v. Baker, 140 App. Div. (N. Y.) 460; 125 N. Y. Supp. 417.

³⁹ Real Prop. Law, § 260.

⁴⁰ Note of Revisers to 1 R. S. 739, § 148.

Assuming the correctness of the principal case their object has scarcely been accomplished, for, while another statutory provision ⁴¹ goes far towards annulling the seemingly severe prohibitions against grants, the judicial construction of their amendment has deprived one who has advanced money on the strength of such a claim of his remedy. A grant of lands held adversely is void, but when made, the grantee may maintain ejectment. A mortgage of lands held adversely is not void, but on the contrary is encouraged, yet when made, the mortgagee may not maintain foreclosure. If the claimant himself does not care to prosecute ejectment his mortgagee cannot force him to, but is left to his remedy on the bond. If the conclusion of the court is unavoidable, it would seem as if an amendment to the statutory law were desirable. The conclusion reached by the two dissenting justices was based on the fact that the mortgage under discussion was for purchase money, and that the mortgagee could reacquire whatever interest he had had in the property.⁴²

§ 746. Where mortgagee conveys part of premises.—The fact that a mortgagee may have conveyed a part or even a whole of the mortgaged premises will not deprive him of his right to foreclose. The conveyance of the land does not pass his interest in the mortgage. In a case in which this question arose Chancellor KENT said: “The suggestion that the mortgagee could not foreclose, because he had previously sold parcels of the land, is entirely without any foundation in precedent or justice. The sales created of themselves no obstacle to the right of redemption. If the mortgagor was entitled to redeem, he could secure the possession as against those purchasers equally as well as he could secure it against the mortgagee himself, or his heirs after his death; a mortgagor cannot by fine and non-claim bar the equity of redemption.”⁴³

§ 747. An agreement to extend the time of payment of the principal has no effect upon the provisions of the mortgage respecting the payment of interest and the consequences of a default therein. Such an agreement may be entirely consistent with the provisions of the mortgage as to payment of interest,

⁴¹ Code of Civ. Proc., 1501.

⁴³ Wilson v. Troup, 2 Cow. 195,

⁴² De Garino v. Phelps, 176 N. Y. aff'd 7 Johns. Ch. 25.
455.

and where it does not appear to have been the intention of the parties that the agreement should operate to alter such provisions, the court will not so construe it.⁴⁴ The same is true in regard to a tax or water-rate clause, for the court will not consider such important conditions of the mortgage abrogated in the absence of either express terms which so stipulate, or a clear implication that the parties so intended.⁴⁵ These two cases are distinguished in a more recent case in which the defendant set up an absolute and unqualified extension of the time of payment of the principal debt beyond the time at which the action was commenced, and alleged a valuable consideration. In the lower court the answer was stricken out as frivolous, but on appeal the court reversed the order, holding that in the cases above referred to the agreement extended the mortgage and all of its provisions, while in the case at bar there was no extension of the mortgage, the allegations being simply of an unqualified extension of the time of payment of the principal amount.⁴⁶

WHAT MAY BE LITIGATED IN ACTIONS TO FORECLOSE.

§ 748. The nature of the jurisdiction in which the action to foreclose is entertained, and the nature of the judgment which is sought, will determine the questions which may properly be litigated. The object of the action is twofold: to extinguish the equity of redemption, and to compel the performance of a contract to pay money. The court in which the questions are passed upon is guided by the rules which prevail in courts of equity, and an action to foreclose a mortgage is in the nature of a suit in equity. It differs from some other actions which are also equitable, in the special statutory provisions which have been made concerning it; but except as the statute controls, the same rules govern in actions to foreclose, as apply in all actions which, prior to the Code, were litigated in the Court of Chancery.

The statute declares that "if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof, as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs the action."⁴⁷

⁴⁴ Jester v. Sterling, 25 Hun, 344.

⁴⁵ Leopold v. Hallheimer, 1 App. Div. 202; 37 N. Y. Supp. 154.

⁴⁶ Beach v. Shanley, 35 App. Div. 566; 55 N. Y. Supp. 130.

⁴⁷ Code Civ. Proc. § 1626.

This provision did not change the existing law, and the practice in this State, both before and since the statute, has been to sell, and not to adjudge a strict foreclosure.⁴⁸ The sale has the same effect as the foreclosure would have had under former provisions of law,⁴⁹ and so far as the question of what may be litigated is concerned, the same rules apply in an action to foreclose by a sale, as in an action to foreclose by fixing a time beyond which the right of redemption could not exist.

The Code also makes provision for the collection of the mortgage debt in the action to foreclose,⁵⁰ and in this respect it changed the previous law, for the former Court of Chancery could not entertain actions on a bond or on agreements collateral to a bond and mortgage in suit, given to secure payment of the mortgage debt. For this reason it was held that the provisions of the old statute did not extend to a case where the complainant had no right to come into chancery to foreclose the mortgage as against the interest of any one in the mortgaged premises, or any part thereof.⁵¹

§ 749. Title of mortgagor cannot be tried.—The mortgagor may not, in an action to foreclose, and in the absence of fraud, deny his title at the time of the execution of the mortgage. The action is inappropriate to the settlement of a disputed title, and there is no reason why the court should entertain a question concerning the legal right to the mortgaged premises. The purchaser under the judgment will acquire what interest the mortgagor had in the premises, whatever that was. Such title, which was before defeasible, will then become absolute; if there be dispute concerning its nature and extent, that must be adjudicated in some proceeding in which the pleadings and proceedings are adapted to that purpose.⁵²

So, where the mortgagor claimed title to the mortgaged premises under a conveyance from four grantors, two of whom were minors at the execution of the deed, but who had done no act

⁴⁸ *Mills v. Dennis*, 3 Johns. Ch. 367.

⁴⁹ 2 R. S. 192, § 158.

⁵⁰ Code Civ. Proc. § 1627.

⁵¹ *Mann v. Cooper*, 1 Barb. Ch. 185.

⁵² Per DYKMAN, J., in *Dime Savings Bank of Brooklyn v. Crook*, 29

Hun, 671. See § 23 *ante*. See *Duryea v. Mackey*, 151 N. Y. 204; 45 N. E. 458; *Croner v. Cowdrey*, 139 N. Y. 471; 34 N. E. 1061; *Newton v. Avers*, 143 App. Div. 673; 128 N. Y. Supp. 327; *Monroe v. Button*, 20 Misc. R. 494; 46 N. Y. Supp. 637.

after they became of age to disaffirm the deed, it was decided that the purchase of the equity of redemption from the mortgagor, who had taken a conveyance from him subject in terms to the payment of the mortgage, could not, upon a bill to foreclose the mortgage, set up as a defense a quit-claim deed obtained from the minors after they became of age.⁵³

§ 750. Title adverse to the title of mortgagor cannot be tried.—

It is not every conflicting title to the property which can be litigated, but only those which concern the equity of redemption. A mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying his adverse claim in a court of equity.⁵⁴ And where a party making a claim of title anterior to the mortgage is made a defendant, the judgment will not bind his prior interest, and it will be reversed, though made after a hearing on pleadings and proofs.⁵⁵ In a case where a woman claiming a paramount right of dower was made a defendant and answered insisting upon such paramount right, and a trial was had on the issue thus presented, and the court directed a judgment in the usual form, barring and foreclosing the defendant of all right, claim, interest, and equity of redemption in the mortgaged premises and every part thereof, it was held on appeal that the judgment should either dismiss so much of the action as to said defendant as related to the interest claimed

⁵³ *Eagle Fire Ins. Co v. Lent*, 6 Paige's Ch. 635.

⁵⁴ *Nelson v. Brown*, 144 N. Y. 384; 39 N. E. 355; *Ruyter v. Reid*, 121 N. Y. 498; 24 N. E. 791; *Rathbone v. Hooney*, 58 N. Y. 463; *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Brundage v. Domestic & For. Miss. Soc.*, 60 Barb. 204; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 637; *Frelinghuysen v. Colden*, 4 Paige, 206; *Jones v. St. John*, 4 Sandf. Ch. 208; *Holcomb v. Holcomb*, 2 Barb. 22; *Banks v. Walker*, 3 Barb. Ch. 438; *Meigs v. Willis*, 66 How. Pr. 466; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Emigrant Industrial Savings Bank v. Clute*, 33 Hun, 82; *Mayer v. Margolies*, 47 Misc. R. 24; 95 N. Y.

Supp. 204; *Larremore v. Squires*, 30 Misc. R. 62; 62 N. Y. Supp. 885. See also *Bozarth v. Landers*, 113 Ill. 181; *Wolfinger's Adm'r v. Retz*, 66 Iowa, 594; 24 N. W. 228; *Dorr v. Leach*, 58 N. H. 18; *Kinsley v. Scott*, 58 Vt. 470; 5 Atl. 390; *Hekla Fire Ins. Co. v. Morrison*, 56 Wis. 133; 14 N. W. 12; *Macloon v. Smith*, 49 Wis. 200; 5 N. W. 336; *Roberts v. Woods*, 38 Wis. 60.

See § 794 herein.

⁵⁵ *Ruyter v. Reid*, 121 N. Y. 498; 24 N. E. 791; *Corning v. Smith*, 6 N. Y. (2 Seld.) 82; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Lee v. Parker*, 43 Barb. 611; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Barker v. Burton*, 67 Barb. 458.

by her to be paramount to the mortgage, or else that interest should be excepted from the operation of the judgment by a proper statement expressive of that qualification.⁵⁶

The validity of a trust deed executed prior to the mortgage cannot be tried in an action to foreclose.⁵⁷

Where premises were transferred to parties as joint tenants, who subsequently executed mortgages thereon to secure an indebtedness of the grantor, who between the time of the conveyance and the execution of the mortgages, took a conveyance to remove a cloud from title, it was held in an action to foreclose the property that a defense that such conveyance gave a title paramount to the liens under the mortgages, could not be sustained. It was declared that such a defence was most inequitable and would be a reproach to our laws if it could prevail.⁵⁸

An action to foreclose is not a proper proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a previous mortgage from which the defendant does not seek to redeem.⁵⁹

§ 751. **Motive of mortgagee immaterial.**—Where a mortgagee has the legal right to foreclose and sell the mortgaged premises in satisfaction of the debt, the question whether he was influenced by a sinister or unworthy motive in proceeding to foreclose at a particular time is immaterial, as the motive will not affect the legal, existing right.⁶⁰

It rests with the mortgagee or the assignee of a mortgage where it has been assigned to elect for himself the time and manner of enforcing his security provided that he does not hold it or put it forward in some way, unlawfully or inequitable, as against another. He may exercise his own judgment as to when he will bring an action to foreclose, and cannot be compelled by a junior mortgagee to enforce it or to permit the latter to do so in an action of foreclosure.⁶¹

⁵⁶ Lanier v. Smith, 37 Hun, 529.

⁵⁷ Helck v. Reinheimer, 23 W. Dig. 473.

⁵⁸ Griswold v. Atlantic Dock Co., 21 Barb. 225.

⁵⁹ Bell v. Pate, 47 Mich. 468; 11 N. W. 275.

⁶⁰ North Central Realty Co. v.

Blackman, 145 App. Div. 199; 129 N. Y. Supp. 1005, citing Morris v. Tut-hill, 72 N. Y. 575; Swift v. Finnigan, 53 App. Div. 76; 65 N. Y. Supp. 723.

⁶¹ Adams v. McPartlin, 11 Abb. N. C. 369, following and applying McReynolds v. Munns, 2 Keyes, 214.

§ 752. Where a person claiming a lien or title prior to the mortgage is made a party, it is not necessary for him to set up his rights by answer, since the entire force of the decree will be to exclude him from any interest in the equity of redemption. This applies to the wife of the mortgagor who did not join in the mortgage,⁶² and to a life estate not bound by the mortgage,⁶³ and to the holder of a prior judgment,⁶⁴ and to the holder of a prior mechanic's lien.⁶⁵

If the mortgagor since the execution of the mortgage has acquired an outstanding or further title, this will not constitute a defense to the mortgage, and the validity of such title cannot be tried in the foreclosure suit. The judgment will operate to foreclose the mortgagor as to the title owned by him at the time when the mortgage was executed, and the judgment will not prevent him from setting up his after-acquired title against the purchaser at the mortgage sale.⁶⁶ This principle will apply where the owner of the equity of redemption or a person holding a lien upon it has purchased the property at a sale for taxes. The validity of the tax sale cannot be set up in defense against the mortgage; and the judgment of foreclosure and the sale made in pursuance of it will not affect the tax title.⁶⁷ This rule was applied in a case where the wife of the mortgagor who had joined in the mortgage, subsequently obtained a tax title.⁶⁸

A prior mortgagee who is made a defendant as also holding a junior lien, may answer in the action and ask to have his prior mortgage paid out of the proceeds of the sale, before applying any portion of such proceeds to the satisfaction of the plaintiff's mortgage.⁶⁹

The delivery of a mortgage by the mortgagee, as collateral security for a debt, when it is unaccompanied by the bond, confers no rights upon the holder as against an assignee to whom both the bond and mortgage are transferred. And it is immaterial

⁶² Lewis v. Smith, 9 N. Y. 502; Merchants' Bank v. Thomson, 55 N. Y. 7.

⁶³ Rathbone v. Hooney, 58 N. Y. 463.

⁶⁴ Frost v. Koon, 30 N. Y. 428; Payn v. Grant, 23 Hun, 134.

⁶⁵ Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127.

⁶⁶ Weil & Bro. v. Uzzell, 92 N. C. 515.

⁶⁷ Odell v. Wilson, 63 Cal. 159; Elias v. Verdugo, 27 Cal. 428; Bozarth v. Landers, 113 Ill. 181; *contra*, Lyon v. Powell, 78 Ala. 351; Randle v. Boyd, 73 Ala. 282.

⁶⁸ Bozarth v. Landers, 113 Ill. 181.

⁶⁹ Doctor v. Smith, 16 Hun, 245.

whether the prior transfer was by parol or in writing. Therefore since such former transfer conferred no interest in the mortgage upon the holder, such delivery is no defense to an action of foreclosure by the second assignee against one claiming through the prior holder.⁷⁰

§ 753. **Conflicting claims to priority may be determined.**—But, on the other hand, the court will entertain every question which must be determined in order to do complete justice between all parties whose rights in the equity of redemption are destroyed by the foreclosure and sale. As an example of this, it may be stated that it is a matter of common practice to determine, as between holders of several parcels of land mortgaged together, the order in which they should be sold to pay the mortgage debt.⁷¹ And, in *Brown v. Keeney Settlement Cheese Association* (59 N. Y. 242), the Court of Appeals held that it was permissible for the owner of a structure on the mortgaged premises to set up and litigate in the foreclosure suit an alleged right to remove such structure, because of an agreement between him and the mortgagor or mortgagee, or of the circumstances under which the annexation was made; and that the court might, by the judgment in the action, in case the right is established, protect it by authorizing the removal before the sale, or providing that the sale should be subject to such right.

In an action to foreclose a mortgage a subsequent attaching creditor may prove the existence of his attachment, and show that, in consequence of the plaintiff's acts, his lien is superior to the mortgage.⁷²

One asserting a right under the mortgagor prior to the mortgage is a proper party to an action for the foreclosure of the mortgage, and the question of priority may be determined in that action.⁷³ But while an assignee for value of a mortgage takes it subject to the equities existing between the original parties, they must be established by common-law evidence, and declarations of

⁷⁰ *Merritt v. Bartholick*, 36 N. Y. 44 (1867).

⁷¹ *The New York Life Ins. & Trust Co. v. Milner*, 1 Barb. Ch. 353.

⁷² *Scrivner v. Dietz*, 68 (Cal. 1) 8; Pac. 609.

⁷³ *Brown v. Volkenning*, 64 N.

Y. 76, 84; *Alder v. Russell*, 8 App. Div. 519; 40 N. Y. Supp. 892; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316. See also *Board of Supervisors of Iowa Co. v. Mineral Point R. R. Co.*, 24 Wis. 93.

the assignor made prior to the assignment, are inadmissible against the assignee to establish a defense to an action brought by him to foreclose the mortgage.⁷⁴

In an action by a trustee to foreclose a mortgage given to secure the payment of bonds it has been said that doubtless the plaintiff may pray for a determination in the action of the rights and interests of all its *cestuis que trust*, the holder of the bond issued under the mortgage, as a part of the judgment of foreclosure, and that such a judgment, proper notice being given to all the claimants of the bonds to appear and assert their rights, may preclude all the parties and determine the rights of the *cestuis que trust* among themselves.⁷⁵ But where a claimant to bonds serves his answer on an adverse claimant, in an action by the trustee to foreclose a trust mortgage, but the adverse claimant does not serve its answer in return, and the answer served does not specifically demand a determination of the rival claims, the claimant not serving an answer is not entitled to have the question determined in such action.⁷⁶

§ 754. Where a mortgage has no inception in the hands of the mortgagee, he never having advanced any money upon it or held it as security for any money, and the only agreement is that an assignee of the mortgagee should make the loan, the mortgage simply being executed to the mortgagee named that such assignee might have his guarantee of payment, the effect of the whole transaction is the same as if the mortgage had been executed directly to the assignee, and the mortgagee had then guaranteed payment or executed his bond as collateral thereto. It first has its inception and becomes valid as a security when, with the assignment, it is delivered to the assignee and he advances the money upon it. Such assignee does not occupy the position of an assignee of the mortgage, in the sense that he takes it subject to any equities or defenses which the mortgagor had at the time of the assignment against the mortgagee.⁷⁷

⁷⁴ *Merkle v. Beidleman*, 165 N. Y. 21; 58 N. E. 757.

⁷⁵ *Knickerbocker Trust Co. v. Oneonta, Cooperstown & R. S. Ry. Co.*, 188 N. Y. 38; 80 N. E. 568, *aff'd* 116 App. Div. 78; 101 N. Y. Supp. 241.

⁷⁶ *Knickerbocker Trust Co. v.*

Oneonta, Cooperstown & R. S. Ry. Co., 116 App. Div. 78; 101 N. Y. 241, *aff'd* 188 N. Y. 38; 80 N. E. 568.

⁷⁷ *Riggs v. Pursell*, 89 N. Y. 608, so holding aside from an estoppel by virtue of a written declaration by the mortgagor to the assignee stating in effect that the mortgage was a

§ 755. **Pleading to raise question of priority.**—In a case where the plaintiff desires to contest the priority of a lien held by a defendant, of earlier date or record than his mortgage, it will not be sufficient to adopt the allegation under the rule to the effect that the defendant has or claims to have some interest or lien which is subsequent to the mortgage. The complaint should contain a description of the lien sought to be attacked, and a statement of the grounds upon which relief is asked.⁷⁸

good and valid security for the whole
amount thereof.

78 Bank of Orleans v. Flagg, 3
Barb. Ch. 318.

CHAPTER XX

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WHO ARE PROPER PLAINTIFFS IN FORECLOSURE CASES.

§ 756. If a mortgage be assigned as security for a debt of less amount, it would be proper for both the assignor and assignee to join as plaintiffs in foreclosing it;¹ it would also be regular for the assignee to proceed by himself,² and, having done so, he will hold any surplus as trustee for his assignor.³

Since, in equity, the assignor is still the owner of the security he can proceed in his own name, especially if the assignee declines to move.⁴ And it has been decided that a *bona fide* assignee for value of a mortgage originally given as consideration for a fraudulent transfer of the land may foreclose the mortgage; notwithstanding the transfer has been adjudged void as against creditors.⁵ If the mortgagee, who has assigned the mortgage as security, commence a foreclosure, making his assignee a party defendant, the assignee is the only person who can object; the mortgagor will not be allowed to raise the question, since it is of no importance to the mortgagor whether the assignee is a plaintiff or a defendant.⁶

The fact that a mortgagor claims to have a valid defense for the balance unpaid on a bond secured by mortgage, is no reason for denying an application by the assignee of such bond for leave to bring an action thereon under section 1628 of the Code of Civil Procedure. The validity of such a defense should be left for determination in the action, and should not be tried on affidavits used on the motion for leave to sue.⁷ If the assignee of the mortgage, holding the same as a mere security, becomes the owner of the equity of redemption, the mortgage does not merge and the assignor may foreclose.⁸

Where the assignee holding the mortgage as a mere security,

1 Hoyt v. Martense, 16 N. Y. 231; Cerf v. Ashley, 68 Cal. 419; 9 Pac. 658.

2 Dalton v. Smith, 86 N. Y. 176; Trustees of Union College v. Wheeler, 61 N. Y. 88; Bloomer v. Sturges, 55 N. Y. 168; Andrews v. Gillespie, 47 N. Y. 487; Bard v. Poole, 12 N. Y. 495; Slee v. Manhattan Company, 67 Barb. 48.

3 Norton v. Warner, 3 Edw. Ch. 106.

4 Norton v. Warner, 3 Edw. 106; Simson v. Satterlee, 6 Hun, 305, aff'd 64 N. Y. 657; Hopson v. Aetna Axle & Spring Co., 50 Conn. 597.

5 Smart v. Bement, 4 Abb. Ct., aff'd Dec. 253.

6 Simson v. Satterlee, 6 Hun, 305, aff'd 64 N. Y. 657.

7 La Grave v. Hellingner, 109 App. Div. 515; 96 N. Y. Supp. 564.

8 Graydon v. Church, 7 Mich. 36.

obtains a judgment for the satisfaction of his own demand, and this amount is paid to him by his assignor, this reverts the title in such assignor, who may afterward bring an action in his own name. The previous judgment will not be a bar to the new action.⁹

§ 757. **Foreclosure by party in interest.**—An action to foreclose may be maintained by any person who has an interest in the mortgage, though it cannot always be maintained by the person who has an interest in the proceeds of the mortgage. The test is as to whether the plaintiff has the right to give a valid acquittance to the mortgagor for the mortgage debt, or any part of it; or as to whether his acquittance would be necessary to perfect the discharge; and, in either case, he may institute the foreclosure. If the person foreclosing has only a part interest in the mortgage, those who are interested with him should first be invited to become plaintiffs, and on refusal, they should be joined as defendants.¹⁰

Where a mortgage is executed to one to secure money to be paid to another, the latter, if alive, can maintain a suit to foreclose it,¹¹ and if he be dead the action is properly brought by his administrator.¹²

If the mortgage belongs to two or more persons, it is best that they should all join as plaintiffs in the action to foreclose.¹³ If the action is brought by one of them, and the others are joined as defendants, the complaint should show that those not joining as co-plaintiffs had been requested so to join, and had refused; but if the complaint does not show these facts, and the defect is not objected to by the interposition of a demurrer, it will be waived.¹⁴

Where there are two co-mortgagees, and one has become the owner of the equity of redemption, the other can sustain a bill for foreclosure against him to the extent of his proportionate interest.¹⁵

⁹ O'Dougherty v. Remington Paper Co., 81 N. Y. 496.

¹⁰ Hancock v. Hancock, 22 N. Y. 568; Lawrence v. Lawrence, 3 Barb. Ch. 71.

¹¹ Lady Superior v. McNamara, 3 Barb. Ch. 375; 49 Am. Dec. 184.

¹² Nolte v. Libbert, Adm'r, 34 Ind. 163.

¹³ Shirkey v. Hanna, 3 Blackf. (Ind.) 403; 26 Am. Dec. 426.

¹⁴ Carpenter v. O'Dougherty, 2 N. Y. Sup. (T. & C.) 427, aff'd 58 N. Y. 681.

¹⁵ Sandford v. Bulkley, 30 Conn. 344.

Partners need not be joined as plaintiffs in the foreclosure of a mortgage given to only one of the firm as trustee for the partnership.¹⁶

On a bill filed by partners to foreclose a partnership debt, on the death of one of them the suit can be prosecuted by the survivors.¹⁷

§ 758. If a mortgage is made to secure different debts of two or more persons, all of the parties in interest should unite as plaintiffs in an action to foreclose it;¹⁸ but any one of them may bring the action if the others refuse, and those refusing may be joined as defendants.¹⁹ Such a mortgage is several and not joint, and if one dies, the survivor cannot enforce it for both debts.²⁰

Where a number of mortgages have equal liens upon the same property, all mortgagees should be asked to join as plaintiffs, and such as refuse should be made defendants.²¹ But a mortgagee may maintain an action to foreclose a mortgage without making a party plaintiff one who has a claim upon a portion of the fund secured by the mortgage by reason of an assignment of an interest therein. And a failure to make such person a party plaintiff does not render the judgment in such action invalid or furnish a ground for collateral attack upon it.²²

§ 759. Surety subrogated to rights of mortgagee.—If a person who stands in the relation of surety to the mortgage debt is compelled to pay it, he is entitled to be subrogated to the rights of the mortgagee, and without any formal assignment, either in writing or by parol, he may foreclose the mortgage in his own name.²³ This is the position of a person who has guaranteed the payment of the mortgage, or who, being obligated to pay the debt, has sold the land, either subject to the mortgage debt,²⁴ or to some person who assumed the obligation.²⁵

¹⁶ *Shelden v. Bennett*, 44 Mich. 634; 7 N. W. 223.

¹⁷ *Roberts v. Stigleman*, 78 Ill. 120.

¹⁸ *Etna Ins. Co. v. Finch*, 84 Ind. 301.

¹⁹ *Goodall v. Mopley*, 45 Ind. 355.

²⁰ *Burnett v. Pratt*, 39 Mass. (22 Pick.) 556.

²¹ *Potter v. Crandell*, Clark, 119.

²² *Batterman v. Albright*, 122 N. Y. 485; 25 N. E. 856.

²³ *McLean v. Towle*, 3 Sandf. Ch. 117; *Halsey v. Reed*, 9 Paige, 446; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Patterson v. Birdsall*, 64 N. Y. 294.

²⁴ *Cox v. Wheeler*, 7 Paige, 248; *Tice v. Annin*, 2 Johns. Ch. 125; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Ferris v. Crawford*, 2 Den. 595.

²⁵ *Johnson v. Zink*, 52 Barb. 396; *Brewer v. Staples*, 3 Sandf. Ch. 579; *Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 Paige, 595.

In this connection it has been said: "If the party, in a position or with an interest which gives him a right to redeem a mortgage, is also in effect surety, or can be regarded as surety for the mortgage debt, then, on paying the mortgage debt, he is entitled to an assignment, not only of the mortgage but also of any bond or other instrument evidencing the debt."²⁶ Where the owner of mortgaged premises sells a part of the land to a purchaser who assumes the payment of the whole mortgage, and the owner of the residue of the land is obliged to pay the mortgage, the latter is entitled to an assignment of such mortgage, to enable him to obtain satisfaction out of the land of the person who has assumed the payment.²⁷

So where a debtor mortgaged lands to his creditor and also transferred to him collateral securities for the same debt, and then sold the land subject to the mortgage, deducting its full amount from the price, and the mortgagee realized a portion of the mortgage debt from the collateral securities, it was held in an early case that the mortgaged premises in equity remained chargeable in the hands of the purchaser with the whole amount of the original mortgage debt; that the incumbrance, to the extent of the balance due the mortgagee, was for his benefit and as to the amount realized upon the collateral security, it was for the benefit of the mortgagor.²⁸ So where a junior mortgagee has paid the debt of the prior incumbrancer, he is entitled to be subrogated to the prior liens and all securities held by the prior incumbrancer as security for his debt.²⁹

The same right extends to a person who, though not holding the actual relation of surety for the mortgage debt, still holds an interest in the land subsequent to the mortgage, since to the extent of his interest in the land he is a surety for the mortgage.³⁰ But where the indorsers of notes entered into an agreement to pay a proportionate share of such notes if the maker should fail to pay at maturity, and in case of the failure of either to pay his proportion, and either of the others should pay more than his share, the one so paying should "have and recover from the one so

²⁶ Ellsworth v. Lockwood, 42 N. Y. 89, per SUTHERLAND, J.

²⁷ Halsey v. Reed, 9 Paige's Ch. 446.

²⁸ Ferris v. Crawford, 2 Den. 595.

²⁹ Dings v. Parshall, 7 Hun, 522.

³⁰ Averill v. Taylor, 8 N. Y. (4 Seld.) 44; Ellsworth v. Lockwood, 42 N. Y. 89.

failing an amount equal to his aliquot part" and mortgages were executed by each to a trustee to secure the performance of such agreement, it being agreed that the trustee might have the power to foreclose the mortgage of one failing to pay after being requested so to do by any of the parties having paid more than their proportionate share, the trust was held to be for the benefit solely of the parties to the agreement, and not for the benefit of the creditors, and it was decided that the holders of the notes were not entitled to be subrogated to the rights of the indorsers in the securities, and could not maintain an action with the trustee to foreclose one of the mortgages.³¹

§ 760. **Other remedies of surety.**—It is not necessary for the surety to pay the mortgage debt before being entitled to some relief. The principle is settled in this State that if a surety requests the creditor to collect the debt from the principal, and the creditor refuse or neglect to do so at a time when it is collectible, and from a subsequent change of circumstances it becomes uncollectible, the surety is by such conduct of his creditor exonerated from his liability.³² In an early case it was held, by Chancellor KENT, that a surety is not only clothed with all the rights of his principal upon payment of the debt, but that he might compel the creditor to sue the principal debtor if he apprehended danger and that it was the right of the surety to call upon a creditor having another fund, which the surety cannot make available, and to require him to resort to that fund in the first instance, and exhaust it.³³ It will be noticed that mere delay in foreclosing or neglect on the part of the mortgagee, no request being shown, will not release the surety or charge the mortgagee with the loss; the surety must request the mortgagee to proceed.³⁴ Nor is this his only remedy; a surety is entitled to be exonerated by coercing the creditor into a proceeding against the principal debtor or against property which he may hold in pledge.³⁵ This cannot be done by compelling the mortgagee to

³¹ Seward v. Huntington, 94 N. Y. 104, reversing 26 Hun, 217, distinguishing Lawrence v. Fox, 20 N. Y. 268.

³² Remsen v. Beekman, 25 N. Y. 552; Osborne v. Heyward, 40 App. Div. 78; 57 N. Y. Supp. 542; King v. Baldwin, 17 Johns. 384; Pain v.

Packard, 13 Johns. 174; Colgrove v. Tallman, 67 N. Y. 95.

³³ Hayes v. Ward, 4 Johns. Ch. 123, 131.

³⁴ Merchants' Ins. Co. v. Hinman, 34 Barb. 410.

³⁵ Norton v. Warner, 3 Edw. 108, n.; King v. Baldwin, 17 Johns. 384.

file a bill to foreclose; but the surety may himself file a bill, the mortgage debt being due, and making the mortgagee and all parties interested in the equity of redemption parties to the suit, he may call for a sale of the property pledged for the payment of the debt, and for a judgment that those parties who are primarily liable discharge the obligation.³⁶

§ 761. **Mortgage to executors and trustees.**—A mortgage which names the mortgagee as “A. B., acting executor of the last will of C. D.,” is *prima facie* the private property of A. B.³⁷ On the death of a trustee who has taken a security for trust funds in his individual capacity, though he is described as trustee in the instrument, the legal title to the security *prima facie* vests in his personal representatives, and not in his successors in the trust;³⁸ and if the administrator with the will annexed of C. D., commence an action to foreclose such mortgage, the personal representatives of A. B. are necessary parties, and the complaint must show and the plaintiff must prove, aside from the language of the mortgage that it is a part of the assets of C. D.³⁹ If the mortgage be intended to secure a debt to the estate, it should be to A. B., as executor, etc.

Where an executor loans money belonging to the estate, not in his representative, but in his individual capacity, and takes a bond and mortgage to secure the loan, payable to him individually, in case of default the cause of action accrues to him personally, and upon his death his personal representatives only can enforce the securities.⁴⁰ When the suit is brought by persons not in their representative capacity as executors, but as absolute owners of the bond and mortgage, they may maintain such action, the fact that they are also executors not affecting the right.⁴¹

A mortgage executed to a trustee may be foreclosed by his ex-

36 Marsh v. Pike, 1 Sandf. Ch. 210, aff'd 10 Paige, 595; Cornell v. Prescott, 2 Barb. 16; McLean v. Lafayette, 3 McLean, 587; Hayes v. Ward, 4 Johns. Ch. 123, 132. But see Slausen v. Watkins, 86 N. Y. 597, 602, where the doctrine of Marsh v. Pike is limited.

37 People v. Keyser, 28 N. Y. 226; Peck v. Mallams, 10 N. Y. 509;

Renaud v. Conselyea, 4 Abb. 280, aff'd 5 Abb. 346.

38 Renaud v. Conselyea, 4 Abb. 280, aff'd 5 Abb. 346.

39 Peck v. Mallams, 10 N. Y. (6 Seld.) 509.

40 Caulkins v. Bolton, 98 N. Y. 511, distinguishing Walton v. Walton, 4 Abb. Ct. App. Dec. 512; Luers v. Brunges, 56 How. Pr. 282.

41 Smith v. Webb, 1 Barb. 230.

ecutor or administrator.⁴² A provision in a trust mortgage that the trustee shall enforce the mortgage upon a written request signed by a majority of the creditors is binding upon the parties. As a general rule, in order to maintain such an action, the written request provided for is a prerequisite and a single creditor is not entitled to maintain an action upon a refusal of the trustee to bring proceedings at the request of a less proportion of the creditors than designated.⁴³ In such a case it might be that if a request had been made to the creditors upon facts presented to them showing that the property was going to waste and a foreclosure of the mortgage was necessary to preserve it, equity would interfere even though a majority of the creditors did not join in the request to the trustee.⁴⁴

§ 762. **Right of trustee to proceed.**—In general, it is the right and duty of a trustee to whom a mortgage is given to secure bonds, to foreclose the same when there is a default in the payment of principal. It is not necessary that the power to bring such an action should be conferred by the mortgage itself.⁴⁵

Where a trust mortgage contains a provision that: "In case of default as hereinbefore defined, the said trustee may adopt any legal or equitable method for foreclosing this mortgage and enforcing the trusts herein contained, or for collecting the principal and interest of the bonds secured hereby, and may have appointed a Receiver of all property, real and personal, covered by this mortgage who shall have and exercise the powers by law provided for Receivers of railroad Corporations" the trustee is held to have ample power to sue in foreclosure to compel a sale of the mortgaged premises, so far as may be necessary to pay the amount of which the mortgagor is in default. It is not necessary where there is such a clause to show that a majority of the bondholders have set the trustee in motion as provided in another clause in the mortgage.⁴⁶

⁴² *Bunn v. Vaughan*, 1 Abb. App. Dec. 253.

⁴³ *Allen v. Pierson*, 113 App. Div. 586; 100 N. Y. Supp. 451, aff'd 186 N. Y. 546; 79 N. E. 1100.

⁴⁴ *Allen v. Pierson*, 113 App. Div. 586; 100 N. Y. Supp. 451, aff'd 186 N. Y. 546; 79 N. E. 1100.

⁴⁵ *Farmers' Loan & Trust Co. v. Hoffman House*, 7 Misc. R. 358, 364; 27 N. Y. Supp. 634.

⁴⁶ *Long Island Loan & Trust Co. v. Long Island City & Newtown R. Co.*, 85 App. Div. 36; 82 N. Y. Supp. 644, aff'd 178 N. Y. 588; 70 N. E. 1102.

Where by the terms of a trust mortgage a trustee is empowered to foreclose in his discretion after default, it is not necessary to allege, or prove that a majority of the bondholders requested a foreclosure.⁴⁷ In such an action all that it is necessary for the plaintiff to establish to be entitled to a judgment of foreclosure, is that there are valid outstanding obligations issued under the mortgage, and that the railroad company has made default in their payment. It is immaterial who owns the bonds, provided the railroad company owes the obligations.⁴⁸

A provision in a mortgage given by a corporation to secure bonds issued by it, that the trustee may at the expiration of a certain period after default in the payment of the principal of any of the bonds, enter upon the premises and sell the property summarily, without resorting to an action to foreclose the mortgage, has for its object the protection of the corporation and its stockholders, against any hasty and summary action on the part of the trustee. Such a provision while it precludes the trustee from pursuing such a course until the expiration of the period specified, does not however, postpone his right to bring an action of foreclosure for default in payment of the interest, where the bondholders have exercised their right under a provision of the mortgage to declare the bonds to be immediately due and payable."⁴⁹

Ordinarily trustees cannot act separately as they constitute in law but one person, and all must join in bringing an action. But where one of two trustees under a mortgage executed to secure bonds, is a director of the mortgagor, his co-trustee may properly institute an action to foreclose the mortgage, in which he names the trustee having such adverse interests a party defendant, without having requested him to become a party plaintiff.⁵⁰

§ 763. Rights of bondholders where trustee refuses to proceed.—The holder of bonds issued by a corporation, secured by a trust

⁴⁷ *Knickerbocker Trust Co. v. Oneonta C. & R. I. R. Co.*, 116 App. Div. 78; 101 N. Y. Supp. 248, aff'd 188 N. Y. 38; 80 N. E. 568. Compare *Farmers' Loan & T. Co. v. New York & Northern R. R. Co.*, 150 N. Y. 410; 44 N. E. 1043, where trustee must foreclose on request of certain number of bondholders.

⁴⁸ *Knickerbocker Trust Co. v. One-*

onta, Cooperstown & R. S. Ry Co., 188 N. Y. 38; 80 N. E. 568, aff'd 116 App. Div. 78; 101 N. Y. Supp. 241.

⁴⁹ *Farmers' Loan & Trust Co. v. Hoffman House*, 7 Misc. R. 358; 27 N. Y. Supp. 634.

⁵⁰ *Cumming v. Middletown, Unionville & W. G. R. R. Co.*, 147 App. Div. 105.

mortgage, are the real parties in interest, and when any emergency happens which makes a demand upon the trustee to foreclose the mortgage futile, and leaves a bondholder, without other reasonable means of redress, his appearance as a plaintiff in an action to foreclose is proper. So where the evidence showed that the trustee was living abroad, that his family had departed to join him abroad, and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane it was held that this, the other facts requisite to the right also being shown, justified the bringing of an action by a bondholder to foreclose.⁵¹ So where a trustee refuses upon a proper request made to him for that purpose, to take necessary legal proceedings for the protection of the beneficiaries under the trust, they may by the appropriate form of action, proceed for their own protection, and the enforcement and maintenance of their rights and interests under the trust.⁵² And where the owner of twelve bonds secured by a mortgage issued to one as trustee by the defendant corporation, upon which two quarterly installments of interest had become due and payable, brought an action to procure the foreclosure of the mortgage, and it was alleged in the complaint that, after default, the trustee refused upon request of the plaintiff to institute the foreclosure suit, it was decided that such refusal authorized the plaintiff to bring the action.⁵³ And in the case of a mortgage given by a railroad company to a trustee to secure bonds issued by it, if a right to foreclose the mortgage exists by reason of a default, and the trustee refuses to bring such proceedings, a bondholder may maintain the action.⁵⁴

A communication from a bondholder to a mortgage trustee stating his desire to foreclose, and that he has attorneys ready to proceed, who will arrange for the trustee's protection, and asking what action the trustee will take, and a refusal by the trustee to authorize any action by him unless indemnified against costs,

⁵¹ *Ettlinger v. Persian Rug & Carpet Co.*, 142 N. Y. 189; 36 N. E. 1055, aff'g 66 Hun, 94; 20 N. Y. Supp. 772.

⁵² *Davies v. New York Concert Co.*, 41 Hun, 492, citing *Weetjen v. St. Paul & Pacific R. R. Co.*, 4 Hun, 529; *Weetjen v. Vibbard*, 5 Hun, 265; *Greaves v. Gouge*, 69 N. Y.

155; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, 56; *Memphis City v. Dean*, 8 Wall. (U. S.) 65, 73.

⁵³ *Davies v. New York Concert Co.*, 41 Hun, 492.

⁵⁴ *Van Benthuyssen v. Central N. E. & W. R. Co.*, 17 N. Y. Supp. 709.

will not authorize the maintenance of such action by the bondholder on the ground of the refusal by the trustee to proceed.⁵⁵

Nor will the mere failure of the trustee to foreclose for a considerable period of time after a default give a bondholder the right to maintain foreclosure proceedings on the ground of abandonment or neglect of the trust. "The relation between a mortgage trustee and the bondholders does not impose upon the trustee the duty in every case of a prompt foreclosure without any request from a bondholder. On the contrary, the relation is one principally of convenience to the bondholders, who are the real parties in interest, and the usual course is for the trustee to await a request from them for a foreclosure. In most cases, a prompt foreclosure is neither desired by the bondholders, nor desirable for their interests."⁵⁶

Where by the terms of bonds it is provided that in case of default in payment of the interest coupons attached thereto, "the principal sum shall become due in the manner and with the effect provided in the said trust deed or mortgage," it is necessary to refer to such trust deed or mortgage to determine the right of bondholders to maintain a foreclosure proceeding in case of such default, as by such reference the provisions of the instrument referred to become an essential part of the contract between the bondholder and his obligor. So, where the mortgage or deed thus referred to provided that in case of default in the payment of any interest coupons and its continuance for six months after demand the principal shall become immediately due and payable and the trustee "upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both the principal and interest of all such bonds by foreclosure and sale" of the property covered thereby, the principal becomes payable only in the manner prescribed, and the right to foreclose is controlled by such provision.⁵⁷

55 *Beebe v. Richmond, Light, Heat & Power Co.*, 13 Misc. R. 737; 35 N. Y. Supp. 1, aff'd 3 App. Div. 334; 38 N. Y. Supp. 395.

56 *Beebe v. Richmond Light, Heat & Power Co.*, 13 Misc. R., 737; 35 N. Y. Supp. 1, aff'd 3 App. Div. 334; 38 N. Y. Supp. 395, per GAYNOR, J.

57 *Batchelder v. Council Grove Water Co.*, 131 N. Y. 42; 29 N. E. 801, aff'g 27 J. & S. (59 Super. Ct.) 262; 14 N. Y. Supp. 306, and holding that plaintiff, and individual bondholder, was entitled to recover only the interest due.

§ 764. **Foreclosure by one executor against another.**—Courts of equity will entertain an action by one executor against another who is indebted to the estate, for such equitable relief as may be proper, and as the interests of the estate or of creditors or legatees may require. On this principle, one executor may maintain an action to foreclose a mortgage as against his co-executor.⁵⁸ And where two executors are named in a will and one of them has taken out letters testamentary in the State and the other has not, the one who has obtained letters here may sue in his own name without naming the other party.⁵⁹ So, also, the fact that the mortgagee holds an interest as trustee in the equity of redemption will not prevent him from foreclosing against his co-trustee and others.⁶⁰ But where a mortgage is given by a husband and wife to their co-executrix to secure the payment of moneys of the estate received by the husband as executor, the wife, after her husband's death cannot file a bill, in her character as executrix, against his personal representatives and heirs at law to foreclose such mortgage, where it does not appear from the bill that she is entitled to a portion of the fund secured by the mortgage, as a legatee for her sole and separate use. However, if in such case she has an interest in the fund, and the co-executrix to whom the mortgage was given, upon a proper application for that purpose, refuses to proceed to foreclose, then it is held that the widow and the other legatees for whose benefit the mortgage was given, may file a bill showing their respective rights in the fund and praying foreclosure of the mortgage.⁶¹

§ 765. **Where a specific legacy is made of a mortgage,** it should be foreclosed by the legatee; but if the legacy be general, to be paid out of the mortgage, the action is properly brought by the executor.⁶²

If a mortgage be bequeathed to a person who is also one of two or more executors, he may foreclose as legatee, being liable to account as legatee for the mortgage if necessary to satisfy debts.⁶³

⁵⁸ *McGregor v. McGregor*, 35 N. Y. 218; *Lawrence v. Lawrence*, 3 Barb. Ch. 71.

⁵⁹ *Lawrence v. Lawrence*, 3 Barb. Ch. 71.

⁶⁰ *Paton v. Murray*, 6 Paige, 474.

⁶¹ *Lawrence v. Lawrence*, 3 Barb. Ch. 71.

⁶² *Newton v. Stanley*, 28 N. Y. 61.

⁶³ *Proctor v. Robinson*, 35 Mich. 284.

§ 766. **Foreign executor or administrator.**—Where a voluntary payment of the mortgage debt is made by the mortgagor to the foreign executor or administrator of the mortgagee, such payment will discharge the debt and cancel the lien;⁶⁴ but such foreign executor or administrator will not be allowed to use the machinery of our courts to enforce such payment without first proving the will, or taking out letters of administration in this State.⁶⁵ It is not because the foreign executor or administrator has no right to the assets of the deceased, existing in this State, that he is refused a standing in our courts, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and others resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established.⁶⁶ The disability of the foreign executor or administrator to sue in our courts does not attach to the subject of the action, but to the person of the plaintiff, and the assignee of such foreign executor or administrator may maintain an action in this State, to foreclose a mortgage transferred to him by such foreign executor or administrator.⁶⁷ Upon a similar principle, the legatee of a bond and mortgage under a will executed in another State, the land being in this State, may foreclose without causing the will to be proved here.⁶⁸ And where an action was brought to foreclose a mortgage on lands in this State, given by the defendant, a resident here, to one who died in Illinois, where an administrator was appointed who assigned the mortgage to the plaintiff, it was decided that the assignment vested the title in the latter and that he could maintain the action.⁶⁹

The objection that the plaintiff is a foreign executor or ad-

⁶⁴ *Parsens v. Lyman*, 20 N. Y. 103. See *Stone v. Scripture*, 4 Lans. 186.

⁶⁵ *Vermilya v. Beatty*, 6 Barb. 429; *Parsons v. Lyman*, 20 N. Y. 103; *Williams v. Storrs*, 6 Johns. Ch. 353; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Vroom v. Van Horne*, 10 Paige, 549; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Brown v. Brown*, 1 Barb. Ch. 189; *Smith v. Webb*, 1

Barb. Ch. 230; *Smith v. Tiffany*, 16 Hun, 552; *Lawrence v. Lawrence*, 3 Barb. Ch. 71.

⁶⁶ Per DENIO, Ch. J., in *Petersen v. The Chemical Bank*, 32 N. Y. 21, 43; 29 How. Pr. 240.

⁶⁷ *Petersen v. The Chemical Bank*, 32 N. Y. 21.

⁶⁸ *Smith v. Webb*, 1 Barb. 230.

⁶⁹ *Smith v. Tiffany*, 16 Hun, 552, wherein this rule is said to be settled.

ministrator, and therefore has "no legal capacity to sue," must be taken either by demurrer or answer, or it will be waived.⁷⁰

§ 767. The foreclosure of a mortgage by advertisement, under a power of sale and pursuant to the statute, is a matter of contract and not of jurisdiction, and the foreign executor or administrator may therefore adopt that method of foreclosure without seeking the authority of our courts of probate.⁷¹

§ 768. Letters of administration conclusive as to regularity of appointment of administrator.—In an action to foreclose a mortgage brought by the administrator of the mortgagee, the regularity of his appointment as such administrator cannot be attacked; his letters are conclusive.⁷² And where the plaintiff in an action for foreclosure is described as an administrator, and as such has prosecuted the action to judgment after proper service on all of the defendants, the judgment and a sale under it cannot be assailed because of any irregularity or even want of jurisdiction in granting the letters of administration.⁷³

WHO ARE NECESSARY DEFENDANTS IN FORECLOSURE CASES.

§ 769. The Code of Civil Procedure provides⁷⁴ that any person may be made a defendant in an action who has or claims any interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed. And, for the purpose of disposing of the entire proceeding in one action and avoiding multiplicity of suits,⁷⁵ it is further enacted that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared or has been personally served with the summons, the final judgment may

70 *McBride v. The Farmers' Bank of Salem*, 26 N. Y. 457, 459; *Robbins v. Wells*, 26 How. Pr. 15; *Doolittle v. Lewis*, 7 Johns. Ch. 51; *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322.

71 *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Averill v. Taylor*, 5 How. Pr. 476; 1 Code R. N. S. 213; *Hayes v. Fray*, 54 Wis. 503, 518; 11 N. W. 695.

72 *Abbott v. Curran*, 98 N. Y. 665;

73 *Abbott v. Curran*, 98 N. Y. 665. Code of Civ. Pro. § 2591.

74 § 447.

75 *Hochstein v. Schlanger*, 150 App. Div. 124; 134 N. Y. Supp. 704, citing *Robert v. Kidansky*, 111 App. Div. 475; 97 N. Y. Supp. 913; *Equitable Life Ass. Society v. Stevens*, 63 N. Y. 341; *Scotfield v. Doscher*, 72 N. Y. 491.

award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein.”⁷⁶

§ 770. Bringing in new parties.—The court undoubtedly has inherent jurisdiction in the furtherance of justice to permit any person claiming to have an interest in real estate to be made parties to an action to foreclose a lien on the same during the pendency of such action, as well as to open any judgment rendered therein affecting their rights.⁷⁷ But a motion to be made a party defendant should not be granted where the moving party has a fair opportunity to protect his interests without being a defendant in the foreclosure action.⁷⁸

The provisions of the Code §§ 452, 453 as to the bringing in of a new party by amendment or supplement at summons or complaint, have been held to comprehend only cases where it appears that the interest of the proposed new party in the controversy, or the subject of the action, or the real property, the title to which may be affected by the judgment, was held by him at the inception of the action, and was not then exclusively represented by one who was made a party. These sections refer to persons who were necessary or proper parties at the beginning of the action.⁷⁹

This construction was applied where a trustee holding the

⁷⁶ Code Civ. Pro. § 1627 also providing “the people of the State of New York may be made a party defendant to an action for the foreclosure of a mortgage on real property, where the people of the State of New York have an interest in or a lien on the said real property subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people, but where the people of the State of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matter required to be set forth by the Code of Civil Pro-

cedure detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the State of New York, and the reason for making the people a party defendant. Upon failure to state such facts, the complaint shall be dismissed as to the people of the State of New York.” L. 1911, ch. 25; September 1, 1911.

⁷⁷ See *Ladd v. Stevenson*, 112 N. Y. 325; 19 N. E. 842.

⁷⁸ *Russ v. Stratton*, 8 Misc. R. 6; 28 N. Y. Supp. 392.

⁷⁹ *Griswold v. Caldwell*, 14 Misc. R. 299; 35 N. Y. Supp. 1057. But see on this point, however, *Michaelis v. Towne*, 51 App. Div. 466; 64 N. Y. Supp. 751.

equity of redemption resigned his trust pending an action of foreclosure and a new trustee was appointed.⁸⁰

Such relief should not be denied because the amount due on the mortgage in suit is conceded and the collection of the same will be delayed thereby.⁸¹

In another case the court permitted a subsequent creditor of a mortgagor to become a party to an action to foreclose his premises, although a sale in foreclosure had been had, where the creditor, entitled to any surplus moneys, alleged that a relative of the mortgagor had purchased at the sale, had not completed in time, had been granted several months additional to complete, and that the proceeds of the sale were inadequate.⁸² A purchaser at a foreclosure sale who is permitted to intervene occupies the same position as though he had originally interposed an answer to the foreclosure proceeding, wherein was raised an issue which either wholly or partially defeated the mortgage. He is entitled to have the issues raised in the intervention proceeding tried therein and the court has no power to deprive him of that right by vacating the intervention proceeding.⁸³ Not every person asserting a claim against another can demand the right to defend an action to foreclose a mortgage simply for the reason that a recovery in such action will lessen or destroy his chances of ultimately realizing on his claims in the event of his success.⁸⁴ So a creditor of a defendant in an action to foreclose a mortgage is not entitled to intervene.⁸⁵

And one who had a claim against a corporation for damages for personal injuries, upon which she had once recovered a judgment that was afterwards reversed upon appeal, has no interest in the corporate property which entitles her to be made a defendant in an action brought for the foreclosure of a mortgage thereon given to secure the payment of corporate bonds.⁸⁶

⁸⁰ *Griswold v. Caldwell*, 14 Misc. R. 299; 35 N. Y. Supp. 1057.

⁸¹ *Commercial Trust Co. v. Peck*, 135 App. Div. 732; 19 N. Y. Supp. 941.

⁸² *Bowers v. Denton*, 41 Misc. R. 133; 83 N. Y. Supp. 942.

⁸³ *Farmers' Loan & Trust Co. v. Hoffman House*, 96 App. Div. 301; 89 N. Y. Supp. 281.

⁸⁴ *Clinton v. South Shore Nat.*

Gas & Fuel Co., 61 Misc. R. 339; 113 N. Y. Supp. 289; *Draper v. Pratt*, 43 Misc. R. 406; 89 N. Y. Supp. 356.

⁸⁵ *Bouden v. Sire*, 92 App. Div. 325; 86 N. Y. Supp. 180.

⁸⁶ *Clinton v. South Shore Nat. Gas & Fuel Co.*, 61 Misc. R. 339; 113 N. Y. Supp. 289, holding also that such a claimant has no such interest by reason of interlocutory orders made in the progress of the litigation

§ 771. All persons who have or claim an interest in or lien upon the mortgaged premises, subsequent and inferior to the lien of the mortgage, are necessary parties to the action to foreclose. That is to say, it is necessary that all persons having any claim to, or lien upon, any part of the equity of redemption, shall be brought into court, in order that the judgment of the court ordering a sale shall bind the entire equity of redemption.⁸⁷ The judgment will be entirely without force as to all persons not made parties; their interests will remain undisturbed, and they will retain the right to redeem from the holder of the mortgage before the sale, and from the purchaser after the sale.⁸⁸

§ 772. Examples.—The owner of the equity of redemption is, of course, a necessary party,⁸⁹ as also is his wife, she having a dower right, even though the mortgage be for purchase money.⁹⁰ But if the mortgage was executed after the marriage of the mortgagor, was not given for purchase money and was not executed by the wife, she is not a necessary party. If she be impleaded but defaults, the judgment will not affect her prior and superior interest in the premises.⁹¹

awarding to her costs that have not been paid nor has she standing to attack the acts of the plaintiff in the foreclosure suit as a fraud upon her rights until she has actually recovered judgment and an execution thereon has been returned unsatisfied.

87 *Fleischman v. Tilt*, 10 App. Div. 271; 42 N. Y. Supp. 506; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; 1 Edw. Ch. 301; *Denton v. Nanny*, 8 Barb. 618; *Peabody v. Roberts*, 47 Barb. 91; *Brainard v. Cooper*, 10 N. Y. (6 Seld.) 356; *Gage v. Brewster*, 31 N. Y. 218. See Code Civ. Proc. § 1638; *St. Stephen's Church v. Church of the Transfiguration*, 201 N. Y. 1; *Robinson v. Pratt*, 151 App. Div. 738. See also *Stockwell v. State*, 101 Md. 1.

88 *Bloomer v. Sturges*, 58 N. Y. 168; *Rathbone v. Hooney*, 58 N. Y. 463; *Kay v. Whittaker*, 44 N. Y. 565; *Peabody v. Roberts*, 47 Barb. 91; *Haines v. Beach*, 3 Johns. Ch. 459; *Ensoworth v. Lambert*, 4 Johns. Ch. 605.

89 *Lyon v. Morgan*, 143 N. Y. 505; 38 N. E. 960; *Beebe v. Richmond Power Co.*, 6 App. Div. 187; 40 N. Y. Supp. 1013; *Reed v. Marble*, 10 Paige, 409; *Hall v. Nelson*, 14 How. Pr. 32; 23 Barb. 88; *Griswold v. Fowler*, 6 Abb. 113. See also *Porter v. Muller*, 65 Cal. 512; 4 Pac. 531; *Travelers Ins. Co. v. Patten*, 98 Ind. 209.

Although a receiver of the mortgagor is made a party the mortgagor is also a necessary party. *Brandow v. Vroman*, 29 App. Div. 597; 51 N. Y. Supp. 943. See also *Dewsnap v. Matthews*, 53 Misc. R. 48; 102 N. Y. Supp. 945.

90 *Franklin v. Beegle*, 102 App. Div. 42; 92 N. Y. Supp. 449; *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 Barb. 561; *Mills v. Van Voorhies*, 20 N. Y. 412; *Wheeler v. Morris*, 2 Bosw. 524. See also *Watt v. Alvord*, 25 Ind. 533.

91 *Barker v. Burton*, 67 Barb. 458. The inchoate right of dower which a wife has in real estate owned by her husband cannot be impaired by

If the mortgagor shall have conveyed the property subsequent to the mortgage, his grantees will stand in his place, and must be made parties; so the assignee in bankruptcy of the mortgagor is a necessary party.⁹² If the mortgagor is dead, his heirs represent him, and must be made parties,⁹³ even though the mortgage be in the form of an absolute conveyance with a parol defeasance.⁹⁴ The holders of all liens or incumbrances upon the equity of redemption, must be joined, or their right to redeem from the mortgage will not be affected,⁹⁵ so a judgment creditor of the mortgagor must be made a party, though the mortgage be for purchase money and the judgment be docketed prior to the conveyance to the mortgagor;⁹⁶ so, too, must the holder of a sheriff's certificate of sale against the mortgagor.⁹⁷ The mortgagor is a necessary party, so long as any interest in the equity of redemption remains in him, as if the equity had been sold under a judgment against him, and the right to redeem under such sale has not yet expired.⁹⁸

If the mortgage be made to secure several notes or obligations, the holders of all of them must be parties to the action to foreclose, either as plaintiffs or defendants.¹ The maker of a bond, intended as collateral security for the payment of a portion of the

any judicial proceeding to which she is not made a party. It follows therefore that in an action to foreclose a mortgage upon premises owned by the husband such right of hers is not affected unless she is made a party to the action. *Mackenna v. Fidelity Trust Co.*, 184 N. Y. 411; 77 N. E. 721, aff'g 98 App. Div. 480; 90 N. Y. Supp. 493.

92 *Titcomb v. Fonda*, *Johnstown & Gloversville R. R. Co.*, 38 Misc. R. 630; 78 N. Y. Supp. 226; *Winslow v. Clark*, 47 N. Y. 261; *Burnham v. De Bevoise*, 8 How. Pr. 159.

93 *Heidgerd v. Reis*, 135 App. Div. 414; 119 N. Y. Supp. 921; *Eschmann v. Alt*, 4 Misc. R. 305; 24 N. Y. Supp. 763; *Berkowitz v. Brown*, 3 Misc. R. 1; 23 N. Y. Supp. 792; *Wood v. Moorhouse*, 1 Lans. 405. See also *Bill v. Hall*, 76 Ala. 546.

Heirs residing in a foreign country

should be made parties. *Lowenfeld v. Ditchett*, 114 App. Div. 56; 99 N. Y. Supp. 724.

94 *Dodd v. Neilson*, 90 N. Y. 243.

95 *Peabody v. Roberts*, 47 Barb. 91. See also *Ward v. McNaughton*, 43 Cal. 161; *Davenport v. Turpin*, 41 Cal. 100; *Pauley v. Canthorn*, 101 Ind. 91; *Hollinger v. Bates*, 43 Ohio St. 437.

96 *Winebrener v. Johnson*, 7 Abb. N. S. 202. See also *Reynolds v. Kaplan*, 3 App. Div. 420; 38 N. Y. Supp. 764.

97 *N. Y. Life Ins. & Trust Co. v. Bailey*, 3 Edw. Ch. 416. See also *Kepley v. Jansen*, 107 Ill. 79; *Britton v. Hunt*, 9 Kans. 228; *Bollinger v. Chouteau*, 20 Mo. 89.

98 *Hallock v. Smith*, 4 Johns. Ch. 649.

1 *Delespine v. Campbell*, 52 Tex. 4.

principal debt, should be made a party defendant to the foreclosure action.²

Where a mortgagee purchases the property under a sale in proceeding to foreclose instituted by him and to which a subsequent mortgagee whose lien appeared of record was not made a party he becomes, as to the second mortgage, merely a mortgagee in possession and liable to account for the rents and profits. In such a case it is said that the utmost effect of the foreclosure and sale is to transfer the equity of redemption from the mortgagor to the purchaser. Under these circumstances, in an action by the junior mortgagee to foreclose his mortgage the plaintiff in the first foreclosure suit is properly made a party defendant.³

A mortgagee is entitled to letters of administration on the estate of a deceased subsequent mortgagee, who is a non-resident with no administrator here, but such letters must be limited to proceedings in foreclosure and other relief upon the mortgage.⁴

§ 773. Vendee in possession under contract of purchase.—Where a vendee is rightfully in possession of mortgaged premises under a contract of purchase and sale, he has an equitable title which may be mortgaged or sold. In such a case he, or one claiming under him, is, as a subsequent incumbrancer, a necessary party to the foreclosure of the mortgage and if he is not made a party the foreclosure is held to operate only as an assignment of the mortgage to the purchaser at the foreclosure sale.⁵

§ 774. Assignee in bankruptcy.—If a petition in bankruptcy be filed against the mortgagor prior to the commencement of the action to foreclose, it will be necessary to join the assignee when he is appointed, since his rights date back to the filing of the petition.⁶ But proceedings in bankruptcy against the mortgagor, or owner of the equity of redemption, do not suspend action in a State court already commenced for the foreclosure of a mortgage, and unless restrained by the bankruptcy court, the plaintiff may

² Hockstein v. Schlanger, 150 App. Div. 124; 134 N. Y. Supp. 704.

³ Walsh v. Rutgers Fire Ins. Co., 13 Abb. Pr. 33.

⁴ Lothrop's Case, 33 N. J. Eq. 246, and note; Courser's Will, 3 Green Ch. (N. J.) 408.

⁵ Titcomb v. Fonda, Johnstown &

Gloversville R. R. Co., 38 Misc. R. 630; 78 N. Y. Supp. 226.

⁶ London v. Townshend, 129 N. Y. 166; 29 N. E. 71; Barron v. Newberry, 1 Biss. (U. S. Circ.) 149; Compare Freehold Construction Co. v. Bernstein, 60 Misc. R. 363; 113 N. Y. Supp. 368.

proceed to judgment and sale in the action.⁷ If the State court acquires jurisdiction of the parties and of the subject-matter of the suit, it is competent to administer full justice; it cannot take judicial notice of the proceedings in bankruptcy in another court, however seriously they may affect the rights of parties to the suit already pending. The bankrupt act expressly provides that the assignee may prosecute or defend all suits in which the bankrupt was a party at the time he was adjudicated a bankrupt. If there is any reason for interposing, the assignee can have himself substituted for the bankrupt or made a defendant on petition. If he chooses to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit commenced.⁸

The assignee of the mortgagor in insolvency is a necessary party as being the owner of the equity of redemption.⁹ And one who is a general assignee of the owner of property subsequent to the giving of a mortgage thereon is properly made a party to an action to foreclose such mortgage although an order has been issued for his discharge, where by such order he is to be discharged upon performance of the decree and he has not at the time of the commencement of the suit fulfilled its requirements.¹⁰

An assignee for the benefit of creditors who, as such, is a proper party to the foreclosure, and who has no interest individually, and who is named a defendant individually, is bound as assignee.¹¹

§ 775. **Unrecorded incumbrance.**—The plaintiff is not bound, in his foreclosure, to take notice of any incumbrance against the mortgaged premises which does not appear in the public records, and of which he does not have actual notice. Persons claiming under an unrecorded mortgage need not be made parties, though their assignment was recorded.¹² This applies also in the case of a grantee under an unrecorded deed.¹³

⁷ *Lenihan v. Hamann*, 55 N. Y. 652; *Cleveland v. Boerum*, 23 Barb. 201.

⁸ *Eyster v. Gaff*, 91 U. S. (1 Otto) 521; 13 Alb. L. J. 272.

⁹ *Stafford v. Adair*, 57 Vt. 63.

¹⁰ *Julien v. Lalor*, 4 Hun, 164; 14 N. Y. St. R. 392.

¹¹ *Wagner v. Hodge*, 34 Hun, 524.

¹² *Abraham v. Mayer*, 7 Misc. R. 250; 27 N. Y. Supp. 264; *Kipp v. Brandt*, 49 How. Pr. 358; Code, § 1671. See NOTICE OF PENDENCY OF ACTION, §§ 808 to 811.

¹³ *Powell v. Jenkins*, 14 Misc. R. 83; 35 N. Y. Supp. 265.

§ 776. **Future and contingent interests.**—When there is a contest in relation to real estate, or where a mortgagee wishes to foreclose a mortgage, in a case where there are several future and contingent interests in the equity of redemption, it is not necessary to make every person having or claiming a future and contingent interest in the premises a party to the action in order to bar his right or claim by a judgment in the cause; but it is sufficient if the person who has the first vested estate of inheritance, and all other persons having or claiming prior rights or interests in the premises, are brought before the court. The person having the first estate of inheritance and who is *in esse*, appears to be a necessary party to an action of foreclosure, to make the judgment a bar either to his right or to the right of any contingent remainderman who is not made a party.¹⁴

Where legacies are charged upon the land the legatees are necessary parties to an action to foreclose a prior mortgage.¹⁵ The heirs of the mortgagor,¹⁶ or of the owner of the equity, and the personal representatives of a deceased subsequent mortgagee, are also necessary parties.¹⁷

§ 777. **Tenants and Occupants.**—Since possession is notice, as complete as the recording of a conveyance or incumbrance would be, to all persons dealing with or proceeding against the property,¹⁸ and since occupants of premises are not bound by a judgment rendered in an action to foreclose a mortgage thereon unless parties thereto,¹⁹ tenants and occupants of mortgaged premises should always be made defendants, and may properly be considered necessary defendants in foreclosure.

If tenants, who were in possession when the action was commenced and have since remained in possession, are not impleaded,

14 Townshend v. Frommer, 125 N. Y. 446; 26 N. E. 805; United States Trust Co. v. Roche, 116 N. Y. 120; 22 N. E. 265; Lockman v. Reilly, 95 N. Y. 64; Curtis v. Murphy, 58 Super. Ct. 292; 11 N. Y. Supp. 726; New York Security & G. Co. v. Schoenberg, 87 App. Div. 262; 84 N. Y. Supp. 359, aff'd 177 N. Y. 556; 69 N. E. 1128; Nodine v. Greenfield, 7 Paige, 544; The Eagle Fire Ins. Co. v. Cammet, 2 Edw. 127; Brevoort v. Brevoort, 70 N. Y. 136.

15 McGown v. Yerks, 6 Johns. Ch. 450.

16 Wood v. Moorhouse, 1 Lans. 405. See post, § 793.

17 Shaw v. McNish, 1 Barb. Ch. 326.

18 Welsh v. Schoen, 59 Hun, 356.

19 Fuller v. Van Geesen, 4 Hill 171; Zeiter v. Bowman, 6 Barb. 133, 140. See Ruyter v. Reid, 121 N. Y. 498; 24 N. E. 791.

they cannot be forcibly dispossessed by any process which can be issued to enforce the judgment.²⁰

The failure to implead such tenants operates as a ratification of the case under which they are in possession, but it does not discharge them from the obligation to pay rent to the receiver.²¹ Tenants who occupy under one whose deed was not recorded until after the filing of the notice of the pendency of the action may be inferred to have entered pendente lite, and are, therefore, chargeable with the effect of the judgment, although not parties to the action.²²

§ 778. **Trustees.**—Where the equity of redemption has been transferred to trustees, all of the trustees must be made parties to the action.²³ In another case however it is held that where a deed of premises is made absolutely to trustees, without qualification, trust or restriction, the title is in the trustees and they are individually necessary and proper parties in a foreclosure case where the premises are subject to the lien of the mortgage, but that where it appears from the face of the deed that it is made in trust or for the use of a corporation, no estate, legal or equitable, vests in the trustees, but is vested in the corporation and the trustees are not necessary parties.²⁴

Where a second mortgagee who holds the mortgage as trustee is made a party individually and not in his official capacity in an action to foreclose the mortgage, if it does not appear on the face of the complaint, or by answer, or by his appearance in the capacity of trustee, that the trust which he represents is intended and understood to be affected by the suit, the second mortgage will remain a lien upon the premises after their sale under the foreclosure of the prior mortgage.²⁵

The omission of a trustee to comply with a statute providing that any person to whom property is assigned in trust shall, before entering upon the discharge of his duties, give a bond, does

20 *Hirsch v. Livingston*, 3 Hun, 9; 5 N. Y. Super. Crt. 263; *Examine Commonwealth Mortgage Co. v. De Waltoff*, 135 App. Div. 33; 119 N. Y. Supp. 781.

21 *Home Life Insurance Co. v. O'Sullivan*, 151 App. Div. 535.

22 *Ostrom v. McCann*, 21 How. Pr. 431.

23 *Steinhardt v. Cunningham*, 130 N. Y. 292; 29 N. E. 100; *Bard v. Poole*, 12 N. Y. 495; *Paton v. Murray*, 6 Paige, 474.

24 *Case v. Price*, 17 How. Pr. 348.

25 *McGuckin v. Milbank*, 83 Hun, 473; 71 N. Y. Supp. 1049, *aff'd* 152 N. Y. 297; 46 N. E. 490.

not render it unnecessary to make him a party to an action to foreclose a prior mortgage.²⁶

§ 779. *Cestuis que trust*.—If the equity of redemption be vested in a trustee in trust, both the trustee and the *cestuis que trust* should be made parties to the foreclosure.²⁷ And the executor of one for whom property was held in trust under an instrument not recorded is a proper party defendant to an action to foreclose a mortgage given by one who held the legal title to the property and by whom the trust was created.²⁸ Although it is a general rule that all persons materially interested in the subject-matter of a suit ought to be made parties, and that the *cestui que trust* as well as the trustees should be brought before the court, an exception as to the *cestui que trust* is made in the case of assignees or other trustees of a fund, for the benefit of creditors, who are suing for the protection of the fund or to collect moneys due to the fund from third persons.²⁹ An established exception to the general rule is in cases of remote limitation of the equity of redemption; in which, on account of the impossibility of bringing in parties not *in esse* or not ascertained, but who may subsequently become entitled, it is held sufficient to bring before the court the persons *in esse* who have the first estate of inheritance, together with the persons having all the precedent estates and prior interests.³⁰

Where real estate was vested in a trustee for a *feme covert* with power of appointment and the property was sold and a mortgage taken back in the name of the trustee who subsequently died, as did also the *cestui que trust* without making any disposition or

²⁶ Gardner v. Brown, 21 Wall. (U. S.) 36.

²⁷ Leggett v. The Mutual Life Ins. Co., 64 Barb. 23; Williamson v. Field, 2 Sandf. Ch. 533, 562; The Eagle Fire Ins. Co. v. Cammet, 2 Edw. Ch. 127; Nodine v. Greenfield, 7 Paige, 544; Rawson v. Lampman, 5 N. Y. (1 Seld.) 456; Hodges v. Walker, 76 App. Div. 305; 78 N. Y. Supp. 447; Phillips v. Wilcox, 12 Misc. R. 382; 33 N. Y. Supp. 561; *contra*, Case v. Price, 9 Abb. 111; 17 How. Pr. 348; Oliver v. Piatt, 3 How. (U. S.) 333; Clark v. Reyburn, 8 Wall.

(U. S.) 318; Union Bank v. Bell, 14 Ohio St. 200; Claverly v. Phelps, 6 Mad. 231; Thomas v. Dunning, 5 De Gex & Sm. 618; Coles v. Forrest, 10 Beav. 552, 557; Story's Eq. Pl. § 193 and cases cited.

²⁸ Wood v. O'Brien, 17 N. Y. Supp. 746.

²⁹ Christie v. Herrick, 1 Barb. Ch. 254.

³⁰ Williamson v. Field, 2 Sandf. Ch. 533; Brevoort v. Brevoort, 70 N. Y. 136; Mitchell v. Mitchell, 17 N. Y. 210; Clemens v. Clemens, 37 N. Y. 59.

appointment of the property but leaving children and her husband sold the mortgage, it was held on a bill to foreclose it that the children ought to be before the court.³¹

The fact that the mortgage was executed by the trustee, pursuant to the direction of the court, will not obviate the necessity for making the *cestuis que trust* parties to the action to foreclose it.³²

It has been said that where a devise is made to an executor *in trust* to sell, the *cestuis que trust* are not necessary parties, and that "the trustee may execute the power of sale by adopting the sale made in the action."³³ In a more recent case it is decided that where real property is left in trust, with remainder over on the expiration of the trust, the remaindermen are necessary parties to a foreclosure action, even though a power of sale is given to the trustees, provided that the exercise of such power of sale is discretionary and not imperative. It seemed to the court that if the power of sale had been imperative, an equitable conversion would have taken place upon the death of the testator, and the remaindermen in the trust would have had no interest in real estate which would render them necessary parties to a foreclosure.³⁴ This would seem to be the better doctrine.

If the mortgagee holds the mortgage upon a secret trust for the benefit of *cestuis que trust* not named in it, they are not necessary parties to the foreclosure.³⁵

In a litigation concerning the title to a bond and mortgage, where the complainant had been appointed receiver to collect the money due thereon and distribute it to four beneficiaries, it was held that all of such beneficiaries were necessary parties.³⁶ But the *bona fide* holder of a mortgage is not bound by the terms of an undisclosed trust existing between the holder of the record title and a third party and need not make the latter claiming to be a *cestui* a party.³⁷

³¹ Kortright v. Smith, 3 Edw. Ch. 402.

³² Williamson v. Field, 2 Sandf. Ch. 533.

³³ Verdin v. Slocum, 9 Hun, 150, reversed 71 N. Y. 345.

³⁴ Scholle v. Scholle, 113 N. Y. 261; 21 N. E. 84. See Townshend v. Frommer, 125 N. Y. 446; 26 N. E.

805; Boehmcke v. McKeon, 119 App. Div. 30; 130 N. Y. Supp. 930.

³⁵ Young v. Whitney, 18 Fla. 54.

³⁶ Tyson v. Applegate, 40 N. J. Eq. 305.

³⁷ Crosby v. Workingmen's Ass'n, 6 App. Div. 440; 39 N. Y. Supp. 678, aff'd 158 N. Y. 694.

§ 780. Limitations of the rule requiring *cestuis que trustent* to be made parties.—“There is no question about the general rule that where the equity of redemption has been sold or devised, and become divided into particular estates and remainders, the owners of these estates should be made parties to an action to foreclose the mortgage, and that when the equity of redemption has been vested in trustees for the benefit of others, the *cestuis que trustent*, as well as the trustees, should be parties. But the trusts here referred to are express trusts under which the *cestuis que trustent* acquire equitable estates or interests directly in the land as land, and not trusts implied by law where the whole legal title is in one person, subject only to a liability to account to others for the value of the property.” In all the cases where *cestuis que trustent* have been held to be necessary parties, they have been entitled to some direct estate or interest in the land as land. The rule does not apply where the equity of redemption has been bought in by an executor on a foreclosure of a junior mortgage for the purpose of protecting the estate from loss of the mortgage debt or some part thereof. In such a case the land is the property of the executor, as such, and is treated as personalty between him and the persons to whom it is his duty to account.³⁸

A guardian holding, as such, a judgment junior in lien on the mortgaged property is the only person necessary to be joined as defendant in order to bar claimants under the judgment; the ward is not a necessary party.³⁹

§ 781. Rule when *cestuis que trust* are exceedingly numerous.—The rule requiring *cestuis que trust* to be joined as defendants has sometimes been departed from where the beneficiaries were very numerous.⁴⁰ In a case where real estate had been purchased by a joint fund, raised by subscription of above 250 shares or subscribers, and the property was conveyed to three trustees, and an action to foreclose was brought, making only the trustees parties, Chancellor KENT remarked: “The trustees were selected in this case to hold and represent the property for the sake of convenience and because the subscribers were too numerous to hold and manage the property as a copartnership. The trustees are sufficient

³⁸ Per RAPALLO, J., in *Lockman v. Reilly*, 95 N. Y. 64.

³⁹ *Loehr, Guardian, v. Colborn*, 92 Ind. 24.

⁴⁰ *Land Co. v. Peck*, 112 Ill. 408.

for the purpose of this bill, which is for a sale of the pledge; it would be intolerably oppressive and burdensome to compel the plaintiffs to bring in all the *cestuis que trust*. The delay and expense incident to such a proceeding would be a reflection upon the justice of the court. This is one of the cases in which the general rule cannot and need not be enforced; for the trustees sufficiently represent all the interests concerned; they were selected by the association for that purpose, and we need not look beyond them.”⁴¹

A similar doctrine was held by WIGRAM, V. C., in *Holland v. Baker* (3 Hare, 68), who said: “I do not doubt that the court does allow a selected number to represent a numerous body of defendants, whose interests are sought to be adversely affected in a suit. Lord ELDON repeatedly said it might be done, if the purposes of justice required it, and LORD COTTENHAM, in *Atwood v. Small*,⁴² after saying that the right course was to bring all parties before the court, observed, that courts of justice are bound to have regard to the mode in which the affairs of mankind are conducted; and when, in consequence of the mode of dealing, it would be impossible to work out justice if the rule requiring all persons to be present were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice.”

The exception to the general rule requiring *cestuis que trust* to be made parties, which allows a foreclosure to proceed without their presence if they are exceedingly numerous, has special application in the case of assignments for the benefit of creditors.⁴³

If *cestuis que trust* are omitted because of their great number, the plaintiff should allege in his complaint the facts which justify their omission.⁴⁴

§ 782. Unknown owners.—When, in an action to foreclose, unknown owners are made defendants as authorized by the Code of Civil Procedure,⁴⁵ and are described in the summons, the addition of the words, “if any,” does not invalidate the process.⁴⁶

⁴¹ Van Vechten v. Terry, 2 Johns. Ch. 197. See also Swift v. Stebbins, 4 Stew. & Port. (Ala.) 447; Willis v. Henderson, 5 Ill. (4 Scam.) 13; N. J. Franklinita Co. v. Ames, 1 Beas. (N. J.) 507.

⁴² Not reported, but see 4 Myl. & C. 635.

⁴³ Willis v. Henderson, 5 Ill. (4 Scam.) 13; Grant v. Duane, 9 Johns. 591.

⁴⁴ Holland v. Baker, 3 Hare, 68. ⁴⁵ § 475.

⁴⁶ Abbott v. Curran, 98 N. Y. 665.

§ 783. When a defendant may require new parties to be joined.

—The want of a necessary party to the suit may be objected to by the mortgagor, because his ultimate liability for the debt makes it of the highest importance to him that the title made by the sale shall be perfect against all equities,⁴⁷ and a subsequent lienor may raise the same objection by demurrer.⁴⁸ If the defect of parties appear upon the face of the complaint, the objection may be made by demurrer, but if not, it should be taken by answer.⁴⁹

A mortgagor defendant cannot insist that a mortgagee, under a mortgage elder than the mortgagor's title shall be made a party defendant, in a suit to foreclose a mortgage for the purchase money, unless in his answer he makes some claim in relation to such prior incumbrance, to show that it should be taken into consideration in the decree.⁵⁰ It has been said that the want of an indispensable party can be taken advantage of at any stage of the litigation when the fact is made to appear.⁵¹ And, under the Code,⁵² it is decided that where it appears that other parties are necessary to a determination of the controversy the court must direct them to be brought in. A judgment will be reversed on appeal where it is clear that this has not been done although the objection of a defect of parties was not raised by demurrer.⁵³

If the ownership of the mortgage is doubtful, it is proper for a defendant to demand that all persons interested in the security be brought in as parties.⁵⁴

It is also said that a surety for the mortgage debt, who is made a party for the purpose of obtaining a judgment against him, is entitled to require that the principal debtor be made a party, if he is within the jurisdiction of the court.⁵⁵

⁴⁷ Hall v. Nelson, 14 How. Pr. 32; 23 Barb. 88; Morris v. Wheeler, 45 N. Y. 708; *contra*, Kay v. Whittaker, 44 N. Y. 565, 573.

⁴⁸ Franklin v. Beegle, 102 App. Div. 412; 92 N. Y. Supp. 449.

⁴⁹ Morris v. Wheeler, 45 N. Y. 708; Code, § 498.

⁵⁰ Western Reserve Bank v. Potter, Clarke's Ch. 432.

⁵¹ Boyle v. Williams, 72 Ala. 351.

⁵² Code Civ. Proc. § 452.

⁵³ Moulton v. Cornish, 138 N. Y. 133; 33 N. E. 842. See Johnston v. Donovan, 106 N. Y. 267; 12 N. E. 594.

An appeal lies from an order denying to owners of the equity of redemption of property of which a receiver has been appointed the right to come in as parties defendant. Dewsnap v. Mathews, 53 Misc. R. 48; 102 N. Y. Supp. 945.

⁵⁴ Kortright v. Smith, 3 Edw. 402.

⁵⁵ Bigelow v. Bush, 6 Paige, 343.

WHO ARE PROPER DEFENDANTS IN FORECLOSURE CASES.

§ 784. **Prior incumbrancer.**—There are those who are said to be proper but not necessary parties to the action. That is to say, the court may, without their being made parties, proceed and render a judgment which will be effectual to transfer the entire equity of redemption, in addition to the interest of the mortgagee in the land, to the purchaser at the sale; but if they are brought in, the court may proceed to grant some further relief or quiet some controversy which could not otherwise be done. For example, the plaintiff may make a prior incumbrancer a party to the action for the purpose of having the amount of such incumbrance determined and liquidated, and either paid out of the proceeds of the property, or allowed to remain as a lien on the property in the hands of the purchaser, the object being to dispose of the estate by one decree, and thus prevent needless litigation.⁵⁶ And the junior mortgagee may make a prior mortgagee a party without offering to redeem and pay the prior mortgage.⁵⁷ A prior assignee of a mortgage is also a proper but not a necessary party to its foreclosure.⁵⁸ But an admitted prior mortgagee is never a necessary party to a foreclosure suit,⁵⁹ and consequently, if he dies, or his interest devolves on another pending the action, the proceedings may go on without reviving or continuing them against his successor. The decree in such a case, cannot affect the prior lien, because there is no party before the court who represents it.⁶⁰

Where, however, the owner of land executed two mortgages upon it to another after which he sold the land in parcels to

56 *Jacobie v. Mickle*, 144 N. Y. 237; 39 N. E. 66; *Metropolitan Trust Co. v. Towanda Valley & Cuba R. R. Co.*, 43 Hun, 521; 18 Abb. N. C. 368; 7 St. R. 90, *aff'd* 106 N. Y. 673; 13 N. E. 937; *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Wait v. Gitman*, 32 App. Div. 168; 52 N. Y. Supp. 965; 28 Civ. Proc. R. 49; *Guilford v. Jacobie*, 69 Hun, 420; 23 N. Y. Supp. 462; *Smith v. Davis*, 4 Civ. Proc. R. 158; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33; *Holcomb v. Holcomb*, 2 Barb. 20; *The Western Ins. Co. v. The Eagle Fire*

Ins. Co., 1 Paige, 284; *Vanderkemp v. Shelton*, 11 Paige, 28; *Hancock v. Hancock*, 22 N. Y. 568; *Moller v. Muller*, 12 Hun, 674. See also *Jerome v. McCarten*, 94 U. S. 734; *Masters v. Templeton*, 92 Ind. 447; *Chamberlain v. Lyell*, 3 Mich. 448; *Porter v. Barclay*, 18 Ohio St. 546. **57** *Vanderkemp v. Shelton*, 11 Paige's Ch. 28.

58 *Merrill v. Bischoff*, 3 App. Div. 361; 38 N. Y. Supp. 194.

59 *Morris v. Wheeler*, 45 N. Y. 708; Code, § 498.

60 *Boyle v. Williams*, 72 Ala. 351.

several different purchasers, each one of whom assumed a proportionate part of the mortgage debt and, after the mortgagee had assigned the second mortgages, actions were begun to foreclose both mortgages, the mortgagee, however, not being made a party to the action to foreclose the second mortgage, it was decided, on an appeal from a judgment foreclosing the latter mortgage, that the liabilities of the purchasers of the mortgaged premises, upon the assumption clause contained in their deeds, should not be determined in the action to foreclose the second mortgage until the holder of the first mortgage had been made a party thereto.⁶¹

A prior mortgagee is only a proper party when his claim is to be paid; he cannot be made a party for the purpose of defeating his lien.⁶² The purpose of joining the prior mortgagee must clearly appear on the face of the complaint or his prior lien will not be affected.⁶³

Where there was an unrecorded prior mortgage, and it was a matter of dispute as to what the rights of the alleged prior mortgagee were, an application made by the junior mortgagee, after a judgment and a sale, had to amend the proceedings by making the prior mortgagee a party, was denied, and a resale was ordered, subject to the alleged claim of priority, so as to give bidders notice of it.⁶⁴

It is only where the junior mortgagee endeavors to sell the entire property, or where there is a substantial doubt as to the amount due to the prior lien creditors, that they should be made parties.⁶⁵

The holder of a mechanic's lien which is prior to the mortgage is a proper party defendant since his claim being prior to the mortgage he has a superior legal right to payment from the premises.⁶⁶

So, where title has been vested in a receiver of the property of the mortgagor by a deed duly executed and recorded, it is not

61 *Rudolf v. Burton*, 85 App. Div. 312; 82 N. Y. Supp. 592.

62 *Smith v. Roberts*, 62 How. Pr. 196.

63 *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

64 *Moller v. Muller*, 12 Hun, 674.

65 *Hagan v. Walker*, 14 How. (U.

S.) 37; *Payne v. Hook*, 7 Wall. (U. S.) 432; *French v. Shoemaker*, 14 Wall. (U. S.) 315; *Jerome v. McCarten*, in U. S. Dist. Ct., 4 N. Y. Weekly Dig. 439.

66 *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

necessary that his grantor or any of his predecessors in title should be made parties to a foreclosure suit; but it is essential in order to divest the receiver of his title that he should be made a party.⁶⁷

A purchaser at a tax sale is also a proper party to a foreclosure, and a provision may be made in the judgment for the payment of his prior lien.⁶⁸

§ 785. Other proper defendants.—A mortgagor who makes an absolute conveyance of his interest in the property is a proper but not a necessary party to the foreclosure.⁶⁹ If such conveyance be absolute upon its face it will not affect the rights of the plaintiff, if he does not acquire notice of the fact before judgment that it was really intended as security.⁷⁰ So, too, if the wife unites with her husband in conveying an estate in which she is entitled to dower, the conveyance operates as an extinguishment of her right, not only with respect to the grantee and his successors in interest, but also as to third parties, and she need not thereafter be made a party to a foreclosure of a prior mortgage.⁷¹

But where the husband and wife have joined in a mortgage, they are both proper parties to the suit for the purpose of extinguishing her contingent right of dower in the mortgaged premises.⁷²

A person to whom the mortgagor has contracted to convey the mortgaged premises is a proper, though not a necessary party to the action.⁷³

67 *Graham v. Lawyers Title Ins. Co.*, 20 App. Div. 440; 46 N. Y. Supp. 1055.

68 *Roosevelt Hospital v. Dowley*, 57 How. Pr. 489.

69 *Kursheedt v. Union Dime Savings Institution*, 118 N. Y. 358; 23 N. E. 473; *Daly v. Burchell*, 13 Abb. N. S. 264; *Bigelow v. Bush*, 6 Paige, 343; *Van Nest v. Latson*, 19 Barb. 604; *Drury v. Clark*, 16 How. Pr. 424; *Root v. Wright*, 21 Hun, 344. See also *Petry v. Ambrosher*, 100 Ind. 510; *Mescall v. Tully*, 91 Ind. 96; *Shaw v. Hoadley*, 8 Black, 165; *An-*

draws v. Stelle, 22 N. J. Eq. 478; *Chester v. King*, 1 Green Ch. (N. J.) 405; *Vreeland v. Loubat*, 1 Green Ch. (N. J.) 104; *Delaplaine v. Lewis*, 19 Wis. 476; *Cord v. Hirsch*, 17 Wis. 532.

70 *Griswold v. Fowler*, 6 Abb. 113.

71 *Elmendorf v. Lockwood*, 4 Lans. 393. See also *Stiger v. Bent*, 111 Ill. 328.

72 *Paton v. Murray*, 6 Paige's Ch. 474.

73 *Crooke v. O'Higgins*, 14 How. Pr. 154.

So, one who claims as equitable owner of premises prior to the execution of a mortgage thereon and who also claims a conveyance of such premises to him, before the commencement of the action, by an instrument not recorded, has been held to be a proper party to an action to foreclose such mortgage.⁷⁴

Where a mortgage has been given to secure the payment of a debt, part of which consists of a note executed by the debtors and indorsed by third persons, the makers of the note are proper parties to a foreclosure suit, as they are personally liable for the debt secured by the mortgage, and the indorsers are also proper parties because they are liable for the payment of a part of the debt secured by the mortgage.⁷⁵ Subsequent mortgagees are also proper parties to a foreclosure action.⁷⁶

In an action to enforce a mortgage given by an insolvent corporation to secure bonds intended to be issued to all of the corporation creditors, the receiver of the corporation and the judgment creditors may properly defend and are entitled to assert the invalidity of the mortgage as a defense thereto.⁷⁷

Where the bond accompanying the mortgage is executed by a person other than the mortgagor, as well as by the latter, it is proper to make such obligor a party to a foreclosure action and to demand a judgment for any deficiency against both.⁷⁸

WHEN THE ASSIGNOR OF THE MORTGAGE IS A NECESSARY OR
PROPER PARTY TO AN ACTION TO FORECLOSE IT.

§ 786. **Assignment as security.**—Where a mortgagee parts with all his interest in the mortgage by assignment, and has no connection afterward with the mortgaged premises, it cannot, in general, be necessary for the assignee to make him a party to

⁷⁴ *Brown v. Volkening*, 64 N. Y. 76, wherein the court said that whether such person's equities were prior and superior to the rights of the plaintiff under his mortgage, or junior and subordinate thereto, must necessarily be determined in the judgment for the foreclosure of the plaintiff's mortgage.

⁷⁵ *Patton v. Townsend*, 19 N. Y. Supp. 946; 47 N. Y. St. R. 490.

⁷⁶ *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 54 N. Y. 675.

⁷⁷ *Jenkins v. John Good Cordage & Machine Co.*, 56 App. Div. 573; 68 N. Y. Supp. 239, aff'd 168 N. Y. 679; 61 N. E. 1130.

⁷⁸ *Thorne v. Newly*, 59 How. Pr. 120.

the action to foreclose;⁷⁹ but it is always proper to make such assignor a party.⁸⁰

And the same principle is applicable to the case of an absolute assignment of a bond and mortgage to a third person in trust, to collect the amount due thereon, and apply the same to the payment of the debts of the assignor.⁸¹

So, where it appeared in a suit brought by the assignee of a mortgage to foreclose the same, that it was the intention of the assignor to give to the assignee the right to receive the moneys due upon the mortgage, and to foreclose in his own name, and to apply the proceeds of the mortgage to the payment of certain debts for which the complainant was holden as surety for the assignor, it was decided that a decree in such suit would be a perfect protection to the defendants therein, and to those who might become purchasers under the decree, against any claim of the assignor or of the creditors whose debts were thus provided for, and that it was unnecessary to make the assignor or the creditors parties.⁸²

In cases where the assignment is by way of security, although it be absolute in terms and express the payment of a full consideration, the assignor is not only a proper but a necessary party to the action;⁸³ the reason given for the rule being that the assignor of the mortgage having a right to redeem it, also has the right to show that the debt which the assignment was given to secure has been paid, and he is entitled to be brought before the court to enable him to do so.⁸⁴

It may also be the object of the assignee of a mortgage in making the assignor a defendant in foreclosure proceedings to

⁷⁹ *Johnson v. Hart*, 3 Johns. Cas. 322; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Christie v. Herrick*, 1 Barb. Ch. 254; *Western Reserve Bank v. Potter, Clarke*, 432; *Ward v. Van Bokkelen*, 2 Paige, 289; *Andrews v. Gillespie*, 47 N. Y. 487. See also *Chew v. Brumagen*, 13 Wall. (U. S.) 497; *Gower v. Howes*, 20 Ind. 196.

⁸⁰ *People's Trust Co. v. Gomolka*, 129 App. Div. 12; 113 N. Y. Supp. 49; *Weed v. Stevenson, Clarke*, 166; *Hoyt v. Martense*, 16 N. Y. 231. See also *Harwell v. Lehman*, 72 Ala. 344; *Stevens v. Reeves*, 33 N. J. Eq. 427.

A prior assignee who has assigned

the mortgage is a proper but not a necessary party. *Merrill v. Bischoff*, 3 App. Div. 361; 38 N. Y. Supp. 194.

⁸¹ *Christie v. Herrick*, 1 Barb. Ch. 254.

⁸² *Christie v. Herrick*, 1 Barb. Ch. 254.

⁸³ *Simson v. Satterlee*, 64 N. Y. 657, aff'g 6 Hun, 305; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Johnson v. Hart*, 3 Johns. Cas. 322; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Bard v. Poole*, 12 N. Y. (2 Kern.) 495.

⁸⁴ *Bard v. Poole*, 12 N. Y. (2 Kern.) 495.

procure an admission, either expressly or by the failure of the assignor to plead at all, that he assigned and transferred the bond and mortgage as alleged in the complaint, and for this purpose he is a proper party.⁸⁵ It has also been determined that, where the ownership of the mortgage being foreclosed is doubtful or in dispute, the court will, at the instance of any of the parties to the action, order the various claimants to be made parties.⁸⁶

§ 787. Assignment by parol.—These decisions would seem to indicate that it is proper in a foreclosure suit to determine, not only the rights of claimants in the equity of redemption as against the mortgagee, but also the rights of different claimants to the mortgage. If the assignment of the mortgage be by parol, it would appear to be necessary for the protection of a purchaser under the judgment to give the assignor a day in court, to answer the allegation that the assignment had been made by him; and where it is in writing, but is not so executed as to be capable of being recorded, the same rule would apply. A similar course of reasoning would show the assignor to be a proper party where the assignment was in writing and recorded, so as to bind him by the allegation that the assignment was absolute and without condition.

It was said by the court in *Bloomer v. Sturges* (58 N. Y. 168, 175), that the interest of an assignor of a mortgage assigned by way of security, that it should bring more than the amount as security for which it has been assigned, is the only ground on which he needs to be a party, but the statement was not necessary to the determination of the case, the decision being to the effect that where an assignor is made a party defendant, he is bound by the judgment in the action, and when the property is sold under the judgment for less than the debt which the assignment is given to secure, no right of redemption remains in the assignor.

§ 788. Purchase by assignee.—It has been adjudged that if the assignee, as security, forecloses the mortgage by advertisement⁸⁷ or by action, the assignor being a co-plaintiff,⁸⁸ and afterward purchases under the foreclosure, he will hold the land or the proceeds thereof subject to the equitable right of the assignor of

⁸⁵ *Merrill v. Bischoff*, 3 App. Div. 361; 38 N. Y. Supp. 194.

⁸⁶ *Kortright v. Smith*, 3 Edw. 402.

⁸⁷ *Slee v. Manhattan Co.*, 1 Paige, 48.

⁸⁸ *Hoyt v. Martense*, 16 N. Y. 231.

the mortgage to redeem, but it will be remarked that in neither of these cases was the assignor a defendant in an action to foreclose, and in neither case did the judgment of foreclosure assume to adjudicate upon his rights.⁸⁹

§ 789. Implied covenants of assignor.—By the sale and assignment of the mortgage the assignor impliedly warrants that there is no legal defense to its collection arising out of its origin,⁹⁰ and it would be convenient to have the assignor in court if any defense should be interposed the success of which would make him liable upon his implied covenant. But it is not necessary to make him a party to accomplish this object. Upon the coming in of an answer, the plaintiff may give notice to the assignor, and offer him the conduct of the action, and upon his so doing, the assignor will be bound by the result of the litigation, whether he takes any part in it or not.⁹¹

ENFORCING PERSONAL OBLIGATION FOR DEBT IN FORECLOSURE SUIT.

§ 790. It is provided by statute that any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained therein.⁹²

§ 791. Assuming mortgage.—If the mortgagor shall have conveyed the mortgaged premises to a person who is one of the defendants, and who has assumed the payment of the mortgage debt, he would be a proper party to the action if the plaintiff desired to obtain a judgment against him, but he would not be a necessary party, and the person who had assumed the debt having become the primary debtor, would have no just cause of complaint if he were not a party.⁹³ But one who purchases

⁸⁹ See these cases distinguished and limited in *Bloomer v. Sturges*, 58 N. Y. 168.

⁹⁰ *Delaware Bank v. Jarvis*, 20 N. Y. 226.

⁹¹ *Andrews v. Gillespie*, 47 N. Y. 487.

⁹² Code of Civ. Pro. § 1627, superseding 2 R. S. 191, §§ 152, 154; *Thorne v. Newby*, 59 How. Pr. 120.

⁹³ *Drury v. Clark*, 16 How. Pr. 424.

premises subject to the mortgage and, as between the seller who originally gave the mortgage and himself, assumes the payment of the mortgage debt, and who afterwards conveys the property to another in like manner subject to the mortgage, is not a proper party to a foreclosure action, as in such a case there is no sufficient covenant or privity of contract between him and the holder of the mortgage to make him liable for any deficiency upon a sale.⁹⁴

Where the plaintiff makes a mere surety of the mortgagor for the payment of the debt, a party for the purpose of obtaining a judgment against such surety for any deficiency, if the mortgaged premises are found to be insufficient to satisfy the debt and costs, such surety has a right to insist that the principal debtor shall be made a party to the action if he is within the jurisdiction of the court.⁹⁵

§ 792. Guarantor.—A person who guarantees the payment of the mortgage debt, either in his assignment of the mortgage to the plaintiff or otherwise, is a proper party to the action, and judgment can be rendered against him in it for deficiency.⁹⁶

So, too, a person who has guaranteed the collection of the mortgage debt is a proper party, but in such a case the judgment should provide that no execution should issue as against him until an execution against the parties primarily liable had been returned unsatisfied.¹ It has also been held that a defendant who covenanted that a mortgage was due and collectible is a proper party.²

⁹⁴ Lockwood v. Benedict, 3 Edw. Ch. 472.

⁹⁵ Bigelow v. Bush, 6 Paige, 343.

⁹⁶ Weinstein v. Sinel, 133 App. Div. 441; 117 N. Y. Supp. 346; Morrison v. Slater, 128 App. Div. 467; 112 N. Y. Supp. 855; Robert v. Kidansky, 111 App. Div. 475; 97 N. Y. Supp. 913; 37 Civ. Proc. R. 1, aff'd 188 N. Y. 638; 81 N. E. 1174; Griffith v. Robertson, 15 Hun, 344; Bristol v. Morgan, 3 Edw. Ch. 142; Rushmore v. Gracie, 4 Edw. Ch. 84. See also Jarman v. Wiswall, 24 N. J. Eq. 267.

Under the Revised Statutes an assignee of a land and mortgage might make the assignor who guaranteed

the collection therefor party, in order to obtain a decree over against him for a deficiency in case it could not be collected by execution against the mortgagor, and the final judgment could so provide and there was no radical change made by the enactment of the Code of Civil Procedure, § 1627, it still remaining the policy of the law to bring into a foreclosure action all parties who may be liable for the mortgage debt.

Robert v. Kidansky, 111 App. Div. 475; 97 N. Y. Supp. 913, aff'd 188 N. Y. 638; 81 N. E. 1174.

¹ Leonard v. Morris, 9 Paige, 90.

² Curtis v. Tyler, 9 Paige, 432.

Where the owner of a mortgage assigned the same with a covenant that the amount of the mortgage was due and collectible, and subsequently took the bond of a third person as his indemnity, it was held that the assignee of the mortgage was, in equity, entitled to the benefit of this collateral bond as security for the mortgage debt; and also that in a suit for the foreclosure of the mortgage, the obligor in such bond was properly made a defendant to enable the complainants to obtain a decree over against him for the deficiency.³

Where the assignor of a mortgage guaranteed the payment of the mortgage "by foreclosure and sale" it was decided that he was properly made a party.⁴

§ 793. **Personal representatives of mortgagor.**—On the death of a mortgagor intestate his administrator is not a necessary party to a suit of foreclosure, since the administrator, as such, has no interest in the lands of his intestate and does not represent the general creditors to such an extent as to make him a necessary party, even if the personalty be insufficient to pay the debts.⁵

But there is no legal objection to making the personal representatives of a person liable for the payment of the mortgage debt, parties to the action, for the purpose of obtaining a judgment against them for the payment of any deficiency out of the estate of the decedent in their hands, to be paid in a due course of administration, and this is expressly authorized by statute.⁶

³ *Curtis v. Tyler*, 9 Paige 432.

⁴ *Vanderbilt v. Schreyer*, 91 N. Y. 392.

⁵ *Heidgerd v. Reis*, 135 App. Div. 414; 119 N. Y. Supp. 921, holding that one who has bid in lands on foreclosure cannot refuse to take title upon the ground that the administrator was not made a party defendant even though the personalty be insufficient to pay the debts.

⁶ *Heidgerd v. Reis*, 135 App. Div. 414; 119 N. Y. Supp. 921; *Glacius v. Fogal*, 88 N. Y. 434; *Collins' Petition*, 6 Abb. N. Cas.; *Leonard v. Morris*, 9 Paige, 90, 227. See also *Boyle v. Williams*, 72 Ala. 351; *Belloe v. Rogers*, 9 Cal. 104; *Hodgson v. Heidman*, 66 Iowa, 645; 24 N. W.

257; *contra Rhodes v. Evans*, Clark 168.

Where the whole interest of a mortgagee in a mortgage is assigned with a guarantee, and the mortgagee dies before a foreclosure is commenced, it is not necessary for the assignee to make the personal representatives of the mortgagee parties defendant, if he does not also proceed upon the guarantee or personal covenant of the mortgagee. *Western Reserve Bank v. Potter*, Clarke's Ch. 432. But to enforce a guaranty of a mortgage against the estate of the deceased guarantor, legatees, devisees, heirs or next of kin of such person may properly be made parties with a view to charging them person-

In most cases, however, it is a useless expense to make the personal representatives, even of the mortgagor, parties to the action to foreclose the mortgage, for no judgment can be made for the payment of the deficiency out of the estate of the decedent, so as to entitle the plaintiff to an execution, until a full account of the administration of the estate has been taken; except in those cases where the executors and administrators admit assets sufficient to pay the plaintiff's debt, and all other debts of an equal and of a higher class which were due by the decedent.⁷

The plaintiff cannot make the heirs or devisees of a deceased mortgagor or guarantor, who have no interest in the mortgaged premises, parties to the action, for the purpose of obtaining a judgment for deficiency which shall bind the real estate of the decedent which has come to them by descent or devise.⁸

UNNECESSARY PARTIES.

§ 794. **Adverse interests.**—So far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. And the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying his adverse claim of title in a court of equity.⁹ The statute makes the title acquired by the purchaser under the judgment the same as if it were a foreclosure of the equity of redemption,¹⁰ and it is manifestly not the purpose of an action of foreclosure to try conflicting claims of title. Where a party setting up a claim of title in hostility

ally, in proportion to the assets received by them, with any deficiency that may accrue. *Matter of Collins*, 17 Hun, 289; 6 Abb. N. C. 227 *dicta*.

⁷ Per WALWORTH, Ch., in *Leonard v. Morris*, 9 Paige, 90.

⁸ *Leonard v. Morris*, 9 Paige 90.

⁹ *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Fern v. Osterhout*, 11 App. Div. 319; 42 N. Y. Supp. 450; *Du-mond v. Church*, 4 App. Div. 194; 38 N. Y. Supp. 557; *Fifth Avenue Bank v. Cudliff*, 1 App. Div. 524; 37 N. Y. Supp. 248; 72 St. R. 528; *Brundage*

v. Domestic & For. Miss. Soc., 60 Barb. 204; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 637; *Frelinghuysen v. Colden*, 4 Paige, 206; *Jones v. St. Johns*, 4 Sandf. Ch. 208; *Holcomb v. Holcomb*, 2 Barb. 22; *Banks v. Walker*, 3 Barb. Ch. 438; *Meigs v. Willis*, 66 How. Pr. 466; *Bram v. Bram*, 34 Hun, 487. See also *Marlow v. Barlew*, 53 Cal. 456; *Cro-gan v. Spence*, 53 Cal. 15; *Chamberlin v. Lyell*, 3 Mich. 448.

¹⁰ Code Civ. Proc. § 1632.

to the mortgagor is made a defendant, the judgment will be held erroneous and will be reversed, though made after a hearing upon pleadings and proofs.¹¹

Where one of four tenants in common made a mortgage purporting to convey the whole estate, it was held that the three who did not join in the mortgage were not proper parties to the foreclosure.¹²

This rule applies to a wife or widow whose dower right is not bound by the mortgage,¹³ and to a mechanic's lien filed before the recording of the mortgage.¹⁴

Devisees who claim by title paramount to the mortgage which it is sought to foreclose, cannot be brought into such action to litigate their rights.¹⁵ And conditioned vendors of personal property placed upon the mortgaged premises and who claim absolute ownership of such personalty, are neither necessary nor proper parties to an action of foreclosure by the mortgagee.¹⁶ Again in an action to foreclose a mortgage the court will not determine the question of an interest of a defendant in the premises in the nature of an easement which arose under deeds executed prior to the mortgage which it is sought to foreclose. In such a case the right of the defendant is regarded as prior and paramount to that of the plaintiff, and the fact that an action to restrain an alleged violation of such easement and the filing of a notice of pendency of such action occurred subsequently to the execution of the mortgage, is held not to make the easement itself either subject or subordinate to the mortgage.¹⁷

A title resting upon a sale of land for taxes regularly conducted is also paramount to the lien of a prior mortgage, and those in possession under such title are not proper parties in an

¹¹ *Corning v. Smith*, 6 N. Y. (2 Seld.) 82; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Lee v. Parker*, 43 Barb. 611; *Rathbone v. Hooney*, 58 N. Y. 463; *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

¹² *Stephen v. Beale*, 22 Wall. (U. S.) 329.

¹³ *Nelson v. Brown*, 144 N. Y. 385; 39 N. E. 355; *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Barker*

v. Burton, 67 Barb. 458; *Anderson v. McNeely*, 120 App. Div. 676; 105 N. Y. Supp. 278; *Fern v. Osterhout*, 11 App. Div. 319; 42 N. Y. Supp. 450.

¹⁴ *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

¹⁵ *Shire v. Plimpton*, 50 App. Div. 117; 63 N. Y. Supp. 568.

¹⁶ *Condit v. Goodwin*, 44 Misc. R. 312; 89 N. Y. Supp. 827, *aff'd* 107 App. Div. 616; 95 N. Y. Supp. 1122.

¹⁷ *Mayer v. Margolies*, 47 Misc. R. 24; 95 N. Y. Supp. 204.

action to foreclose such mortgage, since they cannot be required to defend their title in an equitable action, but are entitled to have their rights passed upon by a jury in a court of law.¹⁸

But such persons, when made party defendants in the foreclosure action, may consent that the question as to the validity of their title be adjudicated therein, in which case the court has the right to pass upon the question.¹⁹

§ 795. **Contest as to priority.**—The case of one claiming in hostility to the mortgagor's title must be distinguished from a contest as to priority between two lienors, both claiming under the mortgagor. In the latter case the claim of priority between the two is necessarily involved in an action to foreclose one of the liens and proper to be determined in it.²⁰

§ 796. **The owner of another parcel of land bound by a junior mortgage** which is also a lien on the equity of redemption of the property, against which a prior lien is sought to be foreclosed, is not a necessary party to the action. He has an interest in making the property bring a high price in order that the lien upon his own land may thereby be reduced, but he has no title in the equity of redemption of the property against which the foreclosure is being had.²¹

Where a part of the mortgaged premises have been conveyed subsequently to the mortgage, the grantees need not be made parties to a bill by the mortgagee to enforce his mortgage against the portion not conveyed.²²

If, however, it is sought to enforce the mortgage against the entire property such grantees or purchasers should be made parties.²³

§ 797. **Persons having no interest or lien.**—It is not necessary or proper that any persons should be made defendants in an action of foreclosure other than those who have either a title to the land or a lien thereon. They alone have a right to re-

¹⁸ *Erie County Savings Bank v. Schuster*, 187 N. Y. 111; 79 N. E. 843, aff'd 107 App. Div. 46; 94 N. Y. Supp. 737.

¹⁹ *Cromwell v. MacLean*, 123 N. Y. 474; 25 N. E. 932.

²⁰ *Brown v. Volkening*, 64 N. Y. 76.

²¹ *Barnes v. Decker*, 49 N. Y. Supr. (17 J. & S.) 221.

²² *Hosford v. Nichols*, 1 Paige, 220. See also *Kirkham v. Dupont*, 14 Cal. 559; *Green v. Dixon*, 9 Wis. 532.

²³ *Moulton v. Cornish*, 138 N. Y. 133; 33 N. E. 842.

deem the land from the mortgage and they alone need to be cut off and barred by the foreclosure.²⁴ And, where a person who has no interest in the controversy and no equity against the defendants, is improperly joined as a complainant, it is a good ground of demurrer to the whole bill.²⁵

Thus, since a married woman may, under our statutes, convey her real estate without the signature or consent of her husband, and thereby bar his inchoate right of curtesy, the husband of the owner of the equity of redemption is not a necessary party to an action to foreclose.²⁶

One in whose favor a judgment was recovered against the owner of real property prior to the execution of a mortgage thereon is not a necessary or proper party to a foreclosure action commenced by the holder of such mortgage.²⁷

A judgment against executors is not a lien upon the land of a deceased person,²⁸ and the holder of such a judgment is, therefore, not a proper party to a foreclosure.

A creditor-at-large of the mortgagee who has no judgment is not entitled to be made a party to the action, even upon his own application.²⁹

And, where the mortgagor is living his simple contract, creditors who have no lien upon the land are neither necessary nor proper parties defendant, nor after his death does their status change.³⁰

So the right of such creditors to be made parties to the action was held not to be affected by allegations that the estate was insolvent; that the administratrix and administrator had applied to the surrogate for a sale of the real estate; that the real estate was the only source from which the creditors could be

²⁴ Gardner v. Lansing, 28 Hun, 413.

²⁵ Clarkson v. De Peyster, 3 Paige's Ch. 336.

²⁶ Trustees of Jones v. Roth, 18 W. Dig. 459; Mapes v. Brown, 14 Abb. N. C. 94.

²⁷ Sumner v. Skinner, 80 Hun, 201; 30 N. Y. Supp. 4, 61 N. Y. St. R. 797.

²⁸ Code of Civ. Proc. § 1823.

²⁹ The People v. Erie Railway Co., 56 How. Pr. 122.

³⁰ Gardner v. Lansing, 28 Hun,

413. See also Heidgerd v. Reis, 135 App. Div. 414; 119 N. Y. Supp. 92; Bouden v. Long Acre Square Bldg. Co., 92 App. Div. 325; 86 N. Y. Supp. 1080, holding that creditor of defendant is not as such entitled to intervene.

Unsecured creditors of a railroad mortgagor not necessary or proper parties. Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340; 12 N. E. 763. See Franklin Trust Co. v. N. A. R. R. Co., 11 App. Div. 249; 42 N. Y. Supp. 211.

paid; that the parties were acting in collusion to procure the mortgage to be foreclosed; and praying that the petitioners be made defendants so that they could set up as a defense that the mortgage was given without consideration, and that it had been in part paid by rents received by the widow since the death of the deceased.³¹

In a proceeding to foreclose a railway mortgage a receiver in an action by the people to dissolve the railroad corporation is not a necessary party, nor are the people.³²

§ 798. **Other unnecessary or improper parties.**—Where the liability of a person to pay a mortgage debt depends upon some extrinsic event which cannot be determined in the prosecution of the foreclosure suit, he cannot be made a party to such an action and charged with a deficiency, because, by the terms of his contract, his liability would not commence until the happening of the event contracted for and that might be wholly disconnected from the process of foreclosure.³³

So, where a party guarantees the payment of a mortgage debt, provided another party upon demand does not do so, a demand is necessary before suit can be brought.³⁴

One whose interests in the mortgaged property were acquired prior to the execution and delivery of the mortgage sought to be foreclosed and who has acquired no subsequent rights or liens which are necessary to be protected, is not a proper party to such foreclosure action.³⁵

Nor are the heirs of a subsequent mortgagee necessary parties to a bill to foreclose a prior mortgage.³⁶

If by reason of the language or the general scheme of a will, there is an implied or express imperative power of sale of real estate to carry out its provisions, there is an equitable conversion of such real estate into personalty and the residuary legatees and devisees under such will are not necessary parties defendant to a suit to foreclose a mortgage on the lands of the testator.³⁷

31 Gardner v. Lansing, 28 Hun, 413.

32 Herring v. New York L. E. & W. R. Co. 105 N. Y. 340; 12 N. E. 763.

33 Vanderbilt v. Schreyer, 91 N. Y. 392, 398; Per RUGER, C. J.

34 Pennsylvania Coal Co. v. Blake, 85 N. Y. 226.

35 Mercantile Trust Co. v. Rochester & Ontario Belt Ry. Co., 22 Wkly. Dig. 65.

36 Shaw v. McNish, 1 Barb. Ch. 326.

37 Boehmcke v. McKeon, 119 App. Div. 30; 103 N. Y. Supp. 930.

Again, in an action to foreclose a mortgage, the committee of one incompetent defendant who executed the mortgage is not a necessary party, nor is it necessary in such a case to allege and prove that the court has granted leave to maintain the action against the committee.³⁸

Although the mortgagee may have knowledge that the record owner of the title intends to convey the property to a third person, yet such third person is not a proper party to the action.³⁹

Where a purchase-money mortgage contained an incorrect description of the premises as did also the deed and after the misdescription was discovered, the mortgagee executed and delivered a further deed to the mortgagor, correcting the misdescription and an agreement was entered into correcting the mortgage and confirming it as an incumbrance upon the property, it was held that the mortgagee was neither a necessary nor a proper party to an action brought by the assignee of the mortgage to foreclose it.⁴⁰

The holder of certificates of indebtedness issued by a cemetery incorporated under chapter 133, of the laws of 1847, are not necessary parties in an action to foreclose.⁴¹

38 *Heburn v. Reynolds*, 73 Misc. R. 73; 132 N. Y. Supp. 460.

39 *Hatfield v. Malcolm*, 71 Hun, 51; 24 N. Y. Supp. 596; 23 Civ. Proc. R. 197; 53 N. Y. St. R. 863.

40 *Haaren v. Lyons*, 9 N. Y. Supp. 211.

41 *Ross v. Glenwood Cemetery Association*, 81 App. Div. 357; 81 N. Y. Supp. 779.

CHAPTER XXI.

NOTICE OF THE PENDENCY OF THE ACTION TO FORECLOSE.

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| <p>§ 799. Independent of statutory provisions.</p> <p>800. Act of 1823.</p> <p>801. Statutory provisions now in force.</p> <p>802. Changes in statutes.</p> <p>803. Rule requiring proof of filing notice, before judgment.</p> <p>804. When the notice must be filed.</p> <p>805. Complaint must be filed at or before filing of notice.</p> <p>806. Form and contents of the notice.</p> <p>807. Errors in notice.</p> <p>808. Who bound by notice.</p> | <p>§ 809. Incumbrancer <i>pendente lite</i>.</p> <p>810. Limitations of notice.</p> <p>811. Junior titles and liens under unrecorded instruments.</p> <p>812. Indexing the notice.</p> <p>813. Amendments.</p> <p>814. If the complaint be amended by making new parties.</p> <p>815. Cancelling the notice.</p> <p>816. Delay of plaintiff.</p> <p>817. Consequences of omission to file the notice.</p> <p>818. Action for malicious filing of notice of <i>lis pendens</i>.</p> |
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§ 799. Independent of statutory provisions, it is a well-established rule that he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit. And hence arises the maxim *pendente lite, nihil innovetur*; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation.¹

§ 800. Act of 1823.—No notice other than that which is implied by the general rule of law, was required for the purpose of binding purchasers *pendente lite*, until the year 1823, when it was provided, in the act vesting equity powers in circuit judges,² that when any bill was filed before them or in the Court of Chancery, which would according to law amount to constructive

¹ Story's Eq. Jur., § 406; Murray v. Ballou, 1 Johns. Ch. 566; Murray v. Lylburn, 2 Johns. Ch. 441; Hayden v. Bucklin, 9 Paige, 512; Jackson v. Losee, 4 Sandf. Ch. 381; Zei-

ter v. Bowman, 6 Barb. 133; Griswold v. Miller, 15 Barb. 520; Cleveland v. Boerum, 23 Barb. 201; 27 Barb. 252; 3 Abb. 294.

² Laws of 1823, p. 213, § 11.

notice to purchasers of real estate, it should not be so deemed unless a notice should be filed in the office of the clerk of the county where the land was situated. The substance of this provision was re-enacted in the Revised Statutes,³ and in sections 1631 and 1670, *et sequi*, of the Code of Civil Procedure it is applied to actions to foreclose mortgages.

§ 801. **Statutory provisions now in force.**—The following is section 1631: “The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk’s office of each county where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this act; which must specify, in addition to the particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of recording it.”

The following are the sections, or portions thereof, of general application to actions respecting real property:

§ 1670. “In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of real property, if the complaint is verified, the plaintiff may, when he files his complaint, or at any time afterward before final judgment, file in the clerk’s office of each county where the property is situated, a notice of the pendency of the action, stating the names of the parties, and the object of the action, and containing a brief description of the property in that county, affected thereby. Such a notice may be filed with the complaint, before the service of the summons; but, in that case, personal service of the summons must be made upon a defendant, within sixty days after the filing, or else, before the expiration of the same time, publication of the summons must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor, as prescribed in chapter fifth of this act.”

§ 1671. “Where a notice of the pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the

notice is directed to be indexed, as prescribed in the next section. A person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action."

§ 1672. "Each county clerk, with whom such a notice is filed, must immediately record it, in a book kept in his office for that purpose, and index it to the name of each defendant, specified in a direction appended at the foot of the notice, and subscribed by the attorney for the plaintiff."

§ 1673. "Where a defendant sets up in his answer a counterclaim, upon which he demands an affirmative judgment affecting the title to, or the possession, use, or enjoyment of real property, he may, at the time of filing his answer, or at any time afterward before final judgment, file a like notice. The last three sections apply to such a notice. For the purpose of such an application, the defendant filing such a notice is regarded as a plaintiff, and the plaintiff is regarded as a defendant."

§ 1674. "After the action is settled, discontinued or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as may be directed or approved by it, direct that a notice of the pendency of an action, filed as prescribed in the last four sections, be cancelled of record by a particular clerk, or by all the clerks with whom it is filed and recorded. The cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled."

§ 802. **Changes in statutes.**—These sections of the Code of Civil Procedure, as they now stand, are the result of numerous amendments. Prior to 1851, the notice could be filed only at the time of commencing the action. Prior to 1857, the rule did not apply to attachment proceedings. Prior to 1858, a grantee whose deed was not recorded, had to be discovered by the plaintiff, and

made a party to the action;⁴ but subsequent to that time, and now, every person receiving or recording his conveyance after the filing of such notice, even though it be a few hours only, is deemed a subsequent purchaser and incumbrancer; he stands in the same position as if he had actually purchased the land, or actually received his incumbrance after the filing of such notice, whatever the fact may be, and he is bound by such proceedings to the same extent as if he were a party to the action; that is, he is foreclosed and barred of all rights in the subject-matter of the controversy.⁵ Prior to 1862, if the notice were in proper form and had been filed in an action in conformity with the provisions of the statute, the court had no power to order it to be taken from the files.⁶ Prior to 1862, there had been doubt as to whether the action could be said to be pending until after a summons had been served,⁷ and the amendment of that year not only settled that doubt, but also fixed a limit beyond which the notice would not operate without the action being prosecuted. The Code of Civil Procedure made a few changes mainly of detail only. It has since been amended, without affecting the statute in so far as it concerns the foreclosure of mortgages.⁸

§ 803. Rule requiring proof of filing notice, before judgment.—Rule 60 requires that “in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the parties thereto, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint as required by law.”

This is a mere rule of practice, and does not affect the validity of the judgment. If no proof of the filing of the notice is fur-

⁴ Hall v. Nelson, 23 Barb. 88; 14 How. Pr. 32.

⁵ Stern v. O'Connell, 35 N. Y. 104.

⁶ Pratt v. Hoag, 12 How. Pr. 215; 5 Duer, 631.

⁷ Burroughs v. Reiger, 12 How. Pr. 171; The Farmers' Loan & Trust Co. v. Dickson, 17 How. Pr. 477;

Butler v. Tomlinson, 38 Barb. 641; Sanders v. McDonald, 63 Md. 503; but see Stern v. O'Connell, 35 N. Y. 104.

⁸ Laws of 1892, chap. 504; Laws of 1904, chap. 518; Laws of 1905, chap. 60.

nished, the judgment is irregular, but not void.⁹ Where a proper notice of *lis pendens* is in fact filed, a defect in the affidavit of filing may be disregarded or amended.¹⁰

§ 804. **When the notice must be filed.**—By the express provision of the statute, the notice of *lis pendens* is required to be filed “at the time of filing the complaint, or at any time afterward.” Before the passage of the statute of 1823, the filing of the bill was necessary to constitute a notice to a subsequent purchaser, the principle being that the record should contain everything necessary for his information; the rule is still the same, and the decisions are uniform that the notice has no force or effect until the filing of the complaint.¹¹ It has been said that if the notice be filed before the filing of the complaint, it will commence to operate when the complaint shall be filed. This may be a fair rule, but it is not perceived how it can be deduced from the statute. Unless the fact that the notice remains in the hands of the clerk constitutes a new filing, it seems quite plain that a notice filed at a time when there was no warrant for filing it, could not become operative because an event subsequently happened which would have rendered a filing of it proper.¹²

§ 805. **Complaint must be filed at or before filing of notice.**—In *Weeks v. Tomes* (16 Hun, 349, aff’d 76 N. Y. 601) the objection that the complaint had not been filed until after the filing of the notice of *lis pendens*, was attempted to be corrected by an order made at special term directing that the complaint be filed *nunc pro tunc* as of the date of filing the notice. It was held, however, that this order did not operate to bind a person not a party to the action who acquired a lien upon the property after filing a notice of *lis pendens*, and before the actual filing of the complaint. The power of the court to amend by filing papers *nunc pro tunc* was fully conceded, and the operation of such an

⁹ *Potter v. Rowland*, 8 N. Y. (4 Seld.) 448; *Curtis v. Hitchcock*, 10 Paige, 399; *White v. Coulter*, 1 Hun, 357, 3 T. & L., 608, on appeal; 59 N. Y. 629. For a discussion of the rule see *Kelly v. Searing*, 4 Abb. Pr. 354.

¹⁰ *White v. Coulter*, 1 Hun, 357; 3 N. Y. Sup. (T. & C.) 608.

¹¹ *Leitch v. Wells*, 48 N. Y. 585;

Stern v. O’Connell, 35 N. Y. 104; *Weeks v. Tomes*, 16 Hun, 340, aff’d 76 N. Y. 601.

¹² *Examine Burroughs v. Reiger*, 12 How. Pr. 171; *Tate v. Jordan*, 3 Abb. 392; *Benson v. Sayre*, 7 Abb. 472 n.; *Farmers’ Loan & Trust Co. v. Dickson*, 9 Abb. 61; 17 How. Pr. 477; *Butler v. Tomlinson*, 38 Barb. 641.

order upon all persons who are parties to the action in which it was made, was not controverted. But such an order is not operative as against persons who are not parties to the action and have no opportunity to be heard upon the question whether or not it should be granted. The proper practice would have been to bring in the new lienor by amendment.

If a notice of *lis pendens* is filed before the complaint, an amended notice may be filed at the time of filing the complaint, or at any time afterward, and will from that date operate as notice.¹³

Unless the complaint be filed, the filing of a notice of the pendency of the action is inoperative.¹⁴ A premature filing, however, is not fatal where no right is acquired by third parties between the commencement of the suit and the sale under the decree.¹⁵

§ 806. Form and contents of the notice.—In an action for the foreclosure of a mortgage, the notice of the pendency of the action must contain the following particulars: 1. The names of the parties to the action; 2. The object of the action; 3. The description of the property in that county affected by the action; 4. The date of the mortgage; 5. The parties thereto; and 6. The time and place of recording the same.¹⁶

It should also contain a direction to the clerk to index it under the names of the defendants specified.¹⁷ As the statute requires the notice to contain only a "brief" description of the property it need not be as precise and formal as those usually contained in deeds and mortgages.¹⁸

§ 807. Errors in notice.—It is not necessary that all of these particulars be described with minuteness or entire accuracy. Thus, when a notice of the pendency of an action against John F. Fowler was filed, this was held sufficient to put a purchaser from John Fowler upon inquiry and charge him with notice.¹⁹ And where the complaint asked only for relief barring "Luke Clark

¹³ *Daly v. Burchell*, 13 Abb. N. S. 264.

¹⁴ *Albro v. Blume*, 5 App. Div. 309; 39 N. Y. Supp. 215.

¹⁵ *Brenen v. North*, 7 App. Div. 79; 39 N. Y. Supp. 975; 25 Civ. Proc. R. 398.

¹⁶ Code, §§ 1631, 1670.

¹⁷ *Freedman v. Safran*, 131 App. Div. 675; 116 N. Y. Supp. 113.

¹⁸ *Freedman v. Safran*, 131 App. Div. 675; 116 N. Y. Supp. 113.

¹⁹ *Weber v. Fowler*, 11 How. Pr. 459.

and those claiming under him subsequent to the filing of *lis pendens*” it was held that this was a defect which did not render the judgment void but merely irregular and subject to amendment.²⁰ So, where the notice stated that the mortgaged premises were situate in the county of Erie, and also stated that the mortgage was recorded on a certain day, but did not state the office or county in which the mortgage was recorded, this was held to be a substantial compliance with the statute, since the mortgage was presumably recorded in the office of the clerk of the county in which the mortgaged premises were.²¹

§ 808. Who bound by the notice.—It was intended by the Code provisions as to the filing of *lis pendens* that those whose conveyances appear of record should be made parties in order that any one holding under or through them not made parties and whose interests did not so appear at the time of such filing should be bound by the result of the action.²²

The filing of a notice of *lis pendens* is constructive notice of the action to subsequent purchasers and incumbrancers of the property, and as to them, it is a substitute for actual notice;²³ but it is not effective as against infants who subsequently acquired title by inheritance.²⁴

Constructive notice is, in its nature, no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.²⁵ A person having actual notice of the pendency of the action is bound by the judgment rendered in it; but what is sufficient notice is a point of some nicety. It has been said that the notice must be so clearly proved or necessarily inferred, as to make it fraudulent for the purchaser to take a conveyance in prejudice to the known title of another;²⁶ and, on the other hand, whatever is sufficient to put a party on inquiry is considered in equity as conveying notice.²⁷

20 *Brenen v. North*, 7 App. Div. 79; 39 N. Y. Supp. 975; 25 Civ. Proc. R. 398. See *Naughton v. Vion*, 91 Hun, 360; 36 N. Y. Supp. 312.

21 *Potter v. Rowland*, 8 N. Y. (4 Seld.) 448.

22 *Kursheedt v. Union Dime Savings Institution*, 118 N. Y. 358; 23 N. E. 473.

23 *Gruner v. Ruffner*, 134 App. Div. 837; 119 N. Y. Supp. 942;

Freedman v. Safran, 131 App. Div. 675; 116 N. Y. Supp. 113; *Hall v. Nelson*, 14 How. Pr. 32; 23 Barb. 88.

24 *Gruner v. Ruffner*, 134 App. Div. 837; 119 N. Y. Supp. 942.

25 *Story's Eq. Jur.* § 399.

26 *Wiswall v. McGowan*, Hoff. Ch. 125.

27 *Pitney v. Leonard*, 1 Paige, 461; *Hawley v. Cramer*, 4 Cow. 717.

When actual notice is alleged, the question of notice is, in general, a mixed question of law and fact.

A person who parts with nothing upon receiving a conveyance of property, concerning which an action is pending, cannot be injured by not receiving notice of it; and such a one is bound by the result of the action, without notice either actual or constructive.²⁸

A grantee whose deed was prior to the mortgage but which was not recorded until after the filing of the *lis pendens* when his grantor was served as defendant is bound by the judgment at least where the plaintiff in foreclosure had no actual notice of such deed when he commenced the action.²⁹

§ 809. *Incumbrancer pendente lite*.—The notice of *lis pendens* is notice to a purchaser, *pendente lite*, of any portion of the premises affected by the action, precisely as the record of a conveyance made by the defendant would be. It is not notice to prior incumbrancers, and as to prior mortgagees, even though made parties, and all other persons whose rights are superior to the claims of the plaintiff, the notice is of no effect.³⁰ So, a purchaser by contract in possession is not chargeable with notice of *lis pendens*, so as to render payments by him to the vendor invalid.³¹ And upon a like principle, a person who claims title under a sale for taxes is not bound by the notice.³²

A judgment creditor of the mortgagor whose judgment is recovered after the due filing of a notice of *lis pendens* in the action to foreclose, is cut off by the decree of foreclosure.³³ It needs no argument or citation of authorities to show that a judgment which is a lien upon lands and might be enforced to the taking of the title to them from the judgment debtor, or any sub-

²⁸ *Leavitt v. Tylee*, 1 Sandf. Ch. 207.

²⁹ *Kursheedt v. Union Dime Savings Institution*, 118 N. Y. 358; 23 N. E. 473; *People's Trust Co. v. Tonkonogy*, 144 App. Div. 333; 128 N. Y. Supp. 1055.

³⁰ *Stuyvesant v. Hone*, 1 Sandf. Ch. 419, *aff'd sub nom. Stuyvesant v. Hall*, 2 Barb. Ch. 151; *The People ex rel. Tremont Bank v. Connolly*, 8 Abb. 128; *Chapman v. West*, 17 N.

Y. 125, *aff'g* 10 How. Pr. 367, *sub nom. Chapman v. Draper*; *Lamont v. Cheshire*, 65 N. Y. 30.

³¹ *Parks v. Jackson*, 11 Wend. 442; *Mayer v. Hinman*, 13 N. Y. 180; *Smith v. Gage*, 41 Barb. 60; *Dwight v. Phillips*, 48 Barb. 116.

³² *Becker v. Howard*, 4 Hun, 359, *aff'd* 66 N. Y. 5.

³³ *Fuller v. Scribner*, 16 Hun, 130, *aff'd* 76 N. Y. 190.

sequent purchaser from him, is a charge and burden upon those lands and hence an incumbrance upon them. Every right to or interest in land to the diminution of its value, but consistent with the passing of the fee by a conveyance, is an incumbrance upon it.³⁴ A judgment becomes an incumbrance as of the date of its docketing, and if this is subsequent to the regular filing of a *lis pendens* under the statute, it is subject to the proceedings in the action.³⁵

The notice being proper in form and properly filed is constructive notice to purchasers of the property from the defendants, who, purchasing *pendente lite*, are bound by the judgment.³⁶ An assignee in bankruptcy, appointed in proceedings commenced subsequent to the filing of the notice, is bound by it,³⁷ and the notice is practically as effectual in preventing a transfer of the property by the defendant as an injunction could be.³⁸

§ 810. Limitations of notice.—The notice arising from a notice of *lis pendens*, and a complaint filed in an action, is notice of what those papers contain, and of nothing more. It cannot be extended beyond the property which is the subject of the suit, and the specific property which is sought to be reached must in some way be designated.³⁹ And it operates only as a notice requiring all persons to beware of acquiring rights in the subject-matter of the action from any of the parties therein named.⁴⁰ If the court has no jurisdiction, the notice cannot operate, since the only information which could be derived from the papers would be, that a suit had been commenced which could not terminate in any valid judgment.⁴¹

Only persons who are not parties to the action, and who claim under parties, are affected by the notice of *lis pendens*, and they only can take advantage of an omission to file it.⁴²

34 Prescott v. Trueman, 4 Mass. 627, 630.

35 Per FOLGER, J., in Fuller v. Scribner, 76 N. Y. 190, 192, distinguishing Rodgers v. Bonner, 45 N. Y. 379, 387.

36 Zeiter v. Bowman, 6 Barb. 133; Griswold v. Miller, 15 Barb. 520; Harrington v. Slade, 22 Barb. 161. See also Aldrich v. Stephens, 49 Cal. 676.

37 Cleveland v. Boerum, 23 Barb. 201, aff'd 24 N. Y. 613; Griswold v.

Fowler, 6 Abb. 113; Hayes v. Dickinson, 9 Hun, 277.

38 Stevenson v. Fayerweather, 21 How. Pr. 449.

39 Griffith v. Griffith, Hoff. Ch. 153, aff'd 9 Paige, 315.

40 Jacob v. Smith, 17 App. Div. 146; 45 N. Y. Supp. 299.

41 Carrington v. Brentz, 1 McLean, 167.

42 White v. Coulter, 1 Hun, 357; 3 N. Y. Sup. (T. & C.) 608.

Under the provisions of the New York City consolidation act of 1882 as amended in 1883,⁴³ in reference to the enforcement of mechanics' liens, a lien ceased to bind the property after the expiration of ninety days from the time the claim was filed, unless the lienor within that time either commenced an action to enforce the lien, and filed a notice of pendency of the action, or unless he within that time was made a party to an action to enforce "any other lien," and in that action a notice of pendency was filed by him or in his behalf. The words "any other lien" were not confined to other mechanics' liens but included as well a lien by mortgage.⁴⁴

§ 811. Junior titles and liens under unrecorded instruments.—

Good faith will require that the mortgagee shall make every person holding interests in or liens upon the equity of redemption, so far as they are known to him, parties to the foreclosure, even though they claim under unrecorded instruments, but it is not entirely clear that he is under legal obligation to do so. Actual possession will operate as equivalent to recording, and a vendee in possession under a contract of purchase must be made a party in order to bar his right and eject him under process issued in the action, after the sale in foreclosure.⁴⁵ This rule will apply to tenants of the mortgagor in possession at the time of the commencement of the foreclosure.⁴⁶ If the mortgagee has no actual notice of any unrecorded title or lien, and if his notice of pendency of action is properly filed, it is clear that he could not be prejudiced by an omission to name the holder of it as a defendant;⁴⁷ but in some States it is held that in case of actual notice the mortgagee must make such a person a party under penalty of invalidating his decree.⁴⁸ Some equity might be noticed in such a rule if it were confined to cases where the mortgagee also becomes the purchaser at the sale, but it could

⁴³ § 1813, ch. 410, Laws of 1882, as amended by § 17, ch. 276, Laws of 1883.

⁴⁴ *Danziger v. Simonson*, 116 N. Y. 329; 22 N. E. 570.

⁴⁵ *Martin v. Morris*, 62 Wis. 418; 22 N. W. 525; *Hodson v. Treat*, 7 Wis. 263, and cases cited; *Green v. Dixon*, 9 Wis. 532.

⁴⁶ *Hirsch v. Livingston*, 3 Hun, 9;

Morris v. Mowatt, 2 Paige, 586, 590; *Veeder v. Fonda*, 3 Paige, 94; *Seaman v. Hicks*, 8 Paige, 655.

⁴⁷ *White v. Bartlett*, 14 Neb. 320; 15 N. W. 702; *Jones v. Witter*, 13 Mass. 304; *Reel v. Wilson*, 64 Iowa, 13; 19 N. W. 814.

⁴⁸ *Dickerman v. Lust*, 66 Iowa, 444; 23 N. W. 916; *Woods v. Love*, 27 Mich. 308.

not be applied without doing injustice if the purchaser could not also be charged with similar notice. It is believed that under our statute as to filing notice of pendency of action the final test in every case must be found in the record. Section 1671 of the Code of Civil Procedure declares the effect of a notice of pendency of action in the following language: "A person whose conveyance or incumbrance is subsequently executed or subsequently recorded is bound by all proceedings taken in the action after the filing of the notice to the same extent as if he was a party to the action." The rule, in other words, requires the plaintiff to name as defendants all persons whose titles or liens appear of record. If other claimants are known to him they may be named, but if omitted they are nevertheless bound in all respects as if they were parties.⁴⁹

§ 812. Indexing the notice.—"Each county clerk, with whom such a notice is filed, must immediately record it in a book kept in his office for that purpose, and index it to the name of each defendant specified in a direction, appended at the foot of the notice, and subscribed by the attorney for the plaintiff."⁵⁰

In the absence of express adjudication it is believed that "the names of such of the defendants as it shall be necessary to insert in said index," are the names of such of the defendants as could give a title to a purchaser or incumbrancer of the property affected thereby, which would include only the names of those persons who had a transferable interest in the equity of redemption. This would include the names of subsequent mortgagees, whose assignees are bound by the *lis pendens*,⁵¹ and the names probably of judgment creditors, and until it is adjudicated that a subsequent assignee of a junior mortgagee or judgment creditor is concluded by such a notice, when, by the act of the plaintiff, the indexing is so done that the name of such person does not appear, it would be the safer practice to index against the names of all the defendants holding any interest in or lien upon the property affected by the action.

A county clerk is liable for the negligence of his deputy in failing to index a *lis pendens*, as required by the statute, and

⁴⁹ Stern v. O'Connell, 35 N. Y. 104; Lamont v. Cheshire, 65 N. Y. 30, 38; Kindberg v. Freeman, 39

Hun, 466; Kipp v. Brandt, 49 How. Pr 358.

⁵⁰ Code of Civ. Pro. § 1672.

⁵¹ Hovey v. Hill, 3 Lans. 167.

where a husband and wife are named as defendants and the county clerk is directed to index against all defendants, an entry in the index book against the name of the husband, adding the characters & Wf. is no index against the wife, so as to impart notice to purchasers from her of land affected.⁵²

§ 813. **Amendments.**—The safer course, where the plaintiff dismisses his complaint in a foreclosure suit, as against a judgment creditor who has a subsisting lien, or leaves his name out of the complaint by amendment, is to file a new notice of the pendency of the suit against the remaining parties; so as to render it perfectly certain that the judgment creditor, whose name is left out after the filing of the first notice, will be barred by the foreclosure and sale. And when the complaint is amended by adding new parties, after the filing of the notice of *lis pendens*, a new notice is absolutely necessary to bar the rights of the judgment creditors of such new parties, as well as to make the amended bill constructive notice to subsequent purchasers from such new parties.⁵³

An amended *lis pendens*, filed with or after the filing of an authorized amended summons and complaint, is effectual, although the filing of the original *lis pendens* was irregular and ineffectual.⁵⁴

§ 814. **If the complaint be amended by making new parties**, the plaintiff's attorney will be unable to make the affidavit or furnish the proof required by Rule 60, unless he file an amended notice, for he is required to show that a notice of the pendency of the action, "containing the names of the parties thereto," had been filed twenty days before the application for judgment. But it seems that this is only necessary as to added parties, and that grantees from the original parties to the action would be bound by the original notice.⁵⁵

It has been said that it is within the power of the court to amend the notice;⁵⁶ but this may be doubted, except in so far as to make formal corrections.⁵⁷ A new notice may be filed at

⁵² Hartwell v. Riley, 47 App. Div. 154; 62 N. Y. Supp. 317.

⁵³ Per Ch. WALWORTH, in Curtis v. Hitchcock, 10 Paige, 399; Clark v. Havens, Clarke, 560.

⁵⁴ Daly v. Burchell, 13 Abb. N. S. 264.

⁵⁵ Waring v. Waring, 7 Abb. 472.

⁵⁶ Vanderheyden v. Gary, 38 How. Pr. 367.

⁵⁷ See Weeks v. Tomes, 16 Hun, 349, aff'd 76 N. Y. 601.

any time, but an amendment could not be ordered which would disturb the vested rights of third persons.

§ 815. **Cancelling the notice.**—Apart from the terms of the statute, the court has no power to remove the notice of the pendency of the action from the public records, and this can only be done when the action is either settled, discontinued, or abated,⁵⁸ or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action.⁵⁹

The notice which is filed is a substitute for actual notice, and it takes the place of the presumption of notice, which the statute destroys; and the impropriety of depriving a litigant of an opportunity to notify the world that he makes certain claims, and that he has sought the aid of a court of justice in order to enforce them, is quite apparent. The notice once filed in a proper action takes the place of actual notice; it does not depend for its efficacy upon the discretion of the court, and it cannot be removed or cancelled on any other grounds than those which the statute provides.⁶⁰

§ 816. **Delay of plaintiff.**—It has been held that a notice of *lis pendens* becomes void if the action be not diligently proceeded with, and a delay of eight years was adjudged to have this effect. Like an execution which has been long disregarded, it is said to become dormant.⁶¹ This rule is, however, open to grave objections, and may be doubted. An order should be applied for on the ground that “the plaintiff filing the notice unreasonably neglects to proceed in the action.”⁶²

§ 817. **Consequences of omission to file the notice.**—If no notice of *lis pendens* be filed in the action, the judgment cannot be deprived of its effect as against persons claiming from or through the defendants after judgment. The only office of a notice of *lis pendens* is to give notice of the pendency of the action so as to affect persons who may deal with the defendants in respect to the property involved, before final judgment, and thus bind them

⁵⁸ Pratt v. Hoag, 12 How. Pr. 215; 5 Duer, 631; Mills v. Bliss, 55 N. Y. 139.

⁵⁹ Code of Civ. Pro. § 1674.

⁶⁰ Mills v. Bliss, 55 N. Y. 139.

⁶¹ Myrick v. Selden, 36 Barb. 15.

⁶² Code of Civ. Pro. § 1674.

by the judgment in the same manner as if they had been made parties to the action. Neither the Revised Statutes nor the Code relate to the effect of a judgment, or to the rights of parties claiming under a title acquired after judgment, but only to those who take during the pendency of the action. Section 1671 of the Code of Civil Procedure provides that *the pendency of the action* shall be constructive notice to purchasers, from the time of the filing of the notice only, and that purchasers shall be bound by all proceedings taken after the filing of such notice, to the same extent as if they were made parties to the action. This is the whole scope and object of the notice. It has no relation to titles acquired after judgment. It never was pretended that any notice was necessary to render the judgment effectual as against parties claiming under the defendant, by transfer subsequent to the judgment. The judgment disposes of the rights of the parties, and is a matter of public record. Its effect cannot be impaired by any subsequent transfer by the defendant. He is concluded by it, and his grantee cannot be in any better situation than the party from whom he obtained his right.⁶³

§ 818. **Action for malicious filing of notice of *lis pendens*.**—The filing of a notice of *lis pendens* in an action intended to affect the title to real estate is authorized by law as an ordinary means for securing the plaintiff in case a judgment is eventually rendered in his favor. Such a filing does not interrupt the enjoyment by the defendant of the property or its rents, although it may practically occasion great inconvenience to him by hampering him in procuring a purchaser or in borrowing money. In *Smith v. Smith* (20 Hun, 555) a demurrer to a complaint in an action for damages for filing a notice of *lis pendens*, maliciously and without probable cause, was overruled, and the doctrine was sustained that such an action could be maintained on its being shown that the notice had been cancelled by the court by an interlocutory order. But, a reargument having been ordered, it was afterward held in the same case (26 Hun, 573) that such actions are governed by the rule applicable to other actions for malicious prosecution, and that it must be shown not only that the prosecu-

⁶³ Per RAPALLO, J., in *Sheridan v. Hall*, 16 N. Y. 579; *Totten v. Stuyvesant*, 49 N. Y. 478; *Campbell v. Sant*, 3 Edw. 500.

tion was malicious and without probable cause, but also that it had reached a termination in favor of the person bringing the action to recover damages for the injury thereby occasioned.⁶⁴

64 Clark v. Cleveland, 6 Hill, 344; Fay v. O'Neill, 36 N. Y. 10; Thomason v. De Mott, 18 How. Pr. 529.

CHAPTER XXII.

PRACTICE IN ACTIONS TO FORECLOSE MORTGAGES.

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INSTITUTING THE ACTION.

§ 819. What courts have jurisdiction.—An action to foreclose a mortgage may be brought in the Supreme Court, which succeeds to the powers of the old Court of Chancery, and has a general jurisdiction both at law and in equity.¹ Such an action is a local action, and the venue must be laid and the trial must be had in the county in which the mortgaged premises, or some part thereof, are situated.² It cannot be tried, either in whole or in part, in any other county.³ By Code provisions the jurisdiction of each county court extends to actions for the foreclosure, redemption or satisfaction of a mortgage on real property.⁴ But “mortgage” as here used means a written mortgage only, and the power to fore-

¹ Const. of 1869, art. 6, § 6; Code of Civ. Pro. § 217.

Has jurisdiction to foreclose a mortgage located partly in New York and partly in another State. *Meade v. Brockman*, 82 App. Div. 480; 81 N. Y. Supp. 594. To sell the whole and to require the mortgagor to ex-

cute a conveyance to the purchaser. *Union Trust Co. v. Olmsted*, 102 N. Y. 729; 7 N. E. 822.

² Code of Civ. Pro. § 982.

³ *Gould v. Bennett*, 59 N. Y. 124.

⁴ Code of Civ. Pro. § 340; *Arnold v. Rees*, 18 N. Y. 57; 17 How. Pr. 35; overruling *Hall v. Nelson*, 23 Barb. 88.

close as here conferred does not carry with it, as incidental thereto, the power to reform.⁵

As one result of the proposition that an action to foreclose partakes of the nature of a suit in equity, the parties have no legal right to have the issues which may be raised by the pleadings tried by a jury. In equitable actions it has always rested in the discretion of the court either to ask the aid of a jury to inform the conscience of the court, or to decide the case without such aid.⁶

§ 820. **Venue.**—The “proper county” for the place of trial is where the mortgaged premises are situated, although the money may be loaned and the mortgage executed and delivered in another county.⁷ If the mortgaged premises are situated in two or more counties, the action to foreclose may be brought in either of them.⁸

It is, however, no objection to the regularity of the proceedings that the trial was in a county other than that in which the mortgaged premises may be situated, where there has been no motion or demand to change the place of trial first selected.⁹

In a case where the venue was laid in the proper county, but the judge for his own convenience and under objection adjourned the trial to another county, this was held to be error, and that the objection was not waived by appearing on the trial.¹⁰

Where the mortgaged property is situated partly in one State and partly in another, it is said that the court of either of them exercising the powers of the court of chancery can foreclose as to the whole.¹¹ The better practice is to institute an independent action in each State.¹² Where a mortgage on realty situated in a foreign State executed by the owner, a resident of New York, to the mortgagee, a resident of the foreign State, is there fore-

⁵ *Thomas v. Harmon*, 122 N. Y. 84; 25 N. E. 257.

⁶ *Carroll v. Deimel*, 95 N. Y. 252; *Borowsky v. Gallin*, 126 App. Div. 364; 110 N. Y. Supp. 818; *Knickerbocker Life Ins. Co. v. Nelson*, 8 Hun, 21; *Barker v. Burton*, 67 Barb. 458; *Lossee v. Ellis*, 13 Hun, 655. See *Herb v. Metropolitan Hospital*, 80 App. Div. 145; 80 N. Y. Supp. 552; 12 Ann. Cas. 415.

⁷ *Miller v. Hull*, 3 How. Pr. 325; 1 Code R. 113; *Vallejo v. Randall*, 5 Cal. 461; *Hackenhull v. Westbrook*, 53 Ga. 285.

⁸ Code of Civ. Pro. § 982; *Bolling v. Munchen*, 65 Ala. 558; *Holme v. Taylor*, 48 Ind. 169.

⁹ *Marsh v. Lowry*, 26 Barb. 197; *sub nom. March v. Lowry*, 16 How. Pr. 41.

¹⁰ *Birmingham Iron Foundry v. Hatfield*, 43 N. Y. 224.

¹¹ *Union Trust Co. v. Olmsted*, 102 N. Y. 729; 7 N. E. 822; *Meade v. Brockman*, 82 App. Div. 480; 81 N. Y. Supp. 594; *Mead v. Hous. & N. R. R. Co.*, 45 Conn. 199.

¹² *Matter of U. S. Rolling Stock Co.*, 55 How. Pr. 286.

closed and where such foreclosure results in a deficiency, the right of the mortgagee to sue the mortgagor for the deficiency in the courts of this State, is governed by the law of the foreign State.¹³ And when a bond and mortgage upon real property in a foreign State are executed by residents of that State, it will be assumed that it was intended by the parties that the contracts should be controlled by the existing laws of that State, not only as to their binding force, but as to the manner of their enforcement for the foreign law becomes a part of the contract.¹⁴

§ 821. Service of summons.—The jurisdiction of the respective local courts does not depend upon the place where the process is served, but upon the place where the real estate affected by the foreclosure is situated; and when a court acquires jurisdiction in this way the action may be commenced by service of the summons in any of the counties of this State, or by publication against non-resident defendants.¹⁵ The court obtains no jurisdiction of a non-resident defendant unless he be served by publication or voluntarily appears in person or by attorney.¹⁶

Where one or more of the defendants cannot be found within this State, the summons may be served upon such defendants by publication in two newspapers, and if their places of residence are known, by depositing a copy of the summons and complaint in the post-office, directed to them.¹⁷ The provision of the Code to the effect that the time when the mortgagor is out of the State is not part of the time limited for the commencement of foreclosure, is not affected by the Code provision allowing service by publication.¹⁸

13 *Stumpf v. Hallahan*, 101 App. Div. 383; 91 N. Y. Supp. 1062, *aff'd* 185 N. Y. 550; 77 N. E. 1196.

14 *Hutchinson v. Ward*, 114 App. Div. 156; 99 N. Y. Supp. 708.

15 *Porter v. Lord*, 4 Duer, 682; 4 Abb. Pr. 43; 13 How. Pr. 254; *Bates v. Reynolds*, 7 Bosw. 685; *Varian v. Stevens*, 2 Duer, 635; *Spyer v. Fisher*, 5 J. & S. 93, 101.

16 *Hope v. Shevill*, 137 App. Div. 86; 122 N. Y. Supp. 127.

Subsequent mortgagee may move to vacate an order to serve by publication on the ground that it was irregularly granted, for his interests require that the property bring its

full value on the sale, which would not be the case if the proceedings were defective, with the result that the mortgagor's right to redeem was still outstanding. *Brandow v. Vroman*, 29 App. Div. 597; 51 N. Y. Supp. 943.

17 Code of Civ. Pro. § 438.

Affidavits insufficient to confer jurisdiction to issue order for such service. See *Empire Sav. Bank v. Silleck*, 98 App. Div. 139; 90 N. Y. Supp. 561, *aff'd* 180 N. Y. 541; 73 N. E. 1123.

18 Code Civ. Proc. § 401; *Simonson v. Nafis*, 36 App. Div. 473; 55 N. Y. Supp. 449.

The failure of the clerk to whom an order for such service together with the papers on which it was granted has been delivered for filing, to actually file the same does not invalidate the service. They may be ordered filed *nunc pro tunc*.¹⁹

Nor will the fact that by mistake and clerical error the order uses the words "notice of object of action hereto annexed" instead of the words "complaint hereto annexed" as required by statute constitute a fatal defect where there was a proper and sufficient publication and service.²⁰

Where the plaintiff dies after service by publication has been started but before it has been completed, in order to render such service effectual, publication should be commenced *de noco* after the substitution of the personal representative of the deceased and continued for the period prescribed.²¹ And, since there are a number of general post-offices in the consolidated city of New York, an order having the caption "Supreme Court, State of New York" and directing that copies of the summons shall be deposited "in the general post-office" is held to be defective as no "specified post-office" can be said to be designated.²² A defendant against whom a judgment for deficiency has been recovered cannot avail himself of the objection that certain other defendants were not served where it appears that the latter have no interest in the mortgaged premises; that the judgment of sale was entered upon the motion of the defendant against whom the judgment for deficiency was subsequently recovered, and that his attorney attended and bid at the sale.²³

§ 822. Unknown defendants.—If any party or parties having any interest in or lien upon the mortgaged premises are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, service of the summons upon such parties may be made by publication in the State paper and a newspaper published in the county where the premises are situated.²⁴ Such a case would arise if the

¹⁹ Fink v. Wallach, 109 App. Div. 718; 96 N. Y. Supp. 543, rev'g 47 Misc. R. 248; 95 N. Y. Supp. 872.

²⁰ Mishkind-Feinberg Realty v. Sidorsky, 189 N. Y. 402; 82 N. E. 448, holding that the order of publication may be amended by an order *nunc pro tunc* substituting the proper words, under Code Civ. Proc. § 723.

²¹ Reilly v. Hart, 130 N. Y. 625; 29 N. E. 1099.

²² Ver Planck v. Godfrey, 31 Misc. R. 54; 64 N. Y. Supp. 545, aff'd 49 App. Div. 648; 63 N. Y. Supp. 1117.

²³ Wager v. Link, 150 N. Y. 549; 44 N. E. 1103.

²⁴ Code of Civ. Pro. § 438.

owner of the equity of redemption should die, and it should remain an uncertain or a disputed question as to who were his heirs at law. If service of the summons, in such a case, should be made under the terms of the statute, it would bar all parties in interest, even though they might have been infants.²⁵ It has sometimes been the practice to foreclose by advertisement in order to cut off unknown heirs, since the statute directs the notice of sale to be served on the personal representatives of the deceased mortgagor, and does not require it to be served upon the heirs at law; but a more satisfactory title may be made by foreclosing by action and serving the summons in the way indicated.

§ 823. **Service of summons on married women.**—Prior to the Code, service of a subpoena upon a married woman in a chancery suit was necessary only when the proceeding was against her in respect to her separate estate, in which her husband was only a nominal party; and not where the estate was in the husband, the wife having merely an inchoate right of dower. In the latter case it was the duty of the husband to put in a joint answer for himself and wife. If the wife refused to answer, the bill would be taken as confessed against her unless she applied and obtained an order to answer separately.²⁶ This rule was not changed by the Code of Procedure, and it was not necessary to serve the wife of the owner of the equity of redemption with the summons in an action to foreclose a mortgage in order to cut off her inchoate right of dower; service upon the husband being sufficient.²⁷ It will be observed that this only affected the service of the summons; if the wife was not a party to the action her inchoate right of dower was not barred.²⁸

This rule was changed by section 450 of the Code of Civil Procedure. "That section," says Mr. THROOP, in his notes, "was intended to sweep away all distinctions between a *feme sole* and a *feme covert* in respect to suing and being sued." Cer-

²⁵ *Wheeler v. Scully*, 50 N. Y. 667. See as to affidavit to authorize publication of summons against unknown owners, *Piser v. Lockwood*, 30 Hun, 6.

²⁶ *Ferguson v. Smith*, 2 Johns. Ch. 139; *Leavitt v. Cruger*, 1 Paige, 421.

²⁷ *Foote v. Lathrop*, 53 Barb. 183, aff'd 41 N. Y. 358; *Eckerson v.*

Vollmer, 11 How. Pr. 42; *Lathrop v. Heacock*, 4 Lans. 1; *White v. Coulter*, 1 Hun, 357; 3 N. Y. Sup. (T. & C.) 608; *Watson v. Church*, 3 Hun, 80; 5 N. Y. Sup. (T. & C.) 243; *Nagle v. Taggart*, 4 Abb. N. C. 144.

²⁸ *Mills v. Van Voorhies*, 10 Abb. Pr. 152, aff'd 20 N. Y. 412.

tainly, the language of the section could not very well have been broader. "In an action or special proceeding, a married woman appears, prosecutes or defends alone or joined with other parties, as *if she were single*." Under this comprehensive provision a married woman having an inchoate dower right in an equity of redemption, has a right to appear and defend a foreclosure by her own attorney in form as if she were single.²⁹

§ 824. **Service of summons on infants.**—Where the defendant is an infant under fourteen years of age, the Code requires that personal service must be made by delivering a copy of the summons within this State to the infant, and also to his father, mother, or guardian, or, if there is none within the State, to a person having the care or control of him, or with whom he resides, or in whose service he is employed.³⁰ Service on the infant alone, or on the father, mother, guardian, or other person mentioned alone, does not constitute a personal service within the Statute. Service upon both must concur to answer this requirement.

The infant must appear by guardian,³¹ but a guardian can be regularly appointed for an infant defendant only after service of the summons personally or by the substituted mode (in certain specified cases) as prescribed.

So, where the mother of an infant defendant under fourteen years of age, made application to be appointed his guardian *ad litem*, and after said order had been granted, appeared for him, it was held that, there having been no personal service of the summons upon him, he was not bound by the judgment.³²

A non-resident infant, taking mortgaged property by descent, who was served in another State with the summons in a suit of foreclosure without an order of publication, and for whom no guardian *ad litem* was appointed, should not be denied the right to maintain an action for partition on the ground of laches, where she did not know that there was an unauthorized appearance for her, or of the foreclosure and sale until a few months prior to her action for partition.³³

²⁹ Per BARREN, J., in *Janinski v. Heidelberg*, 21 Hun, 439.

³⁰ Code of Civ. Pro. § 426.

³¹ Code of Civ. Pro. § 471.

³² *Ingersoll v. Mangam*, 84 N. Y.

622, *aff'g* 24 Hun, 202. See also *Gruner v. Ruffner*, 134 App. Div. 837; 119 N. Y. Supp. 942.

³³ *Hope v. Shevill*, 137 App. Div. 86; 122 N. Y. Supp. 127.

The recitals of a judgment as to service of process and appearance are, however, *prima facie* evidence of jurisdiction even against infants.³⁴ But where infants have not been properly brought in as parties defendant a co-defendant who appeared and objected to the sale for that reason, and who has been charged with a deficiency on the sale, may move to set it aside.³⁵

Where a guardian *ad litem* is appointed but does not appear nor perform any of the acts or duties required of him by law, it is held that the judgment is not, for this reason, invalidated.³⁶

Where an infant defendant is served with process, but no guardian *ad litem* is appointed, the judgment, though voidable, is not absolutely void.³⁷ In such a case, where judgment is obtained by fraud and collusion, an action may be maintained by the infant to set it aside as to him.³⁸ Substituted service may be made upon infants as well as adults under the provision of the statute for such service upon any defendant residing in the state who cannot be found or, if found, avoids or evades service.³⁹

§ 825. In the case of *Wood v. Kroll*⁴⁰ the plaintiff in an action to foreclose, purchased the premises at the sale, conveyed them to another, and subsequently obtained an order vacating and setting aside the sale and giving him leave to take such further proceedings as he might be advised. By virtue of this authority another service of the summons was made upon certain infant defendants and they were properly brought into the action; even if they had not been before. It was here held that it was not necessary to make the grantee of the plaintiff a party to the action. The service of the summons upon adult defendants having been regular, and the substituted service upon the infant defendants not having been vacated or set aside by the order, it

³⁴ *Steinhardt v. Baker*, 163 N. Y. 410; 57 N. E. 629; *Bosworth v. Vandewalker*, 53 N. Y. 597; *Berkowitz v. Brown*, 3 Misc. R. 1; 23 N. Y. Supp. 792. See *Eschmann v. Alt*, 4 Misc. R. 305; 24 N. Y. Supp. 763.

³⁵ *Gruner v. Ruffner*, 134 App. Div. 837; 119 N. Y. Supp. 942.

³⁶ *Hopkins v. Frey*, 64 Hun, 213; 18 N. Y. Supp. 903.

³⁷ *Bloom v. Burdick*, 1 Hill, 130, 143; *Croghan v. Livingston*, 17 N.

Y. 218. See also *Austin v. Trustees*, etc., 8 Met. (Ky.) 196; *White v. Albertson*, 3 Dev. (N. C.) 241; *Barber v. Graves*, 18 Vt. 290.

³⁸ *McMurray v. McMurray*, 66 N. Y. 175; *Wright v. Miller*, 8 N. Y. 9.

³⁹ *Steinhardt v. Baker*, 163 N. Y. 410; 57 N. E. 629, *aff'd* 25 App. Div. 197; 49 N. Y. Supp. 357, which affirmed 20 Misc. R. 470; 46 N. Y. Supp. 707.

⁴⁰ 43 Hun, 328.

was to be assumed that the action was pending against all of the defendants at the time when the order was entered, and the additional service personally made upon the infants of the summons, was to recover any possible ground of alleged irregularity in the service previously made. It did not supersede that service, but at the time when the last summons was served the action was still pending, and though the grantee, by the conveyance to him had secured a transfer of the mortgage, the action could still be regularly prosecuted and continued in the name of the original plaintiff under authority of §756 of the Code of Civil Procedure.

§ 826. **Appearance of defendants.**—A voluntary appearance by the defendant is equivalent to personal service of the summons upon him.⁴¹ The appearance is commonly by attorney, though an appearance in person is always proper.

Where a verified complaint and *lis pendens* have been filed in an action brought, among other things to foreclose a lien on real estate, the owner of the fee, made a party defendant, has a right to appear voluntarily before service of the summons where he deems it necessary to do so in order to protect his interests, and the court will compel the plaintiffs' attorneys to accept from his attorney a general notice of appearance for him.⁴²

§ 827. **Appearance by attorney without authority.**—Where a solvent attorney appears for a defendant, though without authority, the defendant will be bound after judgment.⁴³ There are *dicta* to the effect that such an appearance will become binding as soon as the opposite party has acted upon it.⁴⁴ but it cannot be regarded as settled by authority that any appearance before judgment, or by an attorney who is not of sufficient pecuniary ability to answer for his acts, will be conclusive upon the party. It has even been held that a forged notice of appearance, executed without authority from the client or from the attorney whose name is used, is sufficiently valid to give force to the judgment, and that such a judgment cannot be attacked collaterally,⁴⁵

⁴¹ Code of Civ. Proc. § 424. See U. S. statute passed in February, 1878, authorizing appearance for the United States in foreclosure suits.

⁴² Duer v. Fox, 27 Misc. R. 676; 59 N. Y. Supp. 426.

⁴³ Denton v. Noyes, 6 Johns. 296; Brown v. Nichols, 42 N. Y. 26.

⁴⁴ American Ins. Co. v. Oakley, 9 Paige, 496.

⁴⁵ Ferguson v. Crawford, 7 Hun, 25.

but this decision has been reversed. No man is bound by a forgery.⁴⁶

§ 828. A party to the action may serve a notice of appearance at any stage of the action, either before or after judgment, and he will then be entitled to notice of all subsequent proceedings.⁴⁷

The fact that the plaintiff or any other party to the action died subsequent to the entry of the judgment, will not make it necessary to revive the action as against the legal representatives of such deceased party;⁴⁸ but if the plaintiff or any one of the defendants dies before judgment is entered, the action must be revived as against them or the judgment will be void.⁴⁹

The consent of an attorney for a judgment creditor of the mortgagor given after the entry of judgment, to be bound by the proceedings in the action, is not valid in the absence of proof of express authority.⁵⁰

§ 829. Joinder of actions to foreclose two or more mortgages.—The Code of Civil Procedure permits the plaintiff to unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of the same transaction, or transactions connected with the same subjects of action; or contract, express or implied, or where they fall within the other provisions of the statute. But all the causes of action must affect all the parties to the action, and not require different places of trial.⁵¹ It has been held that actions to foreclose mortgages are not actions on contract within the meaning of this section, but are actions *in rem* against parcels of land.⁵²

It would, however, seem to be clear that two or more mortgages given at the same time as parts of the same agreement, though upon different parcels of land would “arise out of the same transaction”; it would also seem that two or more mortgages upon the same parcel of land, though given at different times and upon different contracts, would “arise out of transactions connected

⁴⁶ Ferguson v. Crawford, 70 N. Y. 253.

⁴⁷ Martine v. Lowenstein, 6 Hun, 225; 51 How. Pr. 353, *aff'd* 68 N. Y. 656; Knapp v. Burnham, 11 Paige, 330.

⁴⁸ Hays v. Thomae, 56 N. Y. 521;

Harrison v. Simons, 3 Edw. Ch. 394; Lynde v. O'Donnell, 21 How. Pr. 34.

⁴⁹ Gerry v. Post, 13 How. Pr. 118.

⁵⁰ Lyon v. Lyon, 67 N. Y. 250.

⁵¹ Code of Civ. Pro. § 484.

⁵² Selkirk v. Wood, 9 Civ. Proc.

R. 141.

with the same subject of action," and that in either case the foreclosure of all of the mortgages might properly be accomplished in one action, if all the causes of action affect all of the parties to the action.⁵³ But quite aside from statute and from judicial rulings, the question of costs will be sufficient to prevent attempts to join causes of action so arising from becoming common.

§ 830. Where there are two mortgages upon the same premises, given by the same mortgagor to the same mortgagee, only one action to foreclose both is proper. In such a case, before the Code, the court exercised its discretion with regard to costs, against a complainant who brought two suits.⁵⁴

If one of several mortgages sought to be foreclosed in a single action was not due when the action was commenced, it may nevertheless be included in the decree of foreclosure with the other mortgages, provided it became due before judgment and was still unpaid, and was covered by the complaint and the evidence.⁵⁵

§ 831. In other jurisdictions, it has been held that the assignee of two mortgages of the same land, made by the same mortgagor to different mortgagees, may unite them in an action of foreclosure;⁵⁶ that two mortgages given by different persons to secure the same debt may be foreclosed in the same action;⁵⁷ that only one foreclosure is permissible of a single mortgage to secure different debts due to two or more creditors,⁵⁸ and that if more than one action is commenced they will be consolidated.⁵⁹

§ 832. Consolidation of actions to foreclose.—The provisions of the Code of Civil Procedure respecting the consolidation of actions⁶⁰ apply exclusively to the consolidation of actions at law, and have never been construed as applicable to suits in equity.⁶¹ In *Grant*

⁵³ See *Morrissey v. Leddy*, 11 Civ. Proc. R. 438.

⁵⁴ *Roosevelt v. Ellithorp*, 10 Paige, 415. Wherein it was said that where a person is the holder of two mortgages upon the same premises and given by the same mortgagor to the same mortgagee, the practice of the court of chancery does not authorize him to file two separate bills to foreclose such mortgages and that it was the settled practice of the court for the complainant to state all of his junior incumbrances upon

the mortgaged premises in his bill to foreclose his prior mortgage.

⁵⁵ *Sherman v. Foster*, 158 N. Y. 587; 53 N. E. 504.

⁵⁶ *Pierce v. Balkam*, 56 Mass. (2 Cush.) 374.

⁵⁷ *McGowan v. Branch Bank at Mobile*, 7 Ala. 823.

⁵⁸ *Chamberlain v. Beck*, 68 Ga. 346.

⁵⁹ *Benton v. Barnet*, 59 N. H. 249.

⁶⁰ Code of Civ. Pro. § 817.

⁶¹ See 2 Wait's Pr. 555.

v. *Spencer* (not reported except by memorandum in Voorhies' Code, p. 336, § e), it was said that actions of foreclosure will not be consolidated under any circumstances, and a motion to consolidate two foreclosure suits was denied by DAVIES, J., with costs in both suits. This rule has also been declared in *Beach v. Ruggles* (6 Abb. N. C. 69), and in *Kipp v. Delamater* (58 How. Pr. 183).

In two actions brought to foreclose two mortgages on separate adjoining parcels of land, both of which were executed on the same day by the defendants to the plaintiff, and the parties were the same, and the defense identical, it was held that the actions could not be consolidated.⁶²

§ 833. Joinder of foreclosure action and separate cause of action.

—The joinder in the same complaint of two causes of action, one at law to secure a personal judgment on a bond secured by a mortgage and the other in equity to procure the sale of the land covered by the mortgage given to secure the same debt and the application of the proceeds thereon is not permissible.⁶³ And a joinder of an ordinary foreclosure action with an action for breach of covenant by a third party to build as further security is improper and demurrable.⁶⁴

Where a third party who has committed waste upon the mortgaged premises was made a party to the action of foreclosure, the plaintiff in that action was not bound to assert a claim founded in tort against the defendant for maliciously impairing the security. He had a right to wait and see whether the proceeds of the foreclosure would satisfy the debt. A plaintiff is never required to join actions in tort and on contract under a penalty of forfeiture of either right of action.⁶⁵

Where a grantee of mortgaged lands assumes the payments of taxes and assessments due or to become due, and the second mortgagee, in consideration thereof, agrees not to foreclose unless default is made in the payments provided for in the agreement, or unless the first mortgagee should start foreclosure, and the grantee

⁶² *Selkirk v. Wood*, 9 Civ. Pro. Rep. 141.

⁶³ *Dudley v. Congregation of the Third Order of St. Francis*, 138 N. Y. 451; 34 N. E. 281; *City Real Es-*

tate Co. v. King, 58 Misc. R. 69; 110 N. Y. Supp. 231.

⁶⁴ *Olim v. Arendt*, 35 App. Div. 529; 54 N. Y. Supp. 820.

⁶⁵ *Morgan v. Waters*, 122 App. Div. 340; 106 N. Y. Supp. 882.

fails to pay the taxes as he agreed, the second mortgagee is not put to his election but may both sue on his contract and foreclose.⁶⁶

Where there is a single cause of action a demand for multiplicity of relief is not ground for demurrer because of improper joinder of actions, as the cause alleged and the relief asked are separate matters.⁶⁷

§ 834. Foreclosure by prior mortgagee no bar to foreclosure by junior mortgagee.—Where premises are incumbered with two mortgages, and a foreclosure is brought upon the first to which the holder of the junior incumbrance is a party, it will ordinarily be unnecessary for him to do more than to appear and wait until a surplus is created by the sale of the property in the action already pending. But in some cases this will not be sufficient. In *Rankin v. Reformed Protestant Dutch Church* (1 Edw. Ch. 20), a first mortgage was foreclosed for default in payment of interest. The mortgagor paid the arrears of interest and costs, and a sale was stayed under 2 R. S. 192, 193. A defendant who was the owner of a second mortgage, petitioned for a sale, showing that his mortgage was due, and asking for a reference to take an account of the moneys due him. It was held by McCoun, V. C., that it was not safe to proceed on said petition; that the defendant might file a supplemental bill setting forth the original bill and decree, and praying for permission to move the latter and be paid, after the first mortgage is satisfied, his amount and costs, and that he might thus connect his proceedings with the original bill without danger from an objection that another suit was pending in relation to the same matter. In *Bache v. Purcell* (51 How. 270, aff'd 6 Hun, 518), a judgment of foreclosure and sale was entered in an action upon a first mortgage, and the mortgagor stayed proceedings by taking an appeal and giving security. The owner of the second mortgage then commenced an action to foreclose, and was met by an answer setting up the previous judgment as a bar, he having been a party to that action. It was held that while the equity of redemption remained in the mortgagor or the owner of the fee, there was no reason for holding that a decree upon a

⁶⁶ *Cook v. Adams*, 32 App. Div. 385; 53 N. Y. Supp. 120.

⁶⁷ *Gotthelf, v. Shapiro*, 136 App. Div. 1; 120 N. Y. Supp. 210.

first mortgage *ipso facto* operated as a bar to present proceedings to enforce junior mortgages or judgments.⁶⁸

A junior mortgagee may commence an action to foreclose his lien notwithstanding the pendency of an action to foreclose a prior mortgage upon the same property.⁶⁹ Where the holder of a first mortgage forecloses it and becomes the purchaser at the sale but fails to make the assignee of a second mortgage, whose assignment is of record, a party to such action of foreclosure, the assignee of the second mortgage is entitled to foreclose his mortgage, and this remedy is not limited to an action to redeem the premises.⁷⁰

THE PLEADINGS.

§ 835. **Complaint.**—The complaint in an action to foreclose a mortgage is governed by the general rules applicable to actions under the Code. It should contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition.⁷¹ Matters of defense need not be alleged.⁷²

A plaintiff suing to foreclose a mortgage must prove his ownership of the bond and mortgage in order to recover,⁷³ and if it be in a particular capacity or character only that he is authorized by law to proceed, then that he clothes himself with that character. And where there is too much doubt as to the right of a complainant to receive a mortgage debt, to permit the cause to proceed to a decree, until others are made parties to the suit, and their rights or claims can be fairly presented to the court, an order may be made that the cause stand over with liberty to the complainant to amend his bill, by adding such persons as parties.⁷⁴

It is not necessary to allege in the complaint, the indebtedness for which the bond and mortgage were given, and, if alleged, it will not have to be proved. It is only necessary to show the exe-

⁶⁸ See also *Mayer v. Burr*, 133 App. Div. 604; 118 N. Y. Supp. 203; *Wendell v. Wendell*, 3 Paige, 509, where only one action was held proper.

⁶⁹ *Daily v. Kingdon*, 41 How. Pr. 22.

⁷⁰ *Bigelow v. Daval*, 62 Hun. 245; 16 N. Y. Supp. 646, following *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33, and criticising *Salmon v. Al-*

len, 11 Hun, 29; *Ross v. Boardman*, 22 Hun, 527.

⁷¹ Code of Civ. Pro. § 481.

⁷² *Seymour v. McKinstry*, 106 N. Y. 230; 12 N. E. 348; 14 N. E. 94.

⁷³ *Fox v. Bambridge*, 151 App. Div. 510.

⁷⁴ *Kortright v. Smith*, 3 Edw. Ch. 402, citing *Hunter v. Hallett*, 1 Edw. Ch. 288.

cution of the bond and mortgage.⁷⁵ Nor need it be alleged that the mortgage was given for value.⁷⁶

The bond and mortgage should be correctly described, though a mere technical variance will be disregarded.⁷⁷

A complaint which alleges the mortgage was given as collateral to a bond, but which does not state the amount or terms of the bond, or that it is due, or that there has ever been any default in its payment, is demurrable, although it does allege that the mortgage has become due and has not been paid,⁷⁸ and where a complaint alleges that a mortgage was assigned to the plaintiff but fails to allege that the bond to which the mortgage was collateral was also assigned to him, a demurrer interposed by a subsequent lienor on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not frivolous.⁷⁹ The complaint itself, in such a case, is frivolous, as the mortgage is a mere incident to the debt and an assignment thereof does not pass the debt.⁸⁰

If a mortgage be payable on demand, it is due at once, and no demand need be made or alleged.⁸¹

When no time of payment is specified the mortgage may be foreclosed at any time.⁸²

It is not necessary to allege title in the mortgagor, for he is estopped as to title, and the only purpose of the action is foreclosure.⁸³

In action by executor's capacity sufficiently shown. See *Brenner v. McMahon*, 20 App. Div. 3; 46 N. Y. Supp. 643.

A complaint seeking to foreclose a mortgage on lands which alleges that the mortgagor died at a specified date leaving one H. her only heir-at-law and next-of-kin, who became the owner of said mortgage "by inheritance," and that the said H. died leaving a will duly admitted to probate by which he bequeathed said mortgage to a person named as executrix, who assigned the same to the plaintiff, sufficiently states the plaintiff's title, although the use of the word "inheritance" be inartificial.

Under such complaint proof that letters of administration on the mort-

gagee's estate were issued to the plaintiff's predecessor is admissible. *Ward v. Bronson*, 126 App. Div. 508; 110 N. Y. Supp. 335.

75 *Day v. Perkins*, 2 Sandf. Ch. 359.

76 *Oliphant v. Burns*, 146 N. Y. 218; 40 N. E. 980.

77 *Harvey v. Truby*, 62 App. Div. 503; 71 N. Y. Supp. 86; *Hadley v. Chapin*, 11 Paige, 245.

78 *Harvey v. Truby*, 62 App. Div. 503; 71 N. Y. Supp. 86.

79 *Manne v. Carlson*, 49 App. Div. 276; 63 N. Y. Supp. 162.

80 *Smith v. Thomson*, 118 App. Div. 6; 103 N. Y. Supp. 336.

81 *Gillett v. Balcom*, 6 Barb. 370.

82 *Wright v. Shumway*, 1 Biss. 23.

83 *Shed v. Garfield*, 5 Vt. 39.

In foreclosing a mortgage executed by an executor, as such, the defendants being the executor and his grantees, there is no necessity for alleging that he had authority to make the mortgage.⁸⁴

Where a complaint asks for a judgment against executors as individuals, but makes no demand for relief against them in their representative capacity, it is not subject to demurrer as not stating a cause of action against them in such capacity.⁸⁵

The complaint should set out all assignments. A mere allegation that "the plaintiff, by several mesne assignments, is the owner and holder of the bond and mortgage," is an averment of a conclusion of law and is not sufficient.⁸⁶

But a complaint in a suit to foreclose a mortgage will be sustained on demurrer where in substance it alleges that the bond and mortgage were given by the defendant to the plaintiff's assignor to secure the payment of certain notes, which in their turn were given to secure the payment of certain judgments recovered by the assignor against the defendant, and that the agreement, notes, bond and mortgage together with the moneys due or to grow due thereon, or thereunder, were assigned to the plaintiff.⁸⁷

An allegation that one who had acquired the premises from the mortgagor orally agreed with the latter to assume and did assume the payment of the mortgage "and thereby and otherwise became legally and equitably bound to the grantor and to the mortgagee to pay the same" is sufficient.⁸⁸

It is proper to allege that the mortgage was recorded and to specify the time and place of record, though this is not absolutely necessary.⁸⁹ It is not necessary against the mortgagor, for he is concluded without the record;⁹⁰ nor against a purchaser from the mortgagor, for if he purchased without notice, that is a matter of defense.⁹¹ It is not necessary to allege that an assignment was recorded, for recording is not essential to its validity.⁹²

⁸⁴ Skelton v. Scott, 18 Hun, 375.

⁸⁵ Olin v. Arendt, 26 Misc. R. 488; 57 N. Y. Supp. 473.

⁸⁶ Rose v. Meyer, 1 How. Pr. N. S. 274; 7 N. Y. Civ. Pro. Rep. 219; Thomas v. Desmond, 12 How. Pr. 321.

⁸⁷ Williams v. Cornell, 137 App. Div. 795; 122 N. Y. Supp. 670.

⁸⁸ Wager v. Link, 150 N. Y. 549; 44 N. E. 1103.

⁸⁹ Scarry v. Eldridge, 63 Ind. 44.

⁹⁰ Faulkner v. Overturf, 49 Ind. 265; Perdue v. Aldridge, 19 Ind. 290.

⁹¹ Seymour v. McKinstry, 106 N. Y. 230; 12 N. E. 348; 14 N. E. 94; Gallatian v. Cunningham, 8 Cow. 361, 374; *contra*, Hiatt v. Renk, 64 Ind. 590.

⁹² Fryer v. Rockefeller, 63 N. Y. 268.

Nor is it necessary to allege that the recording tax upon the mortgage has been paid.⁹³

The foreclosure of a mortgage is a single cause of action, however many notes or installments it secures.⁹⁴

Where a trust mortgage recognizes two classes of creditors, first the creditors of a former owner of the mortgaged premises who transferred the same to the mortgagors, and, second, persons subsequently advancing money to the mortgagors, and provides that on default the trustee shall enforce the mortgage on a written request signed by a majority in amount of the holders of the former class of claims, a complaint in an action to foreclose, brought by only one of that class of creditors, does not state a cause of action when it fails to allege that a request to sue was made to the trustee by persons holding a majority in amount of the claims secured.⁹⁵

Where leave of court required by the Code of Civil Procedure,⁹⁶ is essential to the maintenance of an action a complaint which does not allege leave of court does not state a cause of action.⁹⁷

§ 836. *Allegation as to proceedings at law.*—The Code requires that “the complaint in an action to foreclose a mortgage upon real property, must state, whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected.”¹

“Where final judgment for the plaintiff has been rendered, in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued, upon the judgment, to the sheriff of the county where he resides, if he resides within the State, or, if he resides without the State, to the sheriff of the county where the judgment roll is filed; and has been returned wholly or partly unsatisfied.”²

⁹³ Moore v. Lindsay, 61 Misc. R. 176; 114 N. Y. Supp. 684.

⁹⁴ Harmon v. Hilliard, 101 Ind. 310.

⁹⁵ Allen v. Pierson, 113 App. Div. 586; 100 N. Y. Supp. 451, aff'd 186 N. Y. 546; 79 N. E. 1100.

⁹⁶ § 1628.

⁹⁷ Robert v. Kidansky, 111 App. Div. 475; 97 N. Y. Supp. 913, aff'd 188 N. Y. 638; 81 N. E. 1174.

¹ Code of Civ. Pro. § 1629; Lovett v. German Reformed Church, 12 Barb. 67.

² Code of Civ. Pro. § 1630.

§ 837. **Allegations as to defendants.**—It is necessary that the plaintiff should show that all of the defendants have some interest in the equity of redemption which makes them proper parties to the action, but this may be sufficiently done by a general allegation that the defendants who may be designated have, or claim to have, some interest in or lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage.³ It will not be material that the interests of the defendants are in separate portions of the property or that some relief is asked for, that does not affect them all.⁴

Where a person executes a mortgage upon premises which he has previously contracted to sell to another, the mortgagees should not make such purchaser a party to the foreclosure action on the false allegation that he has acquired an interest in the premises subsequent to their mortgage. The proper course is held to be the giving him a notice of their rights, as mortgagees, to the unpaid purchase money upon the contract, so that he will not pay it to the mortgagor and then to proceed to file the bill against such mortgagor to foreclose the mortgage.⁵

§ 838. **The prayer for judgment** should be for all the relief the plaintiff considers himself entitled to, and a personal judgment cannot be granted against a defendant who does not appear, unless it be asked for in the complaint.⁶

§ 839. **Supplemental complaint amendment.**—If an action be commenced for the foreclosure of a mortgage, on the ground of non-payment of an installment of principal or interest, and subsequent to the commencement of the action, the whole amount becomes due, the plaintiff may, by supplemental complaint, proceed in the action for the full sum.⁷ This will not be the case if nothing was due at the time of the commencement of the ac-

³ *Douw v. Keay*, 16 Misc. R. 192; 38 N. Y. Supp. 994; *Drury v. Clark*, 16 How. Pr. 424; *Frost v. Koon*, 30 N. Y. 428, 448; *Aldrich v. Lapham*, 6 How. Pr. 129; 1 Code R. N. S. 408. See also *Woodworth v. Zimmerman*, 92 Ala. 349; *Ulrich v. Drischell*, 88 Ind. 354; *Clay v. Hildebrand*, 34 Kans. 694; 9 Pac. 466.

⁴ *Bank v. Bacharach*, 46 Conn. 513; *Mix v. Hotchkiss*, 14 Conn. 32;

Wells v. Hydraulic Co., 30 Conn. 316; *Waters v. Hubbard*, 44 Conn. 340.

⁵ *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316.

⁶ *Simonson v. Blake*, 20 How. Pr. 484; 12 Abb. 331; *Bullwinker v. Ryker*, 12 Abb. 311; *French v. New*, 20 Barb. 484.

⁷ *Malcolm v. Allen*, 49 N. Y. 448.

tion, since a cause of action cannot be created by a supplemental complaint.⁸ But if the original complaint shows facts entitling the plaintiff to some relief, he may show, by supplemental complaint, that facts have since transpired which entitle him to further relief.⁹

An order of General Term reversing an order of Special Term allowing a complaint in an action to foreclose a mortgage to be amended by setting forth an omission by mistake of land intended to be covered by the mortgage, and asking for a reformation of the mortgage, is not reviewable in the Court of Appeals; it is a matter in the discretion of the court below.¹⁰

§ 840. Verification of complaint.—An action to enforce a bond and mortgage by foreclosure and sale under the statute, is not an action upon a written instrument for the payment of money only, but upon an instrument for the payment of money and providing for a sale of the defendant's property in case of default. For this reason, a complaint in such an action cannot properly be verified by the attorney, simply because the bond is in his possession.¹¹ In a case where a verification was thus made, an unverified answer was held to be proper.¹²

§ 841. Notice of no personal claim.—“Where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served unreasonably defends the action, costs may be awarded against him.”¹³

It is not necessary to serve this notice, even if the complaint be not served, except for the purpose of saving costs.¹⁴

This provision of the Code does not deprive the court of the power in equity cases to award costs for unreasonably defending,

⁸ *McCullough v. Colby*, 4 Bosw. 603; *Candler v. Pettit*, 1 Paige, 168; *Stilwell v. Van Epps*, 1 Paige, 615.

⁹ *Candler v. Pettit*, 1 Paige, 168; *Hasbrouck v. Shuster*, 4 Barb. 285; *Bostwick v. Menck*, 8 Abb. N. S. 169.

¹⁰ *Sprague v. Cochran*, 144 N. Y. 104; 38 N. E. 1000.

¹¹ Code of Civ. Pro. § 525.

¹² *Peyser v. McCormack*, 7 Hun, 300.

¹³ Code of Civ. Pro. § 423.

¹⁴ *Gallagher v. Egan*, 2 Sandf. 742.

against defendants upon whom a copy of the complaint, but no such notice, has been served, and, since the complaint furnishes the necessary information to the defendant more fully than the notice, which is nothing more than an abstract of it, it is not necessary to serve the notice in case a copy of the complaint is served with the summons.¹⁵

§ 842. Death of parties pending action to foreclose.—Where the plaintiff, or any of the defendants in the action, die before the rendition of judgment, it should be revived and continued in the name of their representatives;¹⁶ otherwise the judgment entered in the name of the plaintiff and the purchasers' title are void,¹⁷ but if any of the parties die after judgment, no revivor is necessary in order that a sale may be made.¹⁸

Where a mortgagor dies, pending the action to foreclose, and his infant children are brought in under an order authorizing an amendment of the summons and complaint "by adding additional parties defendant hereto," the order though somewhat indefinite, is valid and the infants are bound.¹⁹

It has been held that where a non-resident mortgagor has been duly served by publication, his death before decree will not prevent a purchaser from acquiring a valid title.²⁰

And an admitted prior mortgagee not being a necessary party to a foreclosure suit, if he dies or his interest devolves on another pending the action, the proceedings may go on without reviving or continuing them against his successor.²¹

In an action to foreclose a mortgage, a notice of *lis pendens* was filed; the mortgagee conveyed the mortgaged premises and died; the action was then revived by making the mortgagor's administrator, who was also his grantee, a party. It was held that the grantee was bound, under section 1671 of the Code, by

15 O'Hara v. Brophy, 24 How. Pr. 379.

16 Gerry v. Post, 13 How. Pr. 118; Code of Civ. Pro. § 758.

17 Gerry v. Post, 13 How. Pr. 118.

18 Wing v. De La Rionda, 125 N. Y. 678; 25 N. E. 1064; Lynde v. O'Donnell, 21 How. Pr. 34; 12 Abb. 286; Wasson v. Hoff, 27 Misc. R. 55; 57 N. Y. Supp. 953; 30 Civ. Proc. R. 89.

19 Steinhardt v. Baker, 20 Misc. R. 470; 46 N. Y. Supp. 707, *aff'd* 25 App. Div. 197; 49 N. Y. Supp. 357, *aff'd* 163 N. Y. 410; 57 N. E. 629.

20 Fraser v. Prather, 1 MacArthur (D. C.) 206; Voorhees v. Bank, etc., 10 Peters (U. S.) 449.

21 Hancock v. Hancock, 22 N. Y. 568.

all of the proceedings after the filing of the *lis pendens* and a purchaser was compelled to take title.²²

Section 763 of the Code of Civil Procedure provides that "if either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties, unless the offer, verdict, report, or decision, or the interlocutory judgment is set aside." The report of a referee appointed to compute, to take proof, etc., is not the report meant by this section, but that provision of the statute contemplates a decision by a referee which determines the rights of the parties to a controversy as they would be determined by a verdict, decision of a judge, or interlocutory judgment.²³ So, where the plaintiff died after the report of a referee appointed "to compute the amount due to the plaintiff for principal and interest upon the bond and mortgage set forth in plaintiff's complaint, and also to take proof of the facts and circumstance stated in the complaint, and to examine plaintiff or his agent on oath as to any payments which have been made," and thereafter final judgment was entered upon the motion of plaintiff's attorney of record, it was held that the practice was irregular, and that the action should have been revived before entering the judgment.²⁴

A suit to foreclose a mortgage, commenced by a testator, in his lifetime, against the mortgagor, who is appointed one of the executors of his will, and which suit is pending at the death of the testator, does not abate by his death but survives to his personal representatives.²⁵

There is no power in the court to amend a judgment of foreclosure *nunc pro tunc* as of a date prior to the death of a defendant guarantor of the mortgage debt so as to charge that defendant with deficiency, even though he was in default for failure to answer.²⁶ The liberal provisions of our Code relating

²² Weyh v. Boylan, 62 How. Pr. 397, aff'd 63 How. Pr. 72.

²³ Grant v. Griswold, 21 Hun, 509.

²⁴ Smith v. Joyce, 11 Civ. Proc. Rep. 257; 25 W. Dig. 106; Grant v.

Griswold, 21 Hun, 509; Harrison v. Simons, 3 Edw. Ch. 394; Hays v. Thomae, 56 N. Y. 521.

²⁵ McGregor v. McGregor, 35 N. Y. 218.

²⁶ Grant v. Griswold, 21 Hun,

to amendments permit almost any amendment in furtherance of justice, but they do not permit new judgments against the dead except in the cases where the merits of the controversy have been substantially determined during the lifetime of the parties affected. And such relief, if desired, is subject to the discretion of the court, and must be promptly asked for.²⁷

§ 843. Change of parties pending action.—Where a reference is ordered to ascertain the amount due on a judgment of foreclosure, there is no necessity for a change of parties in consequence of an assignment of the decree, whether made before or after the order of reference, as this is a collateral inquiry and not a trial of an issue formed by the pleadings.²⁸

Where one plaintiff is substituted for another, particularly where the person who is thus substituted was originally a defendant, and had no identity with the action as it was instituted, the order for such substitution should not be made except upon notice to all of the defendants, including those who did not appear.²⁹

§ 844. Examination of plaintiff before trial.—On the foreclosure of a mortgage the defendant is not entitled to examine the plaintiff before trial respecting an alleged agreement that the yearly interest was to be added to the principal, where it is apparent that his purpose is merely to discover the plaintiff's evidence and not to elicit testimony to establish a defense.³⁰

§ 845. Survey of the property.—"If the court, in which an action relating to real property is pending, is satisfied that a survey of any of the property, in the possession of either party, or of a boundary line between the parties, or between the property of either of them, and of another person, is necessary or expedient, to enable either party to prepare a pleading, or prepare for trial, or for any other proceeding in the action, it may, upon the application of either party, upon notice to the party in possession, make an order, granting to the applicant leave to enter upon that party's property to make such a survey"³¹

509; 82 N. Y. 569; Code of Civ. Pro. § 765; *Livingston v. Rendell*, 59 Barb. 493.

²⁷ *Grant v. Griswold*, 82 N. Y. 569.

²⁸ *Laing v. Titus*, 18 Abb. 388.

²⁹ *McLean v. Tompkins*, 18 Abb. 24.

³⁰ *Ruesens v. Arkenburgh*, 136 App. Div. 653; 121 N. Y. Supp. 353.

³¹ Code of Civ. Pro. § 1682.

"An order, made as prescribed in the last section, must specify, by a description as definite as may be, the property or boundary line to be surveyed, and the real property of the adverse party, upon which it is necessary to enter for that purpose. A copy thereof must be served on the owner or occupant of that property before entry thereon."³²

"After serving a copy of the order, as prescribed in the last section, the party obtaining it, his necessary surveyors, servants, and agents, may enter, for the purpose of making the survey, upon the real property described in the order, and may there make the survey; but each person so entering is responsible for any unnecessary injury done by him; and the party procuring the order is responsible for such an injury, done by any person so entering."³³

§ 846. **Answer.**—A denial made on information and belief cannot be stricken out as shown for that reason.³⁴

So, where in a suit to foreclose a second mortgage the defendant alleges lack of knowledge or information sufficient to form a belief as to the plaintiff's allegation that he has paid moneys for taxes on the lands and interest upon the prior mortgage in order to protect his lien, pursuant to covenants in the mortgage, an issue of fact is raised so that the plaintiff is not entitled to judgment on the pleadings. Such allegation of lack of knowledge or information is not frivolous or sham.³⁵

But, where facts alleged in a complaint are presumptively within the knowledge of the defendant, as in the case of personal transactions, or where they are matters of public record, that form of denial is not permitted.³⁶

Thus a defendant in a suit of foreclosure, who in a written agreement with the plaintiff has admitted that the latter holds a certain recorded bond and mortgage which is the subject of the foreclosure, cannot allege that he has no knowledge or in-

³² Code of Civ. Pro. § 1683.

³³ Code of Civ. Pro. § 1684.

³⁴ *Ginnel v. Stayner*, 71 App. Div. 540; 75 N. Y. Supp. 887; *Alexander v. Aronson*, 65 App. Div. 174; 72 N. Y. Supp. 640; *Reese v. Walworth*, 61 App. Div. 64; 69 N. Y. Supp. 1115.

³⁵ *Godwin v. Liberty-Nassau Bldg.*

Co., 144 App. Div. 164; 128 N. Y. Supp. 791; *Mutual Life Ins. Co. v. Toplitz*, 58 App. Div. 188; 68 N. Y. Supp. 680.

³⁶ *Preston v. Cuneo*, 140 App. Div. 144; 124 N. Y. Supp. 1031. See *White v. Gibson*, 61 Misc. R. 436; 113 N. Y. Supp. 983.

formation sufficient to form a belief as to the truth of allegations of the complaint alleging the execution and delivery of the mortgage and its assignment to the plaintiff. Such denials are frivolous.³⁷ In an action to foreclose a mortgage where the complaint alleges the simultaneous execution of two other mortgages with the understanding that none of the three should have preference over the others, which allegation is denied by one of the mortgagees in her answer, which asserts that her incumbrance is a prior lien, the failure of the plaintiff to reply does not admit the averments of the answer, which are in contradiction of the complaint, or entitle the answering mortgagee to judgment, but the issue as to the equality of the mortgages should be tried and the right of all the parties determined, since that issue is joined by the complaint and answer.³⁸

Where defendants in foreclosure in their answer set up claims under a deed prior to the mortgage and said claims are adjudicated in their favor upon the trial, the dismissal of the complaint cannot be sustained upon appeal on the ground that rights under a deed prior to mortgage cannot be litigated in foreclosure actions.

It might be proper to dismiss the complaint on this ground had defendants originally claimed they had been improperly made parties defendant.³⁹

A defendant, without the service of an answer by himself, cannot require a determination of the ultimate rights of himself and a co-defendant as between themselves on an answer demanding such determination served on him by such co-tenant.⁴⁰

And a subsequent lienor who is made a party defendant has no right to require a determination of the amount of his claim where he has not served his answer upon the other defendants. He is relegated to the usual proceedings for the distribution of the surplus moneys, if there are any.⁴¹

PRACTICE ON FAILURE TO ANSWER.

§ 847. Rules of practice.—Rule 60 provides that if, in an

³⁷ Preston v. Cuneo, 140 App. Div. 144; 124 N. Y. Supp. 1031.

³⁸ Wade v. Strever, 166 N. Y. 251; 59 N. E. 825.

³⁹ Helck v. Reinheimer, 105 N. Y. 470; 12 N. E. 37.

⁴⁰ Knickerbocker Trust Co. v. Oneonta C. & R. S. R. Co., 188 N. Y. 38; 8 N. E. 568.

⁴¹ Clement v. Congress Hall, 72 Misc. R. 519; 132 N. Y. Supp. 16.

action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.⁴² When no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial, as to all the defendants, may apply for judgment, at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the parties thereto, and the time and place of recording the same, has been filed at least twenty days before such application for

⁴² Boyle v. Williams, 72 Ala. 351.

This rule does not relate in any way to the trial by the court of is-

sues raised by pleadings. Redmond v. Hughes, 151 App. Div. 99.

judgment, and at or after the time of filing of the complaint, as required by law.⁴³

Where one of the defendants is served by substituted service the failure of a judgment of foreclosure to recite the taking of proof of the cause of actions set forth in the complaint as required by section 1216 of the Code of Civil Procedure, will not of itself raise an inference that such proof has not been taken, for the presumption of regularity will prevail in the absence of direct proof to the contrary.⁴⁴

§ 848. Judgment on the pleadings.—The provision of the Code of Civil Procedure that “if either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly”⁴⁵ should be given a liberal construction. It is said that the provision obviously contemplates that the court shall award such a judgment as either party is entitled to under the pleadings, whether the judgment be interlocutory or final.⁴⁶

§ 849. Affidavit on applying for judgment.—On applying for judgment of foreclosure and sale in case of a default, the following facts should appear on the papers presented to the court:

1. That the defendants have properly been served with the summons, or that they have appeared; that the time to answer has expired, and that no answer or demurrer has been received.

2. Whether the whole amount of the mortgage is or is not due.⁴⁷

3. Whether any of the defendants are infants or absentees.⁴⁸

4. That a proper notice of *lis pendens* had been filed at least twenty days before the application.

The “affidavit of regularity” which was required to be made by the solicitor for the complaint, under the practice in chancery before the Code, is no longer necessary.⁴⁹

⁴³ Rule 60. See *Kelly v. Searing*, 4 Abb. Pr. 354.

⁴⁴ *Lauder v. Meserole*, 148 App. Div. 740.

⁴⁵ § 547.

⁴⁶ *White v. Gibson*, 61 Misc. R. 436; 113 N. Y. Supp. 983, holding that under the pleadings under consideration the appropriate relief to which the plaintiff was entitled was

in interlocutory judgment appointing a referee to take proof of the facts, examine the plaintiff or his agent as to any payments that may have been made and to compute the amount due.

⁴⁷ Anonymous, 3 How. Pr. 158.

⁴⁸ Anonymous, 3 How. Pr. 158.

⁴⁹ 4 Edm. St. 667, § 11; Laws of 1840, c. 342, as am'd by Laws of

§ 850. **Notice of application for judgment.**—If a defendant gives notice of appearance in the action before the expiration of the time for answering, he is entitled to eight days' notice of the time and place of the application to the court for the relief demanded in the complaint.⁵⁰ Upon the hearing of this application, the court may either compute the amount due, or refer the computation to the clerk or some other suitable person.⁵¹ Five days' notice of the time and place of making the computation should be given, and it is provided "in a case where an application for judgment must be made in the court, the defendant may serve upon the plaintiff's attorney, at any time before the application for judgment, a written demand of notice of the execution of any reference, or writ of inquiry, which may be granted upon the application. Such a demand is not an appearance in the action. It must be subscribed by the defendant, in person, or by an attorney or agent, who must add to his signature, his office address, with the particulars, prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney. Thereupon at least five days' notice of the time and place of the execution of the reference, or writ of inquiry, must be given to the defendant, by service thereof upon the person, whose name is subscribed to the demand, in the manner prescribed in this act, for service of a paper upon an attorney in an action."⁵²

§ 851. **Order of reference to compute.**—If the whole amount of the mortgage has not become due, the order of reference must direct the referee "to examine and report whether the mortgaged premises can be sold in parcels." If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference must also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage preparatory to the application for judgment of foreclosure and sale.⁵³

Where an answer interposed by an infant alleges payment of

1844, c. 400. For the requisites of the "affidavit of regularity," see *Nott v. Hill*, 6 Paige, 9.

50 Code of Civ. Pro. § 1219.

51 *Kelly v. Searing*, 4 Abb. 354.

52 Code of Civ. Pro. § 1219.

53 Rule 60; *ante*, § 847.

part of the amount due, the issue thus formed should be tried by the court or by a referee appointed for that purpose, and cannot be summarily disposed of under the ordinary reference under the rule.⁵⁴

§ 852. Report on order of sale.—When the mortgage covers several lots, owned severally by different defendants, the referee may be required to ascertain and report the order in which the sale should be made.⁵⁵

Where, in an action to foreclose a mortgage executed by a corporation to secure its bonds, the judgment directs the referee to ascertain and report the amount due on such bonds, the fact that the referee did not make his report until after the sale is no ground for setting aside the sale where it has been confirmed by the court.⁵⁶

§ 853. When one defendant appears and makes default and another defendant answers, it is not proper to make any order of reference as against the defaulting defendant, except for the purpose of computing the amount due, and a judgment cannot be rendered against him except upon application to the court. In such a case, if the issues raised are referred, application must be made to the court for judgment; after the decision by the referee, a judgment cannot be entered merely upon his report.⁵⁷

§ 854. When reference to compute is improper.—If the defendant answers and makes default at the trial, the court must take an inquest, or the whole issue must be referred and a reference to compute is not proper.⁵⁸

The reference previous to the hearing to compute the amount due to the mortgagee, and to prior incumbrancers, is only authorized to be made where the rights of the plaintiff, as stated in the complaint, are admitted by the answer. Where the defendants, therefore, by their answer, set up a claim of priority which is adverse to the claim of the plaintiff as made by his complaint, the referee is not authorized to settle the question of priority. If he makes any report whatever on the subject of such claim,

⁵⁴ Jackson v. Reon, 60 How. Pr. 103.

⁵⁵ Bard v. Steele, 3 How. Pr. 110. See Code Civ. Proc. § 1636.

⁵⁶ Farmers' Loan & Trust Co. v.

Bankers & Merchants' Teleg. Co., 119 N. Y. 15; 23 N. E. 173.

⁵⁷ Cram v. Bradford, 4 Abb. 193; Hill v. McReynolds, 30 Barb. 488.

⁵⁸ Exchange Fire Ins. Co. v. Early, 4 Abb. N. C. 78.

therefore, he should merely ascertain the amount due, upon the supposition that the claim of priority as made by the answer is well founded, leaving it for the court, upon the hearing, to decide the question upon the legal or equitable rights of the defendants, upon the facts stated in their answers.⁵⁹

An order for an interlocutory judgment on the pleadings in a foreclosure suit which is unauthorized because the pleadings raise an issue which requires determination is not justified under rule 60 of the General Rules of Practice, because it also orders a compulsory reference. That rule is designed for the protection of defendants who are infants or absentees and not to facilitate the proceedings of the plaintiff.⁶⁰

An action for the foreclosure of a mortgage is not in a condition to have all the issues therein referred, while any defendants, against whom the plaintiff seeks to recover a judgment over for a deficiency, have not been served with summons, or have been served with a notice that no personal claim is made against them, and have not appeared.⁶¹

§ 855. Notice to attend preliminary reference.—A defendant who has appeared in the cause is entitled to notice of every proceeding therein which may affect his rights injuriously, except in those cases where, by the rules and practice of the court, he is bound to watch the proceedings, so as to protect his rights without such notice. The defendants are entitled to a summons to attend a reference preliminary to a judgment of foreclosure, so that they may see that the interest is correctly computed. If they attend upon the reference and make objections to the draft of the referee's report, so as to authorize them to except to the same, it would be necessary for the plaintiff to file the report, and have it duly confirmed, before he could apply to the court for an order of sale founded upon such report. If the defendants have no opportunity to be present at the reference, they can urge this irregularity in opposition to the plaintiff's application for an order of sale.

The notice of application for the relief demanded in the complaint is sufficient notice to apprise an adult defendant, who has

⁵⁹ Per Chancellor WALWORTH, in *Harris v. Fly*, 7 Paige, 421; *Knapp v. Burnham*, 11 Paige, 330. Co., 144 App. Div. 164; 128 N. Y. Supp. 791.

⁶¹ *Goodyear v. Brooks*, 2 Abb. Pr. R. (N. S.) 296.

⁶⁰ *Godwin v. Liberty-Nassau Bldg.*

not denied any of the allegations in the plaintiff's complaint, that the computation will be made on the hearing of the motion, and the court may proceed at once to compute the amount, or may refer the computation to any suitable person.⁶² In such a case, no new notice or summons need be given to the defendant to enable him to attend such reference, though it is the common practice to give such a notice, and it is not improper to do so.⁶³ But where the reference is to do something more than merely to compute the amount due, or where an application is made to sell for payment of a second instalment coming due after the entry of the judgment, a summons should always be served upon all defendants who have appeared to attend at the reference, since a defendant must always be able to attend at every stage of the cause, if he should see fit to do so, in order to declare and protect his rights.⁶⁴

By section 1219 of the Code of Civil Procedure, a defendant against whom judgment of foreclosure is taken, is entitled to at least five days' notice of the time and place of the assessment by the clerk, and to at least eight days' notice of the time and place of an application to the court for judgment. In a case where an application for judgment must be made to the court, the defendant may serve upon the plaintiff's attorney, at any time before the application for judgment, a written demand of notice of the execution of any reference, or writ of inquiry, which may be granted upon the application. Such a demand is not an appearance in the action. It must be subscribed by the defendant, in person, or by an attorney or agent, who must add to his signature his office address, with the particulars, prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney.

§ 856. Application for judgment.—It has been decided that if no objection be made to the proceedings before the referee, or to his report, upon the coming in of his report, and without further notice, the plaintiff may have judgment. The reference is not a proceeding which renders a new notice to the defendants necessary, nor need such reference be executed in the county in which the action is triable.⁶⁵

⁶² Rule 60.

⁶³ Kelly v. Searing, 4 Abb. 354.

⁶⁴ Knapp v. Burnham, 11 Paige,

⁶⁵ Eyring v. Hercules, 9 App. Div.

306; 41 N. Y. Supp. 191; Kelly v.

Searing, 4 Abb. 354.

But it is said in a recent case that while in actions where an interlocutory judgment must precede final judgment parties may move for the former upon the pleadings yet that where the interlocutory judgment may be granted on motion, it is irregular to order final judgment to be entered on a referee's report, without notice to the other party so that he can be heard before the confirmation of the report.⁶⁶

§ 857. **What may be included in amount due on mortgage.**—The amount due on the bond and mortgage for principal and interest may be collected, though it exceed the penalty of the bond.⁶⁷

If taxes shall have been paid by the mortgagee to protect his lien, the amount of them may be added to the amount due on the bond;⁶⁸ so also if rent be paid by the mortgagee, the mortgage being upon a leasehold, the rent may be added,⁶⁹ but insurance premiums cannot be collected unless by express agreement of the mortgagor or owner of the estate.⁷⁰ It might admit of a doubt as to whether either taxes or insurance premiums could be included in the amount due, if there were no proper allegations in the complaint to show that the plaintiff was entitled to include them.⁷¹

For it is said, neither a mortgagor of real property nor the owner of the equity of redemption therein owes a duty to the mortgagee in the absence of a provision in the mortgage to that effect, to preserve the mortgaged premises against taxes and the consequent impairment of the lien of the mortgage.⁷²

An agreement by a plaintiff to suspend a sale until the happening of a certain event, the delay not to exceed a specified period, in consideration of an agreement by the defendant that the plaintiff shall be permitted to include in the amount to be found due sums paid for insurance, costs of a survey and searches is binding upon the parties.⁷³

⁶⁶ *Godwin v. Liberty-Nassau Bldg. Co.*, 144 App. Div. 164; 128 N. Y. Supp. 791.

⁶⁷ *Mowér v. Kip*, 6 Paige, 88. See also *Long v. Long*, 16 N. J. Eq. 59.

⁶⁸ *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Burr v. Veeder*, 3 Wend. 412; *Rapelye v. Prince*, 4 Hill, 119.

⁶⁹ *Robinson v. Ryan*, 25 N. Y. 320.

⁷⁰ *Faure v. Winans*, 1 Hopk. 283.

⁷¹ Holding that they cannot be recovered without allegations in the complaint, *Hibernia Sav. & L. Soc. v. Conlin*, 67 Cal. 178; 7 Pac. 477. *Contra*, *De Leuw v. Neely*, 71 Ill. 473.

⁷² *Shaw v. Youmans*, 105 App. Div. 329; 94 N. Y. Supp. 178.

⁷³ *Mayer v. Jones*, 132 App. Div. 106; 116 N. Y. Supp. 300.

The parties may also agree that taxes, as to the validity of which there is a dispute, shall not be paid out of the proceeds of the sale and the court may properly make an order to that effect notwithstanding an objection by the municipality by which they are imposed. For the provisions of the Code⁷⁴ relating to payment of taxes and assessments on mortgaged land as part of the expenses of foreclosure sale, are intended solely for the benefit of the purchasers and not for the municipality by which the tax is imposed.⁷⁵

Where a sale on foreclosure is vacated subsequently, the judgment of foreclosure in *res adjudicata* as to the amount due, including costs and disbursements.⁷⁶

§ 858. Oath of referee.—Section 1016 of Code of Civil Procedure requires that a referee appointed as prescribed in either of the foregoing sections of the title, must, before proceeding to hear the testimony, be sworn faithfully and fairly to try the issues, or to determine the questions referred to him, as the case requires, and to make a just and true report according to the best of his understanding. This oath may be waived. It is an open question as to whether a reference to compute the amount due is within this provision. It has been adjudged to be an irregularity to omit the oath, which would be a sufficient excuse to a purchaser desiring to be relieved;⁷⁷ and, on the other hand, the taking of the oath has been held to be unnecessary.⁷⁸ It is the better practice for the referee to be sworn.

§ 859. Duties of referee on reference under the rule.—If the reference be merely to compute the amount due, the testimony of the witnesses need not be signed by them or filed with the report;⁷⁹ but in such cases, it is proper that the referee should annex to his report an abstract of the documentary evidence produced before him.⁸⁰

If, some of the defendants being infants or absentees, the order of reference requires the referee, in addition to computing

⁷⁴ Code Civ. Proc. § 1676.

⁷⁸ McGowan v. Newman, 4 Abb.

⁷⁵ Morgan v. Fullerton, 9 App. N. C. 80.

⁷⁹ Rule 30.

⁷⁶ Clark v. Levy, 130 App. Div.

389; 114 N. Y. Supp. 890.

⁸⁰ Security Fire Ins. Co. v. Martin, 15 Abb. 479.

⁷⁷ Exchange Fire Ins. Co. v. Early, 4 Abb. N. C. 78.

the amount due, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made,⁸¹ the testimony of the witnesses must be signed by them, and the report of the referee must be filed with the testimony.⁸²

If the plaintiff is a corporation, it is proper to examine the officers of the corporation as to the payments which ought to be credited on the mortgage.⁸³

§ 860. The referee must swear and examine the witnesses himself, and the evidence offered before him must be legal evidence of the matters referred to him; he cannot take the testimony of witnesses by their affidavits taken before some other officer qualified merely to administer oaths.⁸⁴ The referee has no discretion given to him, and is limited to the matters referred to him; if he is authorized to examine the plaintiff as to payments on the mortgage, he is limited to that, and, under an order of reference against an absent defendant, the absent defendant cannot be examined in behalf of his co-defendants as to a defense of fraud set up in their answer.⁸⁵ This would certainly be so, as against a defendant who had once been heard upon the merits, but it is believed that as against absent or infant defendants the rule might be different where the reference was to take proof of the facts and circumstances stated in the complaint. In the case of infants or absentees, the plaintiff must prove his debt before the referee in the same manner as if nothing had been admitted by the answer.⁸⁶

§ 861. Production of bond on trial.—The want of possession of the bond by the mortgagee will, if unexplained, operate as evidence of payment, and, if payment be alleged as a defense, the mortgagee must be defeated if he fails either to produce the bond on the trial, or account for its absence.⁸⁷

But where, in an action to foreclose a mortgage, the complaint

⁸¹ Rule 60.

⁸² Rule 30; *Wolcott v Weaver*, 3 How. Pr. 159; *Anonymous*, *Clarke*, 423; 2 R. S. 186, §§ 126, 127, 129.

⁸³ *Ontario Bank v. Strong*, 2 Paige, 301.

⁸⁴ *Security Fire Ins. Co. v. Martin*, 15 Abb. 479.

⁸⁵ *McCrackan v. Valentine's Executors*, 9 N. Y. (5 Seld.) 42.

⁸⁶ *Mills v. Dennis*, 3 Johns. Ch. 367.

⁸⁷ *Bergen v. Urbahn*, 83 N. Y. 49, See also *Weems v. Coker*, 70 Ga. 746.

alleges the making, execution and delivery of a bond as security for the payment of which the mortgage was given, and these averments are admitted by the answer and payment is set up as a defense, the failure of plaintiff to produce the bond, although unexplained, does not entitle defendant to a dismissal of the complaint.⁸⁸

And the failure to produce the bonds which ordinarily accompany mortgages does not constitute a defense to an action to foreclose where the mortgages do not recite the bonds and the mortgagor, although he says he has them in his possession, fails to produce them.⁸⁹

The presumption of payment may also be rebutted, and the mortgagee may have judgment of foreclosure on a lost bond and mortgage, and cannot be compelled to furnish indemnity to the mortgagor in a case where there is strong ground for believing that the loss is genuine, and that there was no assignment.⁹⁰ A bond of indemnity is not required in an action on a lost instrument which is not negotiable.⁹¹ But indemnity will be required if the mortgage secures a negotiable note which has been lost.⁹²

An action to foreclose a mortgage which has not been discharged, but which has been delivered to the mortgagor, together with the note which it was given to secure, may be maintained by proving that the note was never paid, and that the delivery was procured by the fraud of the mortgagor.⁹³

A mortgage may be valid though there be no bond, and in such a case the statute confines the remedy of the mortgagee to the lands mentioned in the mortgage, unless there is an express covenant contained in the mortgage, or in some other instrument.⁹⁴ The failure to produce a bond can be accounted for by proof that no bond was, in point of fact, ever executed, even though a bond is recited in the mortgage.⁹⁵

⁸⁸ *Anderson v. Culver*, 127 N. Y. 377; 28 N. E. 32.

⁸⁹ *Parkhurst v. Berdell*, 5 N. Y. Supp. 328.

⁹⁰ *Stoddard v. Gailor*, 90 N. Y. 575. See also *Sharp v. Cutler*, 25 N. J. Eq. 425.

⁹¹ *Wright v. Wright*, 54 N. Y. 437; *Blade v. Noland*, 12 Wend. 173; *Frank v. Wessels*, 64 N. Y. 155, 159; *Moor v. Fall*, 42 Me. 450; *Torrey v.*

Foss, 40 Me. 74; *Hough v. Barton*, 20 Vt. 455; *Hopkins v. Adams*, Vt. 407.

⁹² *Yerkes v. Blodgett*, 48 Mich. 211; 12 N. W. 211.

⁹³ *Grimes v. Kimball*, 85 Mass. (3 Allen) 518.

⁹⁴ *Real Prop. Law*, § 249; *Gaylord v. Knapp*, 15 Hun. 87; *Green v. Fry*, 93 N. Y. 35.

⁹⁵ *Munoz v. Wilsen*, 111 N. Y. 295;

"It is only when a bond is shown to have accompanied a mortgage, and contains the only apparent evidence of the debt to which the mortgage is collateral, that it must be produced or its non-production accounted for on the trial. . . . The reason of the rule wholly fails when there has never been a bond or when the existence of and liability for the debt secured is proved by the admissions and covenants contained in the mortgage."⁹⁶

§ 862. Mortgage debt payable in instalments.—Where the mortgage debt is payable in instalments the practice is controlled by sections 1634 to 1637 of the Code of Civil Procedure, which are a substantial re-enactment of the provisions of the Revised Statutes.⁹⁷ These sections are as follows:

"Where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due, and the plaintiff's costs."⁹⁸

"In a case specified in the last section, if, after a final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal and interest, and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but, upon a subsequent default in the payment of principal or interest, the court may make an order, directing the enforcement of the judgment, for the purpose of collecting the sum then due."⁹⁹

"Where the mortgage debt is not all due, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct, that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may

18 N. E. 855; *Bergen v. Urbahn*, 83 N. Y. 49; *Goodhue v. Berrien*, 2 Sand. Ch. 630; *Bennett v. Edgar*, 46 Misc. R. 231; 93 N. Y. Supp. 203.

⁹⁶ *Munuz v. Wilsen*, 111 N. Y. 295; 18 N. E. 855, per *RUGER*, C. J.

⁹⁷ R. S. 191, §§ 162 to 166.

⁹⁸ Code of Civ. Pro. § 1634.

⁹⁹ Code of Civ. Pro. § 1635.

apply for an order, directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order, as often as a default happens.”¹

“If, in a case specified in the last three sections, it appears that the mortgaged property is so circumstanced, that a sale of the whole will be most beneficial to the parties, the final judgment must direct, that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action, and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.”²

A judgment, entered upon the foreclosure of a mortgage for one instalment of interest, which directs that the whole premises be sold subject to the whole mortgage debt and interest from a day named, contravenes the provisions of the Code,³ but is irregular merely. When not attached within a year by the party prejudiced, it cannot be collaterally attached thereafter.⁴

Where judgment was entered on the report of a referee which showed one instalment due, and the mortgagor paid that and a subsequent instalment, but failed to pay a third, it was held that a sale made under an *ex parte* order directing a sale for the third instalment was void.⁵

If more is sold than is necessary to pay the judgment, the owner, if he be present, must object seasonably or he will be held to have waived.⁶

§ 863. If the whole amount secured by the mortgage has not become due, the referee will be directed to examine and report whether the mortgaged premises can be sold in parcels.⁷ In such

1 Code of Civ. Pro. § 1636.

5 Long v. Lyons, 54 How. Pr. 129.

2 Code of Civ. Pro. § 1637.

6 McBride v. Lewisohn, 17 Hun,

3 Code Civ. Pro. §§ 1636, 1637;

524.

Matter of Stilwell, 139 N. Y. 337;
Brenen v. North, 7 App. Div. 81.

7 Rule 60; *ante*, § 847; Everitt v.
Huffman, 1 Paige, 648.

4 Stuyvesant v. Weil, 26 Misc. 445;
57 N. Y. Supp. 592.

case the referee will annex to his report all of the testimony taken before him, and the testimony of the witnesses must be signed by them.⁸ If the referee decides that a sale of the whole premises is necessary, he should state the reasons why that will be the most beneficial to the parties. And if he decides that the property may be sold in parcels, he should state the relative situation and value of the several parcels, and which should be first sold, or such other facts in relation to the property as will enable the court to act understandingly in making such an order of sale as will be most beneficial to the parties.⁹ A sale of the whole premises can be most beneficial to the parties, only when the largest amount of money is realized from the sale, so as to leave the largest surplus after paying the mortgage debt. The benefit intended by the statute is common to both parties.¹⁰

Where the judgment provides for a sale to pay interest and one instalment only, but where the plaintiff has elected to declare the whole principal sum due since the action was commenced, the court may, by order, direct a sale for the payment of the whole amount, without amending the complaint.¹¹

§ 864. New application to enforce payment of second instalment.

—If the mortgage be payable in instalments, and if, upon a reference had for that purpose, the referee reports that the premises should not be sold in parcels, it is not necessary to obtain another report upon that subject previous to the obtaining of another order of sale to pay instalments which have become due subsequent to the judgment; but, in such a case, it is necessary to have another reference to report the amount which had become due on the second instalment of the bond and mortgage; for, upon such reference, the defendant would have the right to show that the instalment had been paid either wholly or in part.¹²

Upon any further instalment of principal or interest becoming payable, it will be necessary to have a new reference as to the amount due, but the question as to whether the mortgaged prem-

⁸ Rule 30.

¹¹ *Malcolm v. Allen*, 49 N. Y. 448.

⁹ *Ontario Bank v. Strong*, 2 Paige, 301.

¹² *Knapp v. Burnham*, 11 Paige, 330; *Long v. Lyons*, 54 How. Pr. 129.

¹⁰ *Gregory v. Campbell*, 16 How. Pr. 417.

ises can or cannot be sold in parcels, will not again be inquired into.¹³

§ 865. **Covenants other than for payment of money.**—The provisions of the statute by which future instalments not yet due can be adjudicated upon, and the rights of the parties to the action in relation to them determined by the judgment, apply only to the foreclosure of mortgages executed to secure the payment of money by instalments, and cannot be applied to mortgages conditioned for the performance of covenants other than for the payment of money; as, for example, to support the mortgagee. In such cases, breaches must be alleged, and if denied, established by evidence extrinsic to the bond and mortgage and lapse of time; for, while in the one case a debt is acknowledged to exist by the execution of the bond and mortgage, to be paid absolutely at a future day, in the other there is no present debt, and will not be at any future day if the obligor performs his covenant or the condition of his bond, and the presumption is that he will not suffer any breach of it.¹⁴

§ 866. **A mortgage may be foreclosed for default in payment of interest,** or for an instalment of principal, although no such provision is contained in it.¹⁵

When a mortgage is given to secure money to fall due in several instalments, a judgment enforcing the lien of the mortgage for one instalment is not a bar to another action to enforce it for another instalment subsequently falling due.¹⁶

Judgment should be rendered for all instalments of the mortgage debt that may then be due, though they may have come due subsequent to the commencement of the action.¹⁷ And where a foreclosure was commenced for non-payment of interest, the

¹³ Knapp v. Burnham, 11 Paige, 330.

¹⁴ Ferguson v. Ferguson, 2 N. Y. (2 Comst.) 360, 364, modifying 3 Barb. Ch. 616; Morrison v. Morrison, 4 Hun, 410.

¹⁵ Johnson v. Buckhaults, 77 Ala. 276; Butler v. Blackman, 45 Conn. 159; Giles v. Lewis, 4 Del. Ch. 51; Hatcher v. Chancey, 71 Ga. 689; Miller v. Remley, 36 Ind. 539; Smart v. McKay, 16 Ind. 45; Hunt

v. Harding, 11 Ind. 245; Adams v. Essex, 1 Bibb. (Ky.) 149; 4 Am. Dec. 623; Reddick v. Gressman, 49 Mo. 389; Scheibe v. Kennedy, 64 Wis. 564; 25 N. W. 646; *contra* Brodribb v. Tibbets, 58 Cal. 6.

¹⁶ McDougal v. Downey, 45 Cal. 165.

¹⁷ Smalley v. Martin, Clark, 293; Asendorf v. Meyer, 8 Daly, 278. See also Adams v. Essex, 1 Bibb. (Ky.) 149; 4 Am. Dec. 623.

plaintiff was held entitled to elect the whole to be due under a default clause for non-payment of interest within thirty days after it became due, although the thirty days did not expire until after the service of summons.¹⁸

On foreclosure for unpaid interest, the decree may include taxes paid by the mortgagee to preserve his security, and he need not wait until the principal debt is due.¹⁹ But the mortgagee cannot collect such taxes until some default is made in the payment of principal or interest.²⁰

Where the complainant was the owner of two mortgages upon the same premises, and the whole of the second mortgage had become due, and the first mortgage was payable in instalments and had not all become due, it was held that the complainant was entitled to a decree to sell sufficient of the mortgaged premises to pay the whole of both mortgages, unless the defendant, previous to the sale, should pay the junior mortgage and the costs of foreclosure, together with the instalments which had become due on the senior mortgage.²¹

§ 867. **Opening default.**—In actions to foreclose mortgages, the settled practice has been against setting aside a regular default, simply upon affidavits excusing it, accompanied with an affidavit of merits, although in ordinary cases at law the rule is different. The advantages of delay have been deemed sufficient to justify the adoption of more stringent practice than that in this class of cases. In *Hunt v. Wallis* (6 Paige, 371), it was held to be the settled practice of the Court of Chancery not to set aside a regular order to take a bill as confessed in a foreclosure suit or in any other case, where the defendant has any interest or inducement to delay the proceedings upon a simple affidavit of merits, although an excuse is given for such default. But in such cases the defendant must either produce the sworn answer which he proposes to put in, so that the court may see that he has merits, or must, in his petition or affidavit, state the nature of his defense, and his belief in the truth of the matters constituting such defense, so far at least as to enable the court to see that injustice will probably be done, if the order to take the bill as

¹⁸ *Malcolm v. Allen*, 53 N. Y. 448.

²⁰ *Williams v. Townsend*, 31 N.

¹⁹ *Brickell v. Batchelder*, 62 Cal.

Y. 411.

⁶²³; *Kepley v. Jansen*, 107 Ill. 79.

²¹ *Hall v. Bamber*, 10 Paige, 296.

confessed is permitted to stand.²² And as this rule is not inconsistent with any provision made by the Code of Procedure, it is still continued in force.²³

An order of the county court denying a motion to open a default is appealable as it affects a substantial right.²⁴

But where a motion to open a default on the ground of no service of summons, or in the alternative to show that the mortgage was never executed by the mortgagor is denied, and an appeal from such decision is dismissed the validity of the mortgage becomes *res adjudicata* as between the parties.²⁵

Where a defendant who has defaulted may be regarded as having had his day in court and there is no clear proof of injustice done the judgment will not be vacated.²⁶

THE JUDGMENT.

§ 868. Form and contents of the judgment of foreclosure and sale.—Rule 61 provides that, in every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far, at least, as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, as provided by sections 1626 and 1676 of the Code, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, unless otherwise directed, he pay the expenses of the sale, as provided in section 1676 aforesaid, and that he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff,

²² Hunt v. Wallis, 6 Paige, 371; Winship v. Jewett, 1 Barb. Ch. 173; Goodhue v. Churchman, 1 Barb. Ch. 596; Powers v. Trenor, 3 Hun, 3; 5 N. Y. Supp. (T. & C.) 231.

²³ Per DANIELS, J., in Powers v. Trenor, 3 Hun, 3; 5 N. Y. Sup. (T. & C.) 231; Rule 84.

²⁴ Code Civ. Pro. § 1342; King v. Sullivan, 31 App. Div. 549; 52 N. Y. Supp. 130.

²⁵ De Blase v. Hartfield, 33 Misc. R. 316; 68 N. Y. Supp. 468.

²⁶ Cook v. New Amsterdam Real Est. Ass'n, 2 App. Div. 55; 37 N. Y. Supp. 161.

or his attorney, for the amount so paid, and file the same with his report of sale, and that the purchaser at such sale be let into possession of the premises on production of the deed.²⁷ All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sales within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited, or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases to compute the amount due, or to sell mortgaged premises, shall be selected by the court, and the court shall not appoint as such referee a person nominated by a party to the action, or his counsel.²⁸

Where there are two or more parcels of land and the situation of the property and the nature and amount of subsequent incumbrances have been brought to the attention of the court it may authorize a sale of sufficient of the mortgaged premises to pay all the incumbrances.²⁹

In case a judgment contains arbitrary and erroneous directions as to an apportionment of the proceeds of the sale between different parcels where the land is sold as an entirety, the judgment should be modified so as to direct that a reference be had to ascertain and determine the relative value of the parcels, and that upon confirmation of the referee's report the proceeds be apportioned in accordance with that value.³⁰

The judgment of foreclosure gives to the plaintiff no new or increased interest in the mortgaged premises; his status is simply that of mortgagee until a sale under the judgment.³¹

§ 869. Who may be appointed referee.—No person holding the

²⁷ Bird v. Belz, 33 Kans. 391; 6 Pac. 627.

²⁸ Rule 61.

²⁹ Andrews v. O'Mahoney, 112 N. Y. 567; 20 N. E. 374.

³⁰ Hogg v. Rose, 183 N. Y. 182; 76 N. E. 38.

³¹ Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394; 31 N. E. 231.

office of clerk, deputy clerk, special deputy clerk, or assistant in the clerk's office, of a court of record, within the county of New York, shall hereafter be appointed by any court or judge a referee, receiver or commissioner, except by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear or to plead.³²

Except in cases where the parties consent, as provided in section 1011 of the Code of Civil Procedure, no person, unless he is an attorney of the court in good standing, can be appointed sole referee in any pending action or proceeding. Nor can any person be appointed a referee who is the partner or clerk of the attorney, or counsel, of the party in whose behalf such application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel.³³

§ 870. Provision in judgment as to order of sale.—Where a controversy exists between different defendants in relation to the order in which the several portions of the premises should be sold, instead of directing a reference preliminary to the judgment to settle the order in which the premises should be sold, a provision may be inserted in the judgment directing that, if it shall appear to the referee that separate parcels of the mortgaged premises have been conveyed or incumbered by the mortgagor, or by those claiming under him subsequent to the lien of the plaintiff's mortgage, the referee shall sell the mortgaged premises in parcels, in the inverse order of alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to the referee.³⁴ This qualification of discretion is necessary to meet special cases. It should always be inserted in the decree when such decree directs the sale of the premises in parcels in the inverse order of alienation.³⁵

§ 871. Prior incumbrancers.—Although a prior incumbrancer may be made a party to an action of foreclosure for the purpose of having the amount of such incumbrance determined and liqui-

³² Judiciary Law, § 251. But see *Standfast v. Crotty*, 37 N. Y. St. Rep. 672; 13 N. Y. Supp. 584.

³³ Rule 79.

³⁴ *Knickerbacker v. Eggleston*, 3

How. Pr. 130. See *Clark v. Strong*, 105 App. Div. 179.

³⁵ *New York Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 353; *Rathbone v. Clark*, 9 Paige, 648.

dated, and the amount paid out of the fund produced by a sale,³⁶ a prior mortgage cannot be foreclosed, without provision being made for its payment, upon an action by a junior incumbrancer; and a judgment which provides for such foreclosure will be opened upon motion.³⁷ But where the prior mortgagee has been negligent in asserting his rights, he will not be allowed to disturb the rights of a *bona fide* purchaser of the property, and will be compelled to resort to the fund produced by the sale, in whose hands soever the same may be.³⁸

The judgment in an action to foreclose a junior mortgage may direct a sale subject to the prior incumbrance.³⁹

§ 872. If in an action to foreclose a deed, absolute upon its face, as a mortgage, the defendant denies that it was a mortgage, and alleges it to be an absolute grant, the judgment should be either that the defendant be foreclosed by strict foreclosure, or that the answer of the defendant is true, according as the plaintiff may desire, without prejudice to the right of the plaintiff to proceed at law for the collection of back rents.⁴⁰

§ 873. Property situated in different counties.—Where real property, sold by virtue of a judgment in an action to foreclose a mortgage, is situated in a county other than that in which the judgment is entered, the judgment must be also entered in the office of the clerk of the county wherein the property is situated, before the purchaser can be required to pay the purchase money, or to accept a deed. The clerk of the latter county must enter it in the judgment book kept by him, upon filing with him a copy thereof, certified by the clerk with whom it is entered.⁴¹

§ 874. Amending judgment.—The court has ample power to correct the judgment by amendment whenever that may be necessary to promote the ends of justice.⁴²

³⁶ Holcomb v. Holcomb, 2 Barb. 20; The Western Ins. Co. v. The Eagle Fire Ins. Co., 1 Paige, 284; Vanderkemp v. Shelton, 11 Paige, 28; Hancock v. Hancock, 22 N. Y. 568; Chamberlain v. Lyell, 3 Mich. 448.

³⁷ McReynolds v. Munns, 2 Keyes, 214. See Stillwell v. Hart, 40 App. Div. 112; 57 N. Y. Supp. 639.

³⁸ Hamlin v. McCahill, Clarke, 249.

³⁹ Daily v. Kingon, 41 How. Pr. 22; Western Ins. Co. v. Eagle Fire Ins. Co., 1 Paige, 284.

⁴⁰ Hone v. Fisher, 2 Barb. Ch. 559.

⁴¹ Code of Civ. Pro. § 1677.

⁴² Harrison v. Union Trust Co., 144 N. Y. 326; 39 N. E. 353; Wing v. De La Rionda, 125 N. Y. 678; 25 N. E. 1064; Brown v. Beckman, 53 App. Div. 257; 65 N. Y. Supp. 740.

May amend as to clerical error

Thus, where a sale had been made by a correct description of the property, and an application was made to compel a purchaser to take title, and it was shown that there was a material clerical error in the description contained in the judgment, the court ordered a correction *nunc pro tunc*, and compelled the purchaser to perform.⁴³

It is also within the jurisdiction of the court to amend a judgment by inserting provisions therein requiring the mortgagor to convey lands in an adjoining State, covered by the mortgage.⁴⁴

The question as to the validity or regularity of a provision in a judgment of foreclosure, not raised by a party to the suit by answer, appeal or motion, may not be raised collaterally where the court rendering the judgment had general jurisdiction of the parties and the subject-matter of the action, the remedy of the party being by a motion to set aside, correct or annul the judgment.⁴⁵

§ 875. A decree of foreclosure and sale does not expire by reason of the passage of any number of years, and whether it will be enforced after a long time has elapsed is a question for the Court to decide upon a consideration of all the facts, and this decision is not generally appealable to the Court of Appeals.⁴⁶

JUDGMENT FOR DEFICIENCY.

§ 876. The judgment should provide that if the proceeds of the sale be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the referee specify the amount of such deficiency in his report of sale, and that the defendants personally liable for the mortgage debt pay the same to the plaintiff.⁴⁷ The

without notice to defendant in foreclosure. Commercial Bank v. Catto, 13 App. Div. 608; 43 N. Y. Supp. 777, aff'd 163 N. Y. 569; 57 N. E. 1107.

⁴³ Wood v. Martin, 66 Barb. 241; Hogan v. Hoyt, 37 N. Y. 300; Bogart v. Bogart, 45 Barb. 121.

⁴⁴ Union Trust Co. v. Olmsted, 102 N. Y. 729; 7 N. E. 822.

⁴⁵ Matter of Estate of Stilwell, 139 N. Y. 337; 34 N. E. 777.

⁴⁶ Wing v. De La Rionda, 125 N. Y. 678; 25 N. E. 1064.

⁴⁷ Code, § 1627; McCarthy v. Graham, 8 Paige, 480. Before the statute a personal judgment could not be rendered against the mortgagor. The remedy was by action upon the bond. Dunkley v. Van Buren, 3 Johns. Ch. 330; Globe Ins. Co. v. Lansing, 5 Cow. 380. And the creditor had the right to institute proceedings upon the bond even during the pendency of the foreclosure suit. Jones v. Conde, 6 Johns. Ch. 77. In New Jersey (Laws 1880, p. 255, ch. 170) no execution can issue

statute under which this relief can be obtained was enacted to give the court in which the foreclosure was had, full jurisdiction over the whole subject, and to save the necessity of actions at law and to allow one court to dispose of the whole subject, instead of compelling the parties to resort to different tribunals.⁴⁸

It is not essential to such a judgment that the amount of the deficiency should be ascertained by a sale in the action; it being sufficient if it be ascertained by a sale in an action to foreclose a prior mortgage to which the person liable was a party.⁴⁹ The question of liability for a deficiency must be determined by the judgment of foreclosure and sale, and where that judgment holds that a defendant is not liable for a deficiency, such portion thereof is final and not interlocutory, and is therefore receivable in the Court of Appeals.⁵⁰

§ 877. Judgment for deficiency not allowed.—This relief can, however, be granted only where the defendant personally liable has been personally served with summons, or has appeared in the action.⁵¹ A personal judgment cannot be rendered against a non-resident who is not served and does not appear, and in such case the judgment is valid as a judgment *in rem* as against the specific property described in the complaint, but it is void as a judgment *in personam*, as against the defendant who was not served.⁵²

If the complaint does not ask for a judgment for deficiency, it cannot be rendered as against a defendant who does not defend, but suffers judgment to be taken against him by default.⁵³

In an action to foreclose, two joint guarantors were made par-

on judgment for deficiency, but an action at law can be commenced thereon in six months. If such an action is brought, the person against whom judgment is sought may redeem within six months after judgment is rendered against him in it. *Naar v. Union, etc., Land Co.*, 34 N. J. Eq. 111.

⁴⁸ *Frank v. Davis*, 135 N. Y. 275; 31 N. E. 1100; *Scofield v. Doscher*, 72 N. Y. 491; *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341; *In re Collins*, 17 Hun, 289; *Thorne v. Newby*, 59 How. Pr. 120.

⁴⁹ *Frank v. Davis*, 135 N. Y. 275; 31 N. E. 1100.

⁵⁰ *Wager v. Link*, 134 N. Y. 122; 31 N. E. 213.

⁵¹ See *Matter of Marshall*, 53 App. Div. 136; 65 N. Y. Supp. 760.

⁵² *Schwinger v. Hickok*, 53 N. Y. 280; Code of Civ. Pro. § 1627.

⁵³ *Simonson v. Blake*, 12 Abb. 331; 20 How. Pr. 484; *Bullwinker v. Ryker*, 12 Abb. 311; *French v. New*, 20 Barb. 484. Compare *Matter of McLaughlin*, 76 App. Div. 75; 78 N. Y. Supp. 798; *Durham v. Chapin*, 13 App. Div. 94; 94; 43 N. Y. Supp. 342.

ties, one defended and the other made default, and the plaintiff settled with the one who resisted, and gave him a release under the act of 1838. A judgment for deficiency was refused against the other, and the plaintiff was left to his remedy at law upon the bond.⁵⁴

A composition with the creditors of a bankrupt, when duly confirmed and carried out, is a bar to a recovery of a deficiency judgment on the foreclosure of a mortgage given by the bankrupt where the mortgagee, having been duly scheduled as a secured creditor in the bankruptcy proceedings, did not prove his claim on the composition.⁵⁵ And where a mortgagor, who denies liability for a deficiency, agrees that the rents from the premises shall be deposited to the joint account of the parties "to be held to abide the event of the action," the taxes and insurance premiums to be paid from the sums deposited, is ultimately held not liable for a deficiency, the mortgagee has no right to the balance of such deposit.⁵⁶ But where an assignment of a mortgage to an executrix contained the provision "and I hold myself personally responsible for the payment of the said mortgage or any deficiency thereunder" it was held to be clearly the intention of the assignee to become personally responsible, although the assignment was executed in her representative capacity.⁵⁷

A personal judgment for deficiency against a mortgagor could be set aside where it appears that it was obtained by the perjury of the plaintiff suing as assignee of the mortgage.⁵⁸

§ 878. Adjusting liabilities for deficiency between defendants.—

Where more than one person is liable personally for the payment of the mortgage debt, some being primarily and the others secondarily liable, the judgment should provide for a sale of the mortgaged premises, and for a personal judgment against the principal debtor; and that in case an execution against him does not realize the money, an execution afterward go against the sureties in the order of their liability, for any balance due after sale of the prem-

⁵⁴ North American Fire Ins. Co. v. Handy, 2 Sandf. Ch. 492.

⁵⁵ American Woolen Co. v. Cohen, 142 App. Div. 880; 127 N. Y. Supp. 787.

⁵⁶ Rutherford Realty Co. v. Cook,

130 App. Div. 76; 114 N. Y. Supp. 274.

⁵⁷ Westphall v. Carter, 1 Misc. R. 403; 20 N. Y. Supp. 945.

⁵⁸ Kolashen v. Till, 136 App. Div. 632; 121 N. Y. Supp. 393.

ises, and execution unsatisfied against those severally liable ahead of them.⁵⁹

Where the mortgagee has assigned the mortgage with guaranty of payment, but has received less than its face, he is liable only as surety, and, it has been held, that he is so liable only to the amount of the consideration of the transfer, with interest.⁶⁰ In such a case, after the usual judgment for the foreclosure and sale of the mortgaged premises, and the payment of the debt and costs out of the proceeds of such sale, and a judgment over against the mortgagor personally for a deficiency, if any, the judgment must further direct, that if the plaintiff is not able to collect the amount of such deficiency out of the estate of the mortgagor, upon the issuing of an execution against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this State, the defendant who guaranteed the mortgage pay so much of such deficiency as the proceeds of the sale, and the amount, if any, which shall have been collected of the mortgagor personally, subsequent to the assignment of the plaintiff, exclusive of the costs and expenses of the foreclosure and sale, shall be less than the amount received by him for the assignment, with interest. The judgment should further direct that if the guarantor pays the amount thus adjudged against him personally, or if the same is collected out of his property, he shall have the benefit of the judgment against the mortgagor for the purpose of enabling him to obtain remuneration to the same extent with interest, either by a new execution against the property of the mortgagor, or by filing a creditor's bill, as he may think proper.⁶¹

⁵⁹ Luce v. Hinds, Clarke, 453; Curtis v. Tyler, 9 Paige, 432; Weed v. Calkins, 24 Hun, 582. This is clearly the rule when the surety has guaranteed the *collection* of the debt. Leonard v. Morris, 9 Paige, 90; Harlem Savings Bank v. Mickelsburgh, 57 How. Pr. 106. In Michigan it has been held that a guarantor of collection is not a proper party to the action to foreclosure, and that no personal judgment should be given against him. Johnson v. Shepard, 35 Mich. 115.

⁶⁰ Rapelye v. Anderson, 4 Hill, 472; Jones v. Stienbergh, 1 Barb. Ch.

250; Goldsmith v. Brown, 35 Barb. 484.

⁶¹ Jones v. Stienberg, 1 Barb. Ch. 250. In Farnham v. Mallory (5 Abb. N. S. 380), which was an action upon a guaranty that a mortgage on the property of the plaintiff would be paid, the Court of Appeals held that the judgment should be, not that the defendant should pay absolutely to the plaintiffs, but that he should cause to be paid, or satisfied of record, the said mortgage within thirty days from the date of said judgment, or, in the event of his not doing so, then that he pay to the

§ 879. **Personal judgment without foreclosure.**—If the debt be tendered before the action to foreclose is brought, this will destroy the lien of the mortgage, and will prevent a judgment for the sale of the property; but the plaintiff will be entitled to a money judgment, for the tender does not satisfy or destroy the debt.⁶² This was not so before the Code, for the Court of Chancery could not entertain jurisdiction where the complainant had no right to come into that court to foreclose the mortgage as against some interest in the mortgaged premises, or in some part thereof.⁶³

The judgment which the court is authorized to render, is a judgment for the residue of the debt remaining unsatisfied after a sale of the mortgaged premises.⁶⁴ The plaintiff in a foreclosure suit cannot, therefore, have a contingent personal judgment against some of the defendants before final judgment of foreclosure and sale.⁶⁵

Whatever may be the form of the debt, an absolute personal judgment cannot be rendered in a judgment of foreclosure. A personal judgment can be directed only to the extent of the deficiency remaining after a sale.⁶⁶

Where the owner of a junior mortgage procured a judgment of foreclosure, and afterward failed to procure a sale for the reason that the holder of the prior mortgage took proceedings to foreclose, and a sale was had under the judgment on the prior mortgage for an amount not more than sufficient to pay such mortgage and the costs of foreclosing it, a motion for judgment for deficiency for the amount of the junior lien with costs was denied, and such denial was affirmed at General Term. It was held that the plaintiff should have ascertained the amount of the deficiency by a sale in his own action, and that, failing in that, his only remedy was at law upon the bond.⁶⁷ But where during the pendency of an action to foreclose, the mortgaged premises were sold under the foreclosure of a prior mortgage, and a surplus remained, and the plaintiff in the junior foreclosure proceeded with his action and entered judgment providing for a sale and a per-

plaintiffs the amount of said judgment.

⁶² McCoy v. O'Donnell, 2 N. Y. Supp. (T. & C.) 671.

⁶³ Mann v. Cooper, 1 Barb. Ch. 185.

⁶⁴ Code of Civ. Pro. § 1627.

⁶⁵ Cobb v. Thornton, 8 How. Pr. 66.

⁶⁶ Loeb v. Willis, 22 Hun, 508; Brown v. Willis, 67 Cal. 235; 7 Pac. 682; Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609.

⁶⁷ Loeb v. Willis, 22 Hun, 508.

sonal judgment for deficiency, under which the surplus in the prior foreclosure was paid to him, he was permitted to have a personal judgment ascertained and docketed upon application to the court for that purpose.⁶⁸

§ 880. **Personal representatives of deceased obligor.**—No personal judgment against the personal representatives of a deceased person liable for the mortgage debt can be enforced by execution, until an account of the decedent's estate has been taken; unless they admit assets in their hands sufficient to pay such deficiency and all other debts of the decedent of an equal and of a higher class;⁶⁹ but the judgment may properly establish the debt payable out of the assets of the deceased,⁷⁰ and application to the proper surrogate may be made to have a sufficient portion of the estate of the decedent reserved to meet an anticipated deficiency.⁷¹

No decree can be had against an administrator if the proper notice to present claims has been published and no claim has been made within the time prescribed by law, and the accounts of the administrator have been settled and the estate has been distributed.⁷²

After the death of the mortgagor the deficiency must be paid by the personal estate, and so much of it as was caused by neglect to pay taxes is a preferred debt.⁷³

If the heirs of an intestate bondsman and mortgagor, dying seized of the mortgaged premises and other real property but leaving no personal estate, convey the mortgaged premises to one of their number, who agrees with the mortgagee for an extension of the time of payment of the bond and mortgage, none of the heirs is thereby discharged from liability for the deficiency on foreclosure, to the extent of their respective interests in the real property that descended to them, where the extension agreement is void for want of consideration. This is true even assuming that the conveyance of the mortgaged premises to one of their

⁶⁸ *Siewart v. Hamel*, 33 Hun, 44.

⁶⁹ *Rhodes v. Evans, Clarke*, 168; *Leonard v. Morris*, 9 Paige, 90.

⁷⁰ *Lockwood v. Fawcett*, 17 Hun, 146; *Glacius v. Fogel*, 88 N. Y. 434.

⁷¹ *Williams v. Eaton*, 3 Redf. Surr. 503.

⁷² *Life Ins. Co. v. Howell*, 32 N. J. Eq. 146.

⁷³ *Mitchell v. Bowne*, 63 How. Pr. 1. No personal judgment can be given against the heir of the mortgagor. *Harbison v. Vaughan*, 42 Ark. 539. Even to the extent of property received by him, the remedy must be first against the administrator. *Reinig v. Hecht*, 58 Wis. 212; 16 N. W. 548.

number and his subsequent dealing with the mortgagee had the effect of making him the principal debtor and the other heirs his sureties.⁷⁴

§ 881. Docketing judgment for deficiency an execution thereon.

—It was held by Chancellor WALWORTH, in *Bank of Rochester v. Emerson* (10 Paige pp. 115, 359), that an execution cannot issue upon a judgment for deficiency until the confirmation of the report of sale,⁷⁵ and that if it issues before, it is irregular, and the court will not allow it to be confirmed *nunc pro tunc* to the prejudice of other creditors. In this case, however, by the terms of the judgment, an execution could not properly issue until the report of sale was filed and confirmed. In *Hanover Fire Ins. Co. v. Tomlinson* (3 Hun, 630), it was also said that the confirmation by the court of the report of the referee showing a deficiency was necessary before any execution could be issued thereon. It has been held, however, that the form of judgment under our present statutes does not contemplate any intervention of the court after the rendition of the judgment, and that a judgment for deficiency may properly be docketed upon the report of the referee showing the amount of such deficiency and without confirmation of such report, even by notice under rule 30.⁷⁶

There is no statutory limitation for the docketing of a deficiency judgment and it has been decided that it may be docketed although more than ten years have elapsed since the time of the referee's report of sale.⁷⁷ The object of docketing the deficiency is to give the plaintiff a lien upon any other property. If it can be said that it is regular to enter an order confirming the report of sale of the referee and declaring the deficiency in accordance therewith, before entry of the facts as to the extent of the deficiency upon the docket, its omission would be but an irregularity. To avail of that the defendant would be required, as in other cases of irregularity, to move with promptitude.⁷⁸

It is not necessary to apply to the court after the report of

⁷⁴ *Olmstead v. Latimer*, 158 N. Y. 313; 53 N. E. 5.

⁷⁵ See also *Cobb v. Thornton*, 8 How. Pr. 66; *French v. French*, 107 App. Div. 107; 94 N. Y. Supp. 1026.

⁷⁶ *Moore v. Shaw*, 15 Hun, 428, appeal dismissed, 77 N. Y. 512.

⁷⁷ *Brown v. Faile*, 112 App. Div. 302; 98 N. Y. Supp. 420.

⁷⁸ *Springsteene v. Gillett*, 30 Hun, 260, 264.

sale is made, for judgment against the mortgagor for deficiency. The execution issues on the judgment of foreclosure.⁷⁹

The docketing of a judgment for deficiency is the entry of the judgment within the meaning of the Code in the provision that executions may issue, of course, at any time within five years after the entry of the judgment.⁸⁰ Until the filing of the referee's report of deficiency, the judgment declaring the liability of the defendants for deficiency is not brought to a condition in which execution could issue, and the provision of the Code referred to is intended to limit the time within which executions may issue, of course, upon any judgment to the period of five years after the right to issue the same has fully accrued.⁸¹

§ 882. Varying judgment by subsequent contract.—If, subsequent to the entry of the judgment, the parties to the action enter into a new contract upon sufficient consideration, which varies their rights under the judgment, the new contract takes the place of and controls the judgment. In such a case, if the judgment is sought to be enforced, it will be proper to commence a new action and to stay the proceedings by injunction.⁸² Even if a sale has been had under the judgment, if the purchaser allows the defendant to remain in possession under an agreement to reconvey on terms, he cannot afterward obtain a writ of assistance to enable him to obtain possession.⁸³

§ 883. Effect of judgment for deficiency rendered in another State.—While a judgment for deficiency rendered in another State will not bind a grantee, who by his deed assumed the mortgage but did not reside in that State, and upon whom no personal service was had, yet where the land has been sold under such judgment and the proceeds applied in payment of the mortgage debt, the plaintiff will, in the absence of evidence of fraud or collusion, be permitted to recover the amount remaining unpaid on the mortgage, in an action on the covenant in the State.⁸⁴

⁷⁹ *Bicknell v. Byrnes*, 23 How. Pr. 486, 490.

⁸⁰ *Seaman v. Clarke*, 60 App. Div. 416; 69 N. Y. Supp. 1002; Code of Civ. Pro. § 1375.

⁸¹ *Cupfer v. Frank*, 65 How. Pr. 396.

⁸² *Van Wagenen v. La Farge*, 13 How. Pr. 16.

⁸³ *Toll v. Hiller*, 11 Paige, 228.

⁸⁴ *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660; 26 N. E. 732; *Parham v. Burns*, 135 App. Div. 884; 120 N. Y. Supp. 1421, aff'd 201 N. Y. 559; 95 N. E. 1135; *Barker v. Miller*, 32 App. Div. 364; 53 N. Y. Supp. 283; *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 Barb.

FORCE AND EFFECT OF THE JUDGMENT.

§ 884. The parties to the action are concluded by the judgment, although the nature of their liens was incorrectly stated in the complaint. The law supposes that whatever claims they have were litigated by them, and if their rights were not asserted, they are forever barred from asserting them.⁸⁵ This principle must be qualified to the extent of limiting the effect of the judgment to being a final determination of all the questions which might properly have been litigated in it; a claim of title in hostility to the mortgage could not be set up or litigated in a foreclosure suit, and if such a claim be advanced and a judgment is rendered thereon after a hearing upon the merits, it will nevertheless be set aside upon appeal as exceeding the jurisdiction of a court of equity.⁸⁶

§ 885. Presumption of validity of judgment.—Although the recital in a judgment in an action of foreclosure of service of process upon, and of appearance by, a defendant, is not conclusive, and evidence is admissible on the part of such defendant to show that the court never acquired jurisdiction of his person, every intendment is in favor of the validity of the judgment, if regular upon its face; the burden of establishing want of jurisdiction is upon the party so questioning it, and it should be

441; *Swan v. Wheeler*, 30 Misc. R. 225; 63 N. Y. Supp. 328.

Though a plaintiff may be entitled to equitable relief under a complaint asking that a sale be vacated and he be allowed to redeem yet the judgment is *res adjudicata* as to the amount due, including costs and disbursements. *Clark v. Levy*, 130 App. Div. 389; 114 N. Y. Supp. 890, 1 Civ. Proc. Rep. (N. S.) 70.

Judgment is interlocutory. The judgment though final for purposes of review is in other respects interlocutory and parties to the action having judgment liens upon the property, may sell it upon execution, notwithstanding the judgment, prior to the foreclosure sale. *Nutt v. Cuming*, 155 N. Y. 309; 49 N. E. 880.

⁸⁵ *People ex rel. Bronx G. & El.*

Co. v. Barker, 155 N. Y. 308; 49 N. E. 775; *Roarty v. McDermott*, 146 N. Y. 296; 41 N. E. 30; *Bernstein v. Nealis*, 144 N. Y. 347; 39 N. E. 328; *Alexander v. Donohue*, 143 N. Y. 203; 36 N. E. 263; *Lewis v. Duane*, 141 N. Y. 302; 36 N. E. 322; 57 St. R. 410; *Batterman v. Albright*, 122 N. Y. 484; 25 N. E. 856; *Benjamin v. Elmira*, *Jefferson & Canandaigua R. R. Co.*, 49 Barb. 441; *Lagrange v. Hellingner*, 144 App. Div. 397; 129 N. Y. Supp. 291. See *Slattery v. Schwannecke*, 118 N. Y. 543; 26 N. E. 992.

⁸⁶ *Corning v. Smith*, 6 N. Y. (2 Seld.) 82; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Lee v. Parker*, 43 Barb. 611; *Barker v. Burton*, 67 Barb. 458.

established in the most satisfactory manner to deprive the judgment of its effect.⁸⁷

A judgment of foreclosure is admissible, even against strangers to the record, to show transfer of title, just as a deed of conveyance from the mortgagor would be.⁸⁸ One who acquires title subsequent to the rendition of judgment takes it subject to the lien of that judgment.⁸⁹

A joint obligation cannot be void as to one obligor and valid as to the other, and a final judgment of a foreign court of competent jurisdiction that a mortgage is invalid as to one of two joint mortgagors is *res adjudicata* as to its invalidity as to the other.⁹⁰

Where remaindermen are estopped from denying the validity of a mortgage executed by a life tenant, or that it was a lien upon their interest in the property, both the mortgage and the foreclosure thereof are valid, and effective against them or their descendants who are made parties to the action.⁹¹

Where a complaint does not allege that the plaintiffs were not made parties to a foreclosure suit in a foreign State, the decree in such State will be regarded as conclusive against them and their interest in the property will be cut off. And if in fact they were not made parties to such suit their remedy is to sue for possession in the foreign court.⁹²

In order, however, to bind the estate of a bankrupt by the judgment in a foreclosure suit commenced after the bankruptcy and after title to the property has become vested in the assignee, it is indispensable that the suit be brought against him distinctively in his representative or official character, or at least that it should appear in some way on the face of the proceedings that they related to or affected the bankrupt's estate.⁹³

§ 886. Where property escheats to State.—In view of the settled rule of law that a sovereign State cannot be sued in its own courts without its consent, it may be stated that an action of fore-

⁸⁷ Ferguson v. Crawford, 86 N. Y. 600.

⁸⁸ Murray v. Deyo, 10 Hun, 3.

⁸⁹ Beebe v. Richmond Power Co., 6 App. Div. 187; 40 N. Y. Supp. 1013.

⁹⁰ Kohly v. Fernandez, 133 App. Div. 723; 118 N. Y. Supp. 163, *aff'd* 201 N. Y. 561; 95 N. E. 1131.

⁹¹ Dickinson v. Blake, 116 App. Div. 545; 101 N. Y. Supp. 709.

⁹² Munnally v. Robinson, 113 App. Div. 848; 99 N. Y. Supp. 594.

⁹³ Landon v. Townshend, 112 N. Y. 93; 19 N. E. 424.

closure of a mortgage upon lands vested by escheat in the State will not lie against the State and that the courts can obtain no jurisdiction of such an action. Nor will making the attorney general of the State a party operate to confer jurisdiction.⁹⁴

When property has become vested by escheat in the State the title of the State is not divested by a sale on foreclosure, and, if the statute of limitations has not run against the State, the purchaser's title is not marketable.⁹⁵

§ 887. Remedy is by repeal.—If the judgment is erroneous as to the directions contained therein, as to costs or the distribution of proceeds, the remedy is by appeal.⁹⁶ Although the judgment directs the sale of the premises for the satisfaction of the debt, and that the defendant pay any deficiency appearing after such sale, it is final and not interlocutory merely. Nothing remains for the court judicially to determine, and an appeal may be taken from it at once.⁹⁷ The fact that the judgment is final, however, will not prevent the court from inserting other provisions in it on proper application being made, and that, too, for the benefit of any of the parties to the action.⁹⁸

§ 888. Merger of mortgage in judgment.—The judgment being entered, the mortgage is said to be merged in it, and after a satisfaction of the amount due, by a sale of the land, or of a portion of it, both the mortgage and the judgment cease to be a lien thereon.¹ But a valid mortgage can be merged only in a valid judgment, and a judgment setting aside a foreclosure and sale of mortgaged premises as illegal and fraudulent, is no bar to a subsequent foreclosure of the same mortgage, the mortgage itself, or its lien, being unaffected by said judgment.² So, also, a mortgage is not deemed merged in a judgment of foreclosure so as to give an inequitable advantage to a person having a lien, who was, by mistake, not made a party to the action.³

⁹⁴ *Seitz v. Messerschmitt*, 117 App. Div. 401; 102 N. Y. Supp. 732, *aff'd* 188 N. Y. 587; 81 N. E. 1175.

⁹⁵ *Seitz v. Messerschmitt*, 117 App. Div. 401; 102 N. Y. Supp. 732, *aff'd* 188 N. Y. 587; 81 N. E. 1175.

⁹⁶ *Barnard v. Bruce*, 21 How. Pr. 360.

⁹⁷ *Morris v. Morange*, 38 N. Y. 172; *Bolles v. Duff*, 43 N. Y. 469.

⁹⁸ *Livingston v. Mildrum*, 19 N. Y. 440.

¹ *People v. Beebe*, 1 Barb. 379.

² *Stackpole v. Robbins*, 47 Barb. 212.

³ *Franklin v. Hayward*, 61 How. Pr. 43. See also *Lapping v. Duffy*, 47 Ind. 51.

A judgment of foreclosure does not so far merge the mortgage as to preclude the mortgagee from recovering from the mortgagor on covenants of warranty contained in it.⁴ And by a judgment of foreclosure a mortgage is not so merged that the holder of a junior incumbrance can obtain any priority.⁵ Neither will such a merger prevent the bond and mortgage from being admissible in another action against parties who were not joined in the foreclosure to reform the mortgage and enforce it against other property.⁶ A judgment of foreclosure of a mortgage does not so far merge the mortgage as to blot out the record of the mortgage or relieve any one looking at the judgment, and the deed given on the sale pursuant thereto from the effect of that record as showing what the mortgage contains.⁷

The mortgage will be so far merged in the decree that a purchaser cannot be regarded as a mortgagee in possession as against any party to the action who is bound by the decree.⁸

Upon the question of the merger of a mortgage in a judgment of foreclosure a court of equity will consider all the facts, and will determine the question in each case according to the interest and intent of the parties and the demands of substantial justice and equity. So though a second mortgage has been foreclosed and the property sold, yet where it appears that by mistake a junior mortgagee was not made a party to the action it is said it would be inequitable to hold the purchaser at such sale or parties claiming under him remediless through such omission, and that if redress can be had only by reviving the first mortgage and allowing it to be foreclosed again such result must be accepted.⁹

§ 889. Presumption of redemption after twenty years.—The object of an action which we term an action to foreclose a mortgage, is to enforce the mortgage lien. The effect of the judgment is to fix conclusively the amount due upon the debt,¹⁰ which is its sole foundation. The mortgage is not extinguished, and notwithstanding the decree the rights and liabilities of the mortgagor continue until the sale, to be measured by the obligations stated in

⁴ Lloyd v. Quimby, 5 Ohio St. 262.

⁵ Lapping v. Duffy, 47 Ind. 51.

⁶ Sanders v. Farrell, 83 Ind. 28.

⁷ Bernstein v. Nealis, 144 N. Y. 347; 39 N. E. 328.

⁸ Davenport v. Turpin, 43 Cal. 597.

⁹ Franklin v. Hayward, 61 How. Pr. 43.

¹⁰ Wallace v. Field, 56 Mich. 3; 22 N. W. 91; Haldade v. Sweet, 58 Mich. 429; 25 N. W. 383.

the mortgage until final payment. Until the bond or debt to secure which the mortgage is given is fully paid by the execution of the decree, or otherwise, the mortgagor cannot require the bond and mortgage to be returned to him or cancelled.¹¹ The debt upon the bond then is secured by the mortgage and also by the decree. Yet by this double security it is not placed on any different footing from a debt due upon bond and mortgage. The entering of a decree of foreclosure is not necessary to give security to the debt, for the lien subsists.¹² The decree is a means only of enforcing the lien of the mortgage, and so rendering it available.¹³ The lien remains until the debt is paid or discharged. Neither the foreclosure suit nor the decree affects that, nor does either impair the mortgagor's right to redeem. That right remains the same after decree and until an actual sale of the mortgaged premises under it.¹⁴ So, notwithstanding the decree the lien is liable to be defeated by the same presumption founded upon lapse of time. If the mortgage stands alone without payment or proceedings to enforce it for twenty years, the presumption of payment accrues. If by virtue of foreclosure a new "security" has been taken, the same policy will, under the same circumstances, raise the same presumption. Upon this principle it has been held that where there had been a foreclosure sale not followed by a conveyance to the purchaser or any recognition of the mortgage by the judgment debtor, it will be presumed after the lapse of twenty years that the land had been redeemed from such sale.¹⁵

STAY OF PROCEEDINGS.

§ 890. **Stay Generally.**—The right of a mortgagee to foreclose the equity of redemption being absolute, equity will not obstruct him in the pursuit of his remedy where the default of the mortgagor is due to no fault of the holder of the mortgage.¹⁶ Nor will it hinder him in the collection of his loan in due course of law

¹¹ *In re Coster*, 2 Johns. Ch. 502.

¹² *Lansing v. Capron*, 1 Johns. Ch. 617.

¹³ *Bueklin v. Bueklin*, 1 Abb. Ch. App. Dec. 242.

¹⁴ *Brown v. Frost*, 10 Paige, 243.

¹⁵ *Per DANFORTH, J., in Barnard*

v. Onderdonk, 98 N. Y. 158, 165; *Reynolds v. Dishon*, 3 Bradw. (Ill.) 173.

¹⁶ *Sire v. Long Acre Square Building Co.*, 50 Misc. R. 29; 100 N. Y. Supp. 307.

simply because the debtor believes that it will be more to his interest if another course be pursued.¹⁷

Where a mortgage is executed as payment of a judgment which is afterward set aside, and an accounting ordered, an action of foreclosure of such mortgage may be stayed until the accounting ordered has been taken, and the rights and liabilities of the parties ascertained and settled.¹⁸

An action by one to whom a mortgage has been assigned as collateral security for a debt of less than its face, will be stayed upon the application of the assignee in bankruptcy of the mortgagee until the determination of an action by the latter in which he asks for a foreclosure and equitable distribution of the avails, and to which the pledgee was a party where it appears that before such assignee commenced his action, he applied to the pledgee to foreclose and the latter refused to do so.¹⁹

Where a creditor who took a bond and mortgage to secure the payment of a note endorsed by another for a loan alleged to be usurious, and the transaction took place in another State where all the parties resided, sued the endorser while transiently in this State, instead of resorting to the bond and mortgage, it was held proper to grant an injunction to stay such action at law until the creditor had pursued his remedy on the mortgage in the State in which it was given, reserving the question of costs, and all other questions, until the further application of the creditor.²⁰

On the other hand the court will not, upon a motion made in an action to partition, stay proceedings in another action brought to foreclose a mortgage on the same property for "the inherent of a court to stay proceedings or control the trial of an action is one which must be exercised in the action itself, and where it is sought to enjoin parties from proceeding in another action such relief must be by injunction in an action where by formal prayer it is demanded."²¹

In an action to foreclose a mortgage a stay, until the con-

¹⁷ *Bradford v. Downs*, 24 App. Div. 97; 98 N. Y. Supp. 1051, re-argument denied 25 App. Div. 581; 49 N. Y. Supp. 521.

¹⁸ *King v. Duryea*, 76 N. Y. 626.

¹⁹ *Burlingame v. Parce*, 12 Hun, 149.

²⁰ *Hayes v. Ward*, 4 Johns. Ch. 123.

²¹ *North Central Realty Co. v. Blackman*, 145 App. Div. (N. Y.), 199; 129 N. Y. Supp. 1005.

clusion of condemnation proceedings affecting the mortgaged premises, which proceedings have been running for two years, and are likely to run two years longer, should not be granted on the application of the holder of a subsequent mortgage, unless adequate security is given that the property will finally sell for enough to cover the expenses of the sale and the amount due upon the mortgage, with interest and costs,²² or unless the parties by an agreement between themselves made upon a valuable consideration, so stipulate.²³

A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain, as a cloud upon title, a sale under a power of sale contained in the mortgage, in the absence of any allegation in the complaint or finding by the court that the bond and mortgage have been paid.²⁴

Where plaintiffs allege that they are able, ready and willing to pay a bond and mortgage upon receiving the instruments and a satisfaction piece, and that the defendant has failed to deliver them, claiming that they have been lost, but does not allege any tender to defendant, an injunction *pendente lite* restraining defendant from disposing of or foreclosing the bond and mortgage will not be granted.²⁵

It is within the sound discretion of the court whether or not to stay an action to foreclose on the ground that there is a former action for the same cause between the same parties pending in the federal courts or in the courts of another State, and a stay will not be granted where it appears that the former action was based on technicalities and brought to hinder and delay the mortgagee.²⁶

Where an action is commenced and at issue to foreclose a third mortgage on premises, a motion by the mortgagor to stay such proceedings will not be granted on the ground that a judgment of foreclosure on the first mortgage, both actions having been commenced simultaneously, make it necessary for the mortgagee in the third mortgage to seek his remedy against the sur-

²² Weekes v. McCormick, 16 App. Div. 432; 45 N. Y. Supp. 30.

²³ Mayer v. Jones, 132 App. Div. 106; 116 N. Y. Supp. 300.

²⁴ House v. Carr, 185 N. Y. 453; 78 N. E. 171.

²⁵ Bodenstein v. Saul, 132 App. Div. 628; 117 N. Y. Supp. 349.

²⁶ Curlette v. Olds, 110 App. Div. 596; 97 N. Y. Supp. 144; 35 Civ. Pro. Rep. 306.

plus moneys on the third mortgage. In such a case the third mortgagee has a right to have the issue tried.²⁷

§ 891. *Stay on appeal.*—The provisions of law controlling the right of a defendant to a stay of proceedings on an appeal from a judgment of foreclosure and sale are as follows: If the judgment of order directs the sale or the delivery of the possession of real property, or entitles the respondent to the immediate possession thereof, an appeal does not stay the execution of the judgment or order until the appellant gives a written undertaking to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and if the property is in his possession or under his control, the undertaking must also provide that if the judgment or order is affirmed or the appeal is dismissed, and there is a deficiency upon a sale, he will pay the value of the use and occupation of such property, or the part thereof as to which the judgment or order is affirmed, from the time of taking the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum fixed by a judge of the court below. If the judgment directs a sale of real property upon the foreclosure of a mortgage, and an appeal is taken by a party against whom payment of a deficiency is awarded by such judgment, the undertaking must also provide that if the judgment is affirmed or the appeal is dismissed, the appellant will pay any deficiency which may occur upon the sale, with interest and costs, and all expenses chargeable against the proceeds of the sale, not exceeding a sum fixed by a judge of the court below.²⁸

Under this provision of the Code it has been decided that an owner of leased lands not in possession, nor liable for a deficiency on foreclosure of a mortgage thereon, should not be required to give an undertaking to the effect that he will not commit or suffer waste to be committed on the premises in order to stay a sale pending an appeal from the judgment, because not having a right to possession he cannot legally enter and commit waste, and the words "suffer waste" as used in the statute apply to a person in possession and capable of suffering waste by neglect or omission.²⁹ And when, in an action to foreclose a mortgage upon

²⁷ Daily v. Kingdon, 41 How. Pr.

²² See *ante* § 218, citing Grinnan v. Platt, 31 Barb. 328.

²⁸ Code of Civ. Pro. § 1331.

²⁹ Midwood Park Co. v. Baker, 142 App. Div. 495; 127 N. Y. Supp.

a leasehold, the mortgagor does not appear and has no claim except an alleged right to a redemption from summary proceedings, and the value of the leasehold is rapidly decreasing while the arrears in rents and taxes are rapidly increasing, a stay of execution upon an appeal which is apparently dilatory in character by one not a party to the mortgage, but merely claiming that it was given partly for his benefit should not be granted.³⁰

Again where the plaintiff in foreclosure purchased the mortgage with his own money, and started foreclosure at instance of one defendant who was litigating with one of his co-defendants in reference to their respective rights in the mortgaged premises, it was held that this did not justify a stay pending an appeal to the Court of Appeals in the action between such co-defendants.³¹

Where an undertaking given to stay proceedings, pending appeal, is in substantial, although not in exact compliance with the requirements of the Code, the plaintiff should move to set it aside. If without doing so, and without giving notice of the defect, he proceeds to sell the premises under the judgment, the sale must be set aside and a resale ordered.³²

An undertaking framed under section 1327 of the Code of Civil Procedure, for staying proceedings on an ordinary judgment for the payment of money, would not be appropriate to stay proceedings on a judgment directing the sale of property and the payment of deficiency.³³

§ 892. Substituting receiver for undertaking.—On an appeal to the Court of Appeals, the plaintiff is entitled, as a matter of right, to an undertaking for costs under section 1351 of the Code of Civil Procedure; but on an appeal to the General Term, the court may stay proceedings without any undertaking, or may substitute a receiver in lieu of requiring an undertaking. If any undertaking is required, the section cited controls as to its form.³⁴

A bond conditioned not to commit waste and to pay the value

1132; *Mutual Life Ins. Co. v. Robinson*, 23 Misc. 563; 52 N. Y. Supp. 795.

30 *Bouden v. Sire*, 119 App. Div. 194; 104 N. Y. Supp. 460.

31 *Swift v. Finnigan*, 53 App. Div. 76; 65 N. Y. Supp. 723.

32 *Parfitt v. Warner*, 13 Abb. Pr. 471.

33 *Concordia Savings & Aid Ass'n v. Read*, 124 N. Y. 189; 26 N. E. 347; *Grow v. Garlock*, 29 Hun, 598, 601, and cases cited.

34 *Wilson v. Grant*, 59 How. Pr. 350.

of the use of the property, but with no covenant to pay a deficiency, is insufficient, where the defendant is not in possession,³⁵ and is not adjudged to pay a deficiency,³⁶ or where the judgment directs a sale of both real and personal property.³⁷

This section does not control an appeal from an order directing a resale of premises which have been sold in an action to foreclose a mortgage.³⁸ Nor an appeal from a judgment modifying a surrogate's order as to the amount of a creditor's claim for which real estate is to be sold.³⁹

Rule 67 of the General Rules of Practice provides that "no order to stay a sale under a judgment in partition, or for the foreclosure of a mortgage, shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney."

35 *National Savings Bank v. Slade*, 42 N. Y. Supp. 455; *Commercial Bank v. Folty*, 35 App. Div. 237; 54 N. Y. Supp. 764.

36 *Rosenbaum v. Tobler*, 3 App. Div. 312; 53 N. Y. Supp. 722.

37 *N. Y. Security & T. Co. v. Saratoga G. & El. L. Co.*, 5 App. Div. 535; 39 N. Y. Supp. 486.

38 *Stephens v. Humphries*, 20 N. Y. Supp. 812; 49 St. Rep. 782.

39 *Mead v. Jenkins*, 4 Den. 84.

CHAPTER XXIII.

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DEFENSES GENERALLY.

§ 893. A defendant may properly present any defense which consists in showing that the mortgage ought not to be foreclosed. Thus, he may insist that the obligation which the mortgage was made to secure is void as being without consideration, or usurious, or that it has been paid. The fact that the mortgage has been paid in whole or in part is a valid defense, not only to the mortgagor, but to junior incumbrancers; ¹ but, payment of a mortgage is an affirmative defense, and the burden of proving and pleading it is on the defendant, until twenty years have elapsed from the date of the maturity of the obligation.² So, the payment and discharge of a mortgage given as collateral security to a prior mortgage, is a payment upon such prior mortgage, and is available as a defense to a subsequent incumbrancer in an action to foreclose the same.³

If the mortgage is perfectly valid and unpaid, the defendant may still insist that it is not due, or that the time for paying it has been extended.⁴ So, where the holder of a majority of the bonds in value either before or when the time for the payment of interest coupons arrives, consents to an extension of the time for such payment for a period which is not definitely fixed, he thereby waives strict payment of interest. In such a case he is precluded from insisting that a default has occurred under a clause in the trust mortgage, given to secure the payment of the bonds, providing that in case of any default in the payment of interest upon the bonds, or any of them, and the continuance of such default for six months, if the holders of one-half in value of the outstanding bonds shall so elect and notify the trustee in writing of such election, the whole of such bonds shall immediately become

¹ Prouty v. Price, 50 Barb. 344.

² Redmond v. Hughes, 151 App. Div. 99. See *ante*, Chap. XI.

As to admissibility of testimony regarding payment under § 829 of the Code. See McCarthy v. Stanley, 151 App. Div. 358.

³ Prouty v. Eaton, 41 Barb. 409.

⁴ Dodge v. Crandal, 30 N. Y. 294; Hall v. Davis, 73 Ga. 101; Lucas v. Hendrix, 92 Ind. 54. See Ch. VII herein as extension of time of payment.

due and payable, although the period limited in the bonds for the payment thereof has not expired. His consent operates as a waiver which will preclude the maintenance of an action to foreclose the mortgage upon the demand of such bondholder.⁵ But where it appears that there was no bad faith on the part of the mortgagee he will not be deprived of his right to foreclose for a default in payments by an alleged parol agreement extending the time for and changing the place of payment for which there was no consideration.⁶ The defendant may also allege any fact tending either to defeat the obligation or to reduce its amount, and the issue thus raised can be tried in the action to foreclose and without a jury.⁷

The acceptance of a deed containing a statement that it is made subject to all liens of mortgages merely means that the conveyance is taken subject to the liens of valid mortgages and the grantee may subsequently dispute the validity of any mortgage on the premises.⁸

That the mortgage was never executed may be shown.⁹ And the mortgagor is not estopped by the execution of the mortgage from showing an entire or partial failure of consideration.¹⁰

Since any facts which would justify or require a court of equity to grant affirmative relief against the enforcement of a mortgage, can properly be set up as a defense to the foreclosure, an injunction against the foreclosure of a mortgage can never become necessary except where such foreclosure is attempted by advertisement, without suit.¹¹

§ 894. Defenses open to junior lienors.—Any defense which can be urged by the mortgagor may also be made by those claiming liens junior to the mortgage under him, unless restrained by

⁵ *Arnot v. Union Salt Co.*, 186 N. Y. 501; 79 N. E. 719, reversing 109 App. Div. 433.

⁶ *Asendorf v. Meyer*, 8 Daly, 278.

⁷ *Armstrong v. Gilchrist*, 2 Johns. Cas. 424. See *Farmers' Loan & Trust Co. v. New York & Northern R. Co.*, 150 N. Y. 410; 44 N. E. 1043. See also *Grimball v. Martin*, 77 Ala. 553; *Carmichael v. Adams*, 91 Ind. 526.

⁸ *Purdy v. Coar*, 109 N. Y. 448; 17 N. E. 352.

⁹ *Albany Co. Savings Bank v. Mc-*

Carthy, 149 N. Y. 71; 43 N. E. 427, holding that a husband who joined in a mortgage on lands of his wife is competent to testify as to this after her death.

¹⁰ *Rapps v. Gottlieb*, 142 N. Y. 164; 36 N. E. 1052; *Davis v. Bechstein*, 69 N. Y. 440; 25 Am. R. 218; *Jonas v. Jonas*, 20 Iowa, 388; *Cawley v. Kelley*, 60 Wis. 315; 19 N. W. 65.

¹¹ *Foster v. Townshend*, 2 Abb. N. Cas. 29, 46.

special circumstances. Thus, a junior mortgagee¹² or judgment creditor¹³ may contest the validity of the mortgage on the ground of usury. And the right of a junior lienor to defend is not affected by the circumstance that his claim is not yet due.¹⁴

A second mortgagee, who has foreclosed and bid in the property, can make any defense against the prior mortgage that the mortgagor could have made; as that the first mortgagee had violated an agreement with the mortgagor, by which he was obligated first to proceed against collateral security, and had by his negligence lost such security.¹⁵

When in an action of foreclosure it has been clearly and positively shown that the wife was an accommodation indorser and pledged her lands only as surety for her husband's debt, it is error to refuse to make a finding to that effect on the sole ground that it had not been pleaded as a defense, for the defendant should have been allowed to amend the answer to conform to the proof.¹⁶

Where a mortgage covering lands of a husband and wife, is executed by the latter for the purpose of securing a debt of the former, she has a right to insist, as has also her grantee, that the land of the principal debtor be applied to the debt before recourse be had to hers.¹⁷

Where, however, a mortgagor is obligated to pay a certain amount annually in reduction of the mortgage, the fact that the mortgagee has received insurance money in settlement of a loss by fire which is in excess of the amount to be paid by the mortgagor, will not defeat an action to foreclose for a default in such a payment, the insurance money not being regarded as a payment within the terms of the mortgage, but as a substitution *pro tanto* for the mortgaged property.¹⁸

And in an action by an assignee of a mortgage to foreclose an allegation in the complaint that the mortgagor obtained and converted the insurance money coupled with a demand for judgment therefor does not estop the plaintiff from seeking to re-

¹² Mutual Life Ins. Co. v. Bowen, 47 Barb. 618.

¹³ Thompson v. Van Vechten, 27 N. Y. 568, 585.

¹⁴ Hart v. Haydon, 79 Ky. 346.

¹⁵ Thompson v. Jarvis, 39 Mich. 689.

¹⁶ White v. Rovall, 121 App. Div. 12; 105 N. Y. Supp. 624.

¹⁷ White v. Rovall, 121 App. Div. 12; 105 N. Y. Supp. 624.

¹⁸ Smith v. Ferris, 143 N. Y. 495; 39 N. E. 3.

cover from the mortgagees, upon their guaranty, for any deficiency.¹⁹

A lease given by a life tenant does not survive his death and therefore an action of foreclosure cannot be defended by a tenant in possession, who held under a lease from a life tenant whose death occurred before the action was brought.²⁰

§ 895. The defense of champerty under the Real Property Law (Laws of 1896, ch. 547, § 225), is not limited to the owner in possession under the adverse title, but is available to any defendant in the suit of foreclosure.²¹

§ 896. Mortgage procured by fraud.—A mortgagee will not be permitted to take advantage of his own fraud in procuring a mortgage, to the extent that he may enforce it against the mortgagor.²²

To constitute a good defense to a bill for the foreclosure of a mortgage, on the ground of fraud in obtaining it, it is necessary not only to show that the defendant was defrauded but also that he was defrauded by the mortgagee, or his agents, or at least to show that the mortgagee, at the time of taking the mortgage, was aware that a fraud had been committed upon the mortgagor and the several facts necessary to constitute the fraud and to bring home to the mortgagee the knowledge of it, should be distinctly stated in the answer of the defendant.²³

And though fraud may have been perpetrated upon the mortgagor yet he may be estopped to assert it against a mortgagee who had no knowledge thereof, to the extent of the money advanced by the mortgagee in reliance upon the mortgage.²⁴

So, a grantee or mortgagee, for a valuable consideration and without notice, from one who obtained title by fraud and undue influence, acquires a good title or lien and will be protected against the claims of the defrauded vendor.²⁵

¹⁹ Willard v. Welch, 94 App. Div. 179; 88 N. Y. Supp. 173, *aff'd* 186 N. Y. 564; 79 N. E. 1118.

²⁰ Snedecker v. Thompson, 26 Misc. R. 160; 56 N. Y. Supp. 775.

²¹ Hopkins v. Baker, 140 App. Div. (N. Y.) 460; 125 N. Y. Supp. 417.

²² People's Building Loan & Sav. Ass'n v. Platz, 59 App. Div. 275; 69 N. Y. Supp. 589. See also Ros-

coe v. Safford, 61 App. Div. 289; 70 N. Y. Supp. 309.

²³ Aikin v. Morris, 2 Barb. Ch. 140. See McDonnell v. McCann, 127 App. Div. 302; 111 N. Y. Supp. 312.

²⁴ Dunn v. Sharpe, 9 Misc. R. 636; 30 N. Y. Supp. 353.

²⁵ Valentine v. Lunt, 115 N. Y. 496; 22 N. E. 209. See also Lamb v. Lamb, 18 App. Div. 250; 46 N. Y. Supp. 219.

And a mortgagee who, in reliance upon the record title, takes a mortgage upon property from one to whom it has been transferred by a fraudulent grantee, is not chargeable with constructive notice of the fraud, although the person defrauded occupies the property, where at the time she was ignorant of the fraud perpetrated upon her and could not have disclosed the fact to the mortgagee had he made inquiry.²⁶

Where one who is illiterate executes a mortgage without knowledge of its contents, no fraud being shown, neither he nor his grantee who purchases with knowledge of the mortgage can contest its validity, as against a *bona fide* holder for value, on that ground alone.²⁷ It must also be shown that the mortgagor executed the paper without negligence on his part, and this although he was old, infirm, and illiterate.²⁸ But while one who can read and who executes a mortgage without reading it is guilty of negligence that will prevent him from obtaining relief from the mortgage, because its contents were different from what they were represented to him; yet if a trusted friend and agent of the mortgagor was employed to represent the contents of the mortgage, so that its execution was obtained without the mortgagor's reading it, this is a fraud against which relief will be granted.²⁹

And a mortgagee with no notice of undue influence exercised by the mortgagor upon his grantor in procuring the deed may, it is held, enforce the mortgage.³⁰

Where a daughter, through undue influence and without adequate consideration, procured from her aged and infirm mother the execution of a note and mortgage, it was held that they should be cancelled on petition of the mother's heirs.³¹

It seems that declaration of the mortgagor, made after the execution of a mortgage, as to the intent with which it and other transfers of property were made and as to his pecuniary condition, are inadmissible as evidence against the mortgagee, in an action wherein the mortgage is assailed as fraudulent. *Spaulding v. Keyes*, 125 N. Y. 113; 26 N. E. 15.

²⁶ *Cornell v. Maltry*, 165 N. Y. 557; 59 N. E. 291.

²⁷ *Leslie v. Merrick*, 99 Ind. 180.

²⁸ *Montgomery v. Scott*, 9 S. C. 20; 30 Am. R. 1. See also *Garvey v. New York Bldg. L. & B. Co.*, 57 App. Div. 193; 68 N. Y. Supp. 317, which was an action to reform a mortgage, and *Frank v. Schloss*, 37 Misc. R. 140; 74 N. Y. Supp. 839, which was an action to cancel.

²⁹ *Robinson v. Glass*, 94 Ind. 211; *Matlock v. Todd*, 19 Ind. 130.

³⁰ *Swanston v. Day* 46 Misc. R. 311; 93 N. Y. Supp. 192.

³¹ *Spargner v. Hall*, 62 Iowa, 498;

§ 897. **Mortgages fraudulent as to creditors.**—A mortgage made with intent to defraud the creditors of the mortgagor is good between the parties, and if the mortgagee can show a right to recover without developing the fraud, the mortgagor cannot set up his own fraud in defense.³²

A creditor of the mortgagor may, however, be permitted to attack the transaction on the ground of fraud.³³

And a judgment between parties to a conveyance or mortgage, affirming the validity of the deed or mortgage, whether obtained by default or upon litigation, especially where the exact issue whether or not it was a fraud upon creditors was not presented by the pleadings and decided, does not preclude a creditor, not a party to the action, from subsequently assailing the original transaction as a fraud upon his rights as a creditor of the grantor or mortgagor.³⁴

An action by the creditors of a mortgagor to set aside an assignment made by him on the ground that it was made with the intent to hinder, delay and defraud his creditors will not prevent a mortgagee of the debtor from maintaining an action of foreclosure for default in payment, such mortgage being prior in time to the making of the assignment. And the right to so proceed will not be affected by a question as to the validity of such mortgage, it being declared that any infirmity or limitation of the mortgage as security is a matter of defense available to any party defendant or to any person who, having the right to defend, may become such party.³⁵

§ 898. **Forgery.**—Forgery of the name of the owner of property to a mortgage will be a good defense to an action on the instrument in the absence of evidence clearly showing a subse-

17 N. W. 743; Leighton v. Orr, 44 Iowa, 679; Tucke v. Buckholz, 43 Iowa, 415.

³² Bonesteel v. Sullivan, 104 Pa. St. 9.

³³ Jenkins v. John Good Cordage & Mach. Co., 56 App. Div. 573; 68 N. Y. Supp. 239, aff'd 168 N. Y. 679; 61 N. E. 1130; Ham v. Gilmore, 7 Misc. R. 596; 28 N. Y. Supp. 126.

³⁴ Brooks v. Wilson, 125 N. Y. 256; 26 N. E. 258.

³⁵ Buffalo Chemical Works v. Bank of Commerce, 79 Hun, 93; 29 N. Y. Supp. 663.

That mortgage executed before insolvency is enforceable. See Lehrenkrauss v. Bonnell, 199 N. Y. 240; 92 N. E. 637; Smith v. Perine, 121 N. Y. 376; 24 N. E. 804; Phillips v. Kahn, 96 App. Div. 166; 89 N. Y. Supp. 250.

quent binding ratification' and adoption of the mortgage by the mortgagor.

So, where a son forged his mother's name to a mortgage, two payments of interest made by her after discovering the forgery and without informing the mortgagees thereof, do not as a matter of law estop her executors from attacking the validity of the instrument in the absence of proof that the mortgagees were thereby prevented from enforcing any remedy or that their position was changed to their disadvantage.

Nor do the payments amount to a ratification of the unauthorized act of the son.³⁶

A mortgagor may, however, be estopped by affirmative acts subsequent to the transaction, such as the payment of interest with knowledge of the forgery, to either set it up as a defense or to assert it as a basis for equitable relief.³⁷

§ 899. A mortgage executed upon an illegal consideration is void, and the real facts may be set up in defense, though they contradict the terms of the instrument.³⁸

Under a statute making void a mortgage given for a gambling debt, except that where so given it shall enure for the sole benefit of such person as would be entitled to the said real estate if the mortgagor had died immediately upon encumbering the premises, and shall be taken and held for the use of the person who would be so entitled, if a mortgage is given under such conditions the bondsmen are not personally liable and the bond and mortgage are valid only for the purpose of enabling the heirs of the mortgagee to obtain payment of the debt from the land mortgaged by foreclosure.³⁹

A mortgage given to secure the performance of a contract between a husband and wife to live separately is void as against public policy.⁴⁰

A mortgage executed upon the consideration that the son of the grantor, who was then under arrest for embezzlement, should

³⁶ *Rothschild v. Title Guarantee & Trust Co.*, 139 App. Div. 672; 124 N. Y. Supp. 441.

³⁷ *Rothschild v. Title Guarantee & Trust Co.*, 204 N. Y. 458; 97 N. E. 879.

³⁸ *Morris v. Morris, Adm'r*, 9 Dana (Ky.) 317; 35 Am. Dec. 138.

³⁹ *Luetchford v. Lord*, 132 N. Y. 465; 30 N. E. 859.

⁴⁰ *Boyd v. Boyd*, 130 App. Div. 161; 114 N. Y. Supp. 361.

not be prosecuted, has been held void.⁴¹ So, also where a mortgage was given to prevent the imprisonment of a son for forgery.⁴² And a mortgage the consideration for which, in whole or in part, is the stifling of a prosecution for a conspiracy to defraud, and for embezzlement as a bank officer, is void.⁴³

But where a husband, who was a defaulter, urged his wife to execute a mortgage to secure his sureties, telling her that rather than go to jail he would kill himself, and she executed the mortgage after much importunity on his part and hesitancy on hers, and the mortgagees had no knowledge of her reluctance, and no prosecution had either been commenced or threatened, the mortgage was held to be valid.⁴⁴

In order to avoid a bond and mortgage on the ground that they were given to compound a felony, it is necessary to show that there was some agreement or promise on the part of the mortgagee to forbear prosecution for the crime, or to suppress evidence that would tend to prove it.⁴⁵

Where an action is brought by a receiver of an insolvent banking association to foreclose a mortgage given by an individual as the substitute for an original subscriber in payment of the subscription of the latter to the capital stock, the defendant cannot set up as a defense that the association had no authority to receive the bonds and mortgages from subscribers in payment for the shares of stock issued to them.⁴⁶

Nor in an action to foreclose a mortgage given to an insurance company can the defendant defeat recovery on the ground that the amount loaned on the property did not conform to the standard prescribed by statute, such provision being for the benefit of the policyholders and not for the purpose of enabling the borrower to escape payment.⁴⁷

It is not contrary to public policy to indemnify bail in a criminal case and a bond and mortgage given for such a purpose is not void.⁴⁸

⁴¹ Reed v. McKee, 42 Iowa, 689.

⁴² National Bank v. Cox, 47 App. Div. 53; 62 N. Y. Supp. 314.

⁴³ Pearce v. Wilson, 111 Pa. St. 14; 2 Atl. 99.

⁴⁴ Lefebvre v. Dutruit, 51 Wis. 326; 8 N. W. 149; 37 Am. Dec. 833.

⁴⁵ Barrett v. Weber, 125 N. Y. 18; 25 N. E. 1068.

⁴⁶ Leavitt v. Pell, 27 Barb. 323, aff'd 25 N. Y. 474 (1862).

⁴⁷ Washington Life Ins. Co. v. Clason, 162 N. Y. 305; 56 N. E. 755.

⁴⁸ Moloney v. Nelson, 158 N. Y. 351; 53 N. E. 31, aff'd 12 App. Div. 545; 42 N. Y. Supp. 418.

§ 900. **Mortgage given to indemnify surety.**—Where a mortgage is given for the purpose of “indemnifying and saving harmless” one who has assumed an obligation as surety upon a bail bond, a subsequent clause in the mortgage that in case of default in performance of the conditions of the bail bond the mortgagee may sell the premises “according to law” is to be construed in connection with the clause as to purpose, and an action to foreclose the mortgage cannot be maintained in the absence of proof that the plaintiff has paid all or some portion of the amount named in the bail bond.⁴⁹

§ 901. **Failure to perform condition subsequent.**—Where the mortgagor takes a bond of defeasance from the mortgagee conditioned that if the former should execute to the latter on or before a certain day a good and sufficient deed of a certain parcel of land, the mortgagee would deliver up the bond and mortgage to be cancelled, it is necessary as a performance thereof to execute and deliver an operative conveyance or one that transfers a good and sufficient title to the land conveyed. The conveyance of a title which is admittedly doubtful is not a good performance and will be no defense to an action to foreclose the mortgage.⁵⁰

§ 902. **Correcting or cancelling mortgage because of fraud or mutual mistake.**—The fact that the enforcement of the obligations for the payment of the debt collateral to the mortgage, is intrusted to a court of equity does not create any new rules with regard to the substantial rights of the parties, and all legal and proper defenses to such obligations may be interposed and litigated. In addition to these defenses the defendant may seek the affirmative aid of the court as a court of equity to cancel the instrument sued upon as fraudulent,⁵¹ or to correct it because, by

⁴⁹ *Moloney v. Nelson*, 144 N. Y. 182; 39 N. E. 82.

⁵⁰ *Clute v. Robison*, 2 Johns. 595, holding that if the party covenanting to convey had a good and perfect title at the time of the decree, or the coming in of the master's report, it was sufficient and he might then be allowed to perform his contract and save the forfeiture of his bond on making compensation for the delay of the performance.

⁵¹ *Marden v. Dorthy*, 160 N. Y. 39; 54 N. E. 726; *Matter of Hulbert Bros. & Co.*, 160 N. Y. 9; 54 N. E. 571; *Gibbons v. Campbell*, 148 N. Y. 410; 42 N. E. 1055; *National Bank v. Levy*, 127 N. Y. 549; 28 N. E. 592; *Fisher v. Bishop*, 108 N. Y. 25; 15 N. E. 331; *Wright v. Day*, 59 Misc. R. 76; 111 N. Y. Supp. 1105; *Colton Improvement Co. v. Richter*, 26 Misc. R. 26; 55 N. Y. Supp. 486. See *Swanstrom v. Day*, 46 Misc. 311; 93

reason of accident or mistake, it does not fairly express the agreement of the parties. The correction of mistakes in written instruments, occurring by accident, fraud, or otherwise, has been one of the acknowledged branches of equity jurisdiction from the earliest history of the Court of Chancery, and a party to a foreclosure suit, injured by a mistake, has a right to demand its correction on furnishing satisfactory proof that it has been made.⁵²

So, where through the fraud of the mortgagor in assuming a false name, a mortgagee has been induced to accept a defective instrument, he may maintain a suit in equity to reform, by substituting the true name of the mortgagor according to the real intent of the parties. And a court of equity, on taking jurisdiction may give full relief and decree foreclosure or legal relief in damages.⁵³

The plaintiff may obtain a correction of the description contained in the mortgage, and a judgment for the sale of the property by the corrected description.⁵⁴ And a defendant may have a covenant struck out of a deed purporting to bind him personally for the payment of the mortgage debt,⁵⁵ or he may have a judgment altering the terms of the payment of the mortgage debt.⁵⁶

Such a mutual mistake may be corrected not only as against the

N. Y. Supp. 192; *Market & Fulton National Bank v. Jones*, 7 Misc. R. 207; 27 N. Y. Supp. 677.

A court of equity will keep an encumbrance alive or consider it extinguished as will best serve the purpose of justice; *Lumber Exchange Bank v. Miller*, 18 Misc. R. 127; 40 N. Y. Supp. 1073, and may cancel a mortgage as a cloud on title, *Rapps v. Gottlieb*, 142 N. Y. 164; 36 N. E. 1052; *Stokes v. Hoghton*, 16 App. Div. 381; 45 N. Y. Supp. 21; and an action by the owner of the fee to compel such cancellation is never barred by the statute of limitations, *Schoener v. Lessauer*, 107 N. Y. 111; 13 N. E. 741.

A party cannot plead his own fraud for the purpose of reviving a conveyance which has been set aside on the ground of fraud. *Weiser v.*

Kling, 38 App. Div. 266; 57 N. Y. Supp. 48.

⁵² *Andrews v. Gillespie*, 47 N. Y. 487; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Arnstein v. Berstein*, 127 App. Div. 550; 111 N. Y. Supp. 987.

⁵³ *Gotthelf v. Shapiro*, 136 App. Div. 1; 120 N. Y. Supp. 210.

⁵⁴ *Alexander v. Rea*, 50 Ala. 450; *Savings & Loan Soc. v. Meeks*, 66 Cal. 371; 5 Pac. 624; *Doe v. Vallejo*, 29 Cal. 385; *Halstead v. Board of Com'rs of Lake County*, 56 Ind. 363; *Barnaby v. Parker*, 53 Ind. 271; *Carey v. Reeves*, 32 Kan. 718; 5 Pac. 22; *Palmer v. Windrom*, 12 Neb. 494; 11 N. W. 750.

⁵⁵ *Albany City Savings Institution v. Burdick*, 87 N. Y. 48, rev'g 20 Hun, 104.

⁵⁶ *Andrews v. Gillespie*, 47 N. Y. 487.

mortgagee and his heirs,⁵⁷ but also as against attaching creditors,⁵⁸ and judgment creditors,⁵⁹ and purchasers under them, with notice of the mistake,⁶⁰ or as against a junior mortgagee whose lien was given as security for an antecedent debt,⁶¹ or as against any person except an innocent purchaser for a valuable consideration.⁶²

Where an error in the description of the property is not discovered until after the sale, the judgment and sale may be set aside and an amended complaint filed so as to obtain a new judgment correcting the description and directing a new sale;⁶³ or a new action can be maintained to correct the misdescription.⁶⁴ But where the property is purchased by some person other than the mortgagee, he cannot come into court asking that other property than that sold to and purchased by him be subjected to his purchase on the ground that, by mistake, the mortgage covered different property from that intended.⁶⁵

Nor is a mortgagee entitled to have a mortgage reformed so as to include an agreement entered into at the time of its delivery but which he expressly consented should be omitted from the mortgage.⁶⁶

And reformation of a bond and mortgage cannot be decreed after their assignment, in an action to which the assignee is not a party.⁶⁷

§ 903. Making description definite.—A mortgage describing the lands as “all the lands owned by the mortgagor,” can be made certain by evidence *aliunde*, and a complaint in foreclosure may describe the lands specifically, averring that they were all the lands of the mortgagor, and the judgment may direct the sale

⁵⁷ McKay v. Wakefield, 63 Ind. 27.

⁵⁸ Bush v. Bush, 33 Kans. 556; 6 Pac. 794.

⁵⁹ Duncan v. Miller, 64 Iowa, 223; 20 N. W. 161; Boyd v. Anderson, 102 Ind. 217; 1 N. E. 724.

⁶⁰ Strang v. Beach, 11 Ohio St. 283.

⁶¹ Busenbarker v. Rainey, 53 Ind. 499; Bank, etc., v. Wentworth, 28 Kans. 183.

⁶² Dozier v. Mitchell, 65 Ala. 511; Clay v. Hildebrand, 34 Kans. 694; 9 Pac. 466; Cox v. Esteb, 81 Mo. 393.

⁶³ Thompson v. Maxwell, 16 Fla. 773; Davenport v. Widowell, 6 Ohio St. 459.

⁶⁴ Burkham v. Burk, 96 Ind. 270; Armstrong v. Short, 95 Ind. 326; Bank, etc., v. Wentworth, 28 Kan. 183.

⁶⁵ Schwickerath v. Cooksey, 53 Mo. 75.

⁶⁶ Harvey v. Beckman, 64 Misc. R. 395; 118 N. Y. Supp. 602.

⁶⁷ Ryshpan v. Goldberg, 8 Misc. 442; 28 N. Y. Supp. 657.

by the specific descriptions.⁶⁸ So, other additions to the description of the property which merely tend to definiteness and do not change the property intended by the mortgage, may be made.⁶⁹ Evidence to justify any such change in the description must not contradict the mortgage, but must merely explain the description in the mortgage, and adopt the means of identification contained in it.⁷⁰

If the plaintiff elects to proceed under an indefinite description, the mortgagor cannot be heard to complain, whatever might be the effect of a sale under the description.⁷¹

The judgment or sale will not be affected by errors in the description contained in any of the proceedings, and no relief will be granted as against such errors unless it can be shown that the objecting party will be injured thereby.⁷²

HOW A DEFECT OF PARTIES MAY BE OBJECTED TO.

§ 904. Persons having liens should be made parties.—It is a right of the person obligated to pay the deficiency after the sale of the mortgaged premises, to require that the whole equity of redemption be sold, and to demand that every party necessary to accomplish that be joined, and be made a party to the action, because his ultimate liability for the debt makes it of the highest importance to him that the title which will be made by the sale shall be perfect against all equities.⁷³ All persons having liens upon the equity of redemption are necessary parties;⁷⁴ if any of these are omitted, and that fact appears upon the face of the complaint, the objection may be taken by demurrer; but if it does not so appear, the objection should be taken by answer.⁷⁵

But though an owner in an unrecorded conveyance of the equity of redemption in mortgage premises is not made a party

⁶⁸ *Leslie v. Merrick*, 99 Ind. 180; *Wilson v. Boyce*, 99 U. S. 320.

⁶⁹ *Traveller's Ins. Co. v. Yount*, 98 Ind. 454.

⁷⁰ *Hannon v. Hilliard*, 101 Ind. 310.

⁷¹ *Graham v. Stewart*, 68 Cal. 374; 9 Pac. 555; *Whitney v. Buckman*, 13 Cal. 536; *Tryon v. Sutton*, 13 Cal. 490.

⁷² *Cooper v. Foss*, 15 Neb. 515; 19 N. W. 506.

⁷³ *Hall v. Nelson*, 14 How. Pr. 32; 23 Barb. 88; *Morris v. Wheeler*, 45 N. Y. 708.

⁷⁴ *Ensworth v. Lambert*, 4 Johns. Ch. 605; *McGown v. Yerks*, 6 Johns. Ch. 450.

⁷⁵ *Morris v. Wheeler*, 45 N. Y. 708; *Kittle v. Van Dyck*, 1 Sand. Ch. 76.

to foreclosure and the facts that he is such owner does not appear upon the face of the complaint, which does not contain a demand for deficiency judgment, and that his name does not appear upon the published records, the complaint is not, because of the non-joinder of such owner, demurrable as to the defendant who, so far as appears, is not aggrieved thereby.⁷⁶

A plea in abatement on the ground of non-joinder of parties is demurrable unless it states the names of the parties whom it is claimed should be joined, that they are alive, in the jurisdiction of the court and within the reach of its process.⁷⁷

§ 905. **Persons liable for debt.**—It is also a right of the defendant personally liable to pay the debt, to have all persons who have or claim to have an interest in the mortgage, made parties to the action, and, if the ownership appears doubtful, the court will order all persons appearing to be interested to be brought in.⁷⁸ So, too, it has been thought to be the right of each defendant to have complete justice done with regard to the subject-matter of the controversy, so far as the power of the court may extend; and, upon this principle, a surety for the mortgage debt who is made a party for the purpose of obtaining a judgment for deficiency against him, is said to have the right to insist that the principal debtor shall be made a party to the suit if he is within the jurisdiction of the court,⁷⁹ but the validity of a subsequent mortgage may not properly be litigated in an action to foreclose a prior mortgage, where the plaintiff therein has asked no relief as to the second mortgage.⁸⁰

PROCEEDINGS AT LAW FOR THE SAME DEBT.

§ 906. **The pendency of proceedings at law for the recovery of the same debt** is no objection to the prosecution of a foreclosure, providing that no judgment has been obtained; the only effect of the foreclosure being that the action at law cannot be further proceeded with but by leave of the court in which the foreclosure is pending.⁸¹ But if the action at law, whether it be against a

⁷⁶ *Thompson v. Richardson*, 74 App. Div. 62; 77 N. Y. Supp. 202.

⁷⁷ *Powell v. Linde Company*, 58 App. Div. 26; 63 N. Y. Supp. 676, *aff'd* 171 N. Y. 675; 64 N. E. 1125.

⁷⁸ *Kortright v. Smith*, 3 Edw. 402.

⁷⁹ *Bigelow v. Bush*, 6 Paige, 343.

⁸⁰ *Revoir v. Barton*, 71 Hun, 457; 24 N. Y. Supp. 985.

⁸¹ *Williamson v. Champlin, Clarke* 9, *aff'd* 8 Paige, 70; *Suydam v. Bartle*, 9 Paige, 294.

party to the action to foreclose or a third person, providing only it be for the collection of the debt secured by the mortgage,⁸² has proceeded to judgment, all proceedings in the foreclosure suit must be stayed until an execution upon that judgment has been returned unsatisfied.⁸³

§ 907. Where the complaint shows that a judgment has been obtained for the mortgage debt, and it does not show that the remedy thereon has been exhausted, it is defective, and the objection can be taken by demurrer or answer, or by opposing the application for judgment without answering.⁸⁴ If the fact does not appear upon the face of the complaint it should be set up by way of answer.⁸⁵

INFANCY OR INSANITY AS A DEFENSE.

§ 908. Purchase-money mortgage of infant.—Where upon the sale and purchase of land a deed is executed therefor, and the purchaser gives back a mortgage for the purchase money or for a part thereof, the presumption is that the deed and mortgage were executed at the same time, and the whole is considered one transaction. Taking the whole together, the purchaser acquires only the equity of redemption.⁸⁶ If such a contract be made by an infant it is voidable by him when he becomes of age. He may then relinquish the property to the grantor, and claim the money which was paid at the time of the purchase.⁸⁷ But the infant cannot avoid one part of the contract and affirm the other. If, when he becomes of age, he elects to avoid the bond and mortgage, the deed also will be avoided. By continuing in possession and conveying the land he makes himself legally liable for the payment of the residue of the purchase money.⁸⁸

See chapter XXXII herein as to action at law and leave of court to sue.

⁸² *Pattison v. Powers*, 4 Paige, 549.

⁸³ Code Civ. Proc. § 1630.

⁸⁴ *Shufelt v. Shufelt*, 9 Paige, 137; *Grosvenor v. Day*, Clarke, 109.

⁸⁵ *The North River Bank v. Rogers*, 8 Paige, 648.

⁸⁶ *Stow v. Tift*, 15 Johns. 458; *Jackson v. Austin*, 15 Johns. 477; *Van Horne v. Crain*, 1 Paige, 455;

Rawson v. Lampman, 5 N. Y. (1 Seld.) 456; *Hitchcock v. The North Western Ins. Co.*, 26 N. Y. 68; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Savage v. The Long Island Ins. Co.*, 43 How. Pr. 462.

⁸⁷ *Willis v. Twambly*, 13 Mass. 204.

⁸⁸ *Henry v. Root*, 33 N. Y. 526, 553; *Lynde v. Budd*, 2 Paige, 191; *Kitchen v. Lee*, 11 Paige, 107; *Coutant v. Servoss*, 3 Barb. 128. See also *Hubbard v. Cummings*, 1 Greenl.

§ 909. A mortgage of an infant is voidable only, and if he elects to disaffirm it he should do so promptly upon coming of age.⁸⁹ The burden of proof that the infant has by his conduct since reaching full age ratified his contract made before, rests upon the person seeking to enforce such contract. The mere appearance by attorney in a foreclosure suit will not, however, ratify a contract no part of which can properly be litigated in that action.⁹⁰

But where property was purchased with the funds of an infant, title being taken by a third person who gave a purchase-money mortgage back, the acceptance by the infant, after attaining his majority, of a conveyance of the property with a knowledge of all the circumstances was held to amount to a ratification of the transaction.⁹¹

Where a minor son conveys to his father in possession and the father executes a mortgage and dies, the son being an heir, the executing of a mortgage by the son after attaining his majority will not, alone, disaffirm the deed to the father, since the mortgage is not inconsistent with the deed, for the reason that the son has a mortgageable title as heir.⁹² It will not operate to disaffirm the deed for the further reason that the mortgage is not of as high a character as the conveyance.⁹³ And an infant may attack the proceedings by which his general guardian was authorized to execute a mortgage upon the former's property and show fraud and collusion on the part of the guardian.⁹⁴ But a foreclosure of the father's mortgage after the son's majority, he being a party and making no defense, will bar the son and all claiming under him.⁹⁵

(Me.) 11; *Badger v. Phinney*, 15 Mass. 359; *Roberts v. Wiggin*, 1 N. H. 73.

⁸⁹ *Loomer v. Wheelright*, 3 Sandf. Ch. 135; *Flynn v. Powers*, 35 How. Pr. 279, aff'd 36 How. Pr. 289.

⁹⁰ *Walsh v. Powers*, 43 N. Y. 23, reversing *Flynn v. Powers*, 35 How. Pr. 279; 36 How. Pr. 289.

⁹¹ *Comey v. Harris*, No. 1, 133 App. Div. 686; 118 N. Y. Supp. 244, aff'd 200 N. Y. 534; 93 N. E. 1118.

⁹² *Eagle Ins. Co. v. Lent*, 6 Paige, 635; *Buchanan v. Griggs*, 18 Neb. 121; 24 N. W. 452; *McGan v. Marshall*, 7 Humph. (Tenn.) 121.

⁹³ *Jackson v. Burchin*, 14 Johns. 124; *Jackson v. Carpenter*, 11 Johns. 539; *Bool v. Mix*, 17 Wend. 132; *Eagle Ins. Co. v. Lent*, 1 Edw. 301; *Tucker v. Moreland*, 10 Peters (U. S.) 58; *Buchanan v. Griggs*, 18 Neb. 121; 24 N. W. 452.

⁹⁴ *Warren v. Union Bank of Rochester*, 157 N. Y. 259; 51 N. E. 1036.

⁹⁵ *Jackson v. Losee*, 4 Sand. Ch. 407; *Zeiter v. Bowman*, 6 Barb. 133; *Cleveland v. Boerum*, 3 Abb. Pr. 294; *Ostrom v. McCann*, 21 How. Pr. 431. See also *Buchanan v. Griggs*, 18 Neb. 121; 24 N. W. 452; *McPherson v. Housel*, 13 N. J. Eq. 301.

Knowledge of a broker that the funds of an infant were used by the purchaser who gave a purchase-money mortgage back is not necessarily imputable to the vendor.⁹⁶

§ 910. A mortgage executed by a lunatic is voidable only. If, however, the defense of insanity is set up in an action to foreclose such a mortgage, the burden of proof rests upon the party claiming under the instrument to show ignorance of the mortgagor's insanity or that in fact he was capable of executing the mortgage at the date of the transaction.⁹⁷

The fact that a person may have had delusions as to his ailment or its causes will not, in the absence of fraud, be a ground for relief against an assignment of a mortgage by him in consideration of board and care where the assignee has performed, and there has been no offer to restore the consideration actually supplied.⁹⁸

WANT OR FAILURE OF CONSIDERATION.

§ 911. Want of consideration.—An entire want of consideration is a good defense as between the parties to an action to foreclose a mortgage,¹ as an assignee takes a mortgage subject to the equities of the debtor,² so the same defense may be made to an action by him on the instrument,³ even though he be a *bona fide* holder.⁴

A seal on a mortgage, however, being presumptive evidence of consideration the burden is on the mortgagor to overcome such presumption.⁵

⁹⁶ *Comey v. Harris*, 133 App. Div. 686; 118 N. Y. Supp. 244.

⁹⁷ *Merritt v. Merritt*, 43 App. Div. 68; 59 N. Y. Supp. 357.

⁹⁸ *Gilgallon v. Bishop*, 46 App. Div. 350; 61 N. Y. Supp. 467.

¹ *Yeoman v. McClenahan*, 190 N. Y. 121; 82 N. E. 1086; *Baird v. Baird*, 145 N. Y. 659; 40 N. E. 222; *Hill v. Hoole*, 116 N. Y. 299; 22 N. E. 547; *Boyce v. Walker*, 130 App. Div. 305; 44 N. Y. Supp. 166; *First Nat. Bank of Towanda v. Robinson*, 105 App. Div. 193; 94 N. Y. Supp.

767, *aff'd* 188 N. Y. 45; 80 N. E. 567.

² *Rapps v. Gottlieb*, 142 N. Y. 164; 36 N. E. 1052. See § 334 herein.

³ *Rapps v. Gottlieb*, 142 N. Y. 164; 36 N. E. 1052; *Schlitz v. Koch*, 138 App. Div. 535; 123 N. Y. Supp. 302.

⁴ *Briggs v. Langford*, 107 N. Y. 680; 14 N. E. 502; *Wood v. Travis*; 24 Misc. R. 589; 54 N. Y. Supp. 60; *Compare Spicer v. First Nat. Bank*, 55 App. Div. 172; 66 N. Y. Supp. 902.

⁵ *Alcock v. Davitt*, 179 N. Y. 9; 71 N. E. 264; *Quackenbush v. Mapes*

§ 912. What is good consideration.—It is a good consideration for a mortgage that the mortgagee has agreed to extend the time of payment of an indebtedness which the mortgage is given to secure,⁶ even though the extension is not for a definite period provided it is followed by a long forbearance.⁷ And the settlement of a disputed claim preferred in good faith is, in the absence of fraud or duress a good consideration for a mortgage even though a valid defense to the claim existed.⁸ Likewise the discontinuance of proceedings by a surety to obtain his release and discharge from his obligation as surety is a good consideration for the assignment or execution of a bond and mortgage to him.⁹

But a bond and mortgage executed by a trustee with no other consideration than the delivery of a certificate of deposit issued by the mortgagee, representing a sum already belonging to the trustee and which the mortgagee knew belonged to her, is properly held void as without consideration.¹⁰ Nor is a husband liable on a bond secured by a mortgage where there is no other than a meritorious consideration such as his duty to provide for his wife.¹¹

§ 913. Prior incumbrances on the property.—In the absence of fraud, a party who has purchased real estate, and received a deed for it containing a covenant that it is free from any incumbrance, and has subsequently paid off and discharged an incumbrance, may set off what has been paid by him against the amount due on any mortgage for the purchase money.¹² In order to avail himself of such defense, however, he would be bound to prove either that what had been paid by him was actually due, or that he had given notice to his vendor requiring that such vendor should pay off such incumbrance within a limited time, or that otherwise the purchaser would pay a specified amount. Some of the

(No. 1), 123 App. Div. 242; 107 N. Y. Supp. 1047.

6 MacLaren v. Percival, 102 N. Y. 675; 6 N. E. 582, aff'g 19 W. D. 171; First National Bank v. Keller, 127 App. Div. 435; 111 N. Y. Supp. 729; Werner v. Franklin Nat. Bank, 49 App. Div. 423; 63 N. Y. Supp. 383.

7 Muir v. Greene, 115 App. Div. 173; 100 N. Y. Supp. 722, aff'd 191 N. Y. 201; 108 N. Y. Supp. 722.

8 Zoebisch v. Von Minden, 120 N. Y. 406; 24 N. E. 795.

9 Houseman v. Bodine, 122 N. Y. 158; 25 N. E. 255.

10 First National Bank v. Robinson, 188 N. Y. 45; 80 N. E. 567.

11 Matter of James, 146 N. Y. 78; 40 N. E. 876.

12 Coy v. Downie, 14 Fla. 544. See McCrea v. Connor, 30 App. Div. 598; 52 N. Y. Supp. 231.

authorities lay down the rule that the purchaser may set off or recover the amount paid without any qualification; but it seems to be reasonable that a vendor who has been innocent of any fraud should have an opportunity to set himself right before he is obliged to pay or allow more than the amount actually due.¹³

Where in an action to foreclose a purchase-money mortgage it was made to appear that the land was incumbered with prior judgment liens to an amount exceeding the balance due on the mortgage, there being covenants against such judgments in the conveyance to the mortgagor, the mortgagor was held entitled to an injunction against the collection of the mortgage debt, until the mortgagee should reduce the incumbrance to a sum not exceeding the unpaid purchase money.¹⁴ So, in a suit to foreclose a mortgage for purchase money, the mortgagor and grantee in the conveyance is entitled, by virtue of the covenants against incumbrances therein, to have the amount of liens for taxes or assessments outstanding on the mortgaged property deducted from the amount due on the mortgage and a decree taken only for the balance.¹⁵ And the assignee of such mortgage holds it subject to the same equity.¹⁶

In an action against the purchaser at a sale upon the foreclosure of a mechanic's lien to foreclose a mortgage executed and recorded prior to the filing of the lien, it is held that the defendant is entitled to destroy if he can, any prior lien affecting the land and, therefore, for that purpose, may show as a defense to the action that such mortgage was without consideration, and that an assignment thereof to plaintiff was invalid.¹⁷

But one who purchases premises subject to a purchase-money mortgage which he agrees to pay is estopped from contesting the consideration or validity of the mortgage.¹⁸

§ 914. Defect of title in the conveyance to mortgagor.—It is well settled that where the incumbrance has not been paid off by

¹³ Lee v. Porter, 5 Johns. Ch. 268.

¹⁴ Arnold v. Curl, 18 Ind. 339.

¹⁵ National Bank v. Pinner, 25 N. J. Eq. 495; White v. Stretch, 22 N. J. Eq. 76. See General Underwriting Co. v. Stilwell, 139 App. Div. 189; 123 N. Y. Supp. 653.

¹⁶ National Bank v. Pinner, 25 N. J. Eq. 495.

¹⁷ Nichols v. Hill, 6 Thomp. & C. 335.

¹⁸ McConihe v. Fales, 107 N. Y. 404; 14 N. E. 285.

the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he cannot, in the absence of fraud, have relief against the contract to pay the purchase money or any part of it, on the ground of defect of title.¹⁹ The reason is that the incumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase money should be retained.²⁰

So, where in an action to foreclose a purchase-money mortgage brought by an assignee, the grantee of the owner of the equity of redemption set up as a counterclaim certain alleged breaches of a covenant against incumbrances contained in the deed from the mortgagee, but it appeared that the grantee was in undisturbed possession; that no action was pending for possession by an adverse claimant, and that the alleged defects in title did not amount to a total failure of consideration and there was no allegation in the answer of fraud in the sale of the premises; that the owner had lost the land in whole or in part, or that he had suffered any damage by breach of the covenant, it was decided that the grantee was not entitled to a trial upon the counterclaim. It was, however, held that an appeal to the Courts of Appeals would be granted the appellant upon such terms as would have enabled her to obtain a stay upon an appeal from a judgment of foreclosure.²¹

An adverse tax title cannot be pleaded as a defense to a purchase-money mortgage where no claim under it has been made against the mortgagor.²²

A grantee of land under a warranty deed purporting to con-

¹⁹ *McConihie v. Fales*, 107 N. Y. 404; 14 N. E. 285; *Shire v. Plimpton*, 50 App. Div. 117; 63 N. Y. Supp. 568; *Ferrer v. Pyne*, 81 N. Y. 281; *Parkinson v. Jacobson*, 13 Hun. 317; 74 N. Y. 88; *York v. Allen*, 30 N. Y. 104; *Curtis v. Bush*, 39 Barb. 661; *Sandford v. Travers*, 7 Bosw. 498; *Bumpus v. Platner*, 1 Johns. Ch. 218; *Abbott v. Allen*, 2 Johns. Ch. 519; *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79; *Chesterman v. Gardner*, 5 Johns. Ch. 29; *Denston v. Morris*, 2 Edw. 37; *Leggett v. McCarty*, 3 Edw. 124; *Eagle Fire Ins.*

Co. v. Lent, 1 Edw. 301, aff'd 6 Paige 635; *Bates v. Delavan*, 5 Paige, 300; *Banks v. Walker*, 2 Sandf. Ch. 344; *Tallmadge v. Wallis*, 25 Wend. 107; *Edwards v. Bodine*, 26 Wend. 109; *Burke v. Nichols*, 21 How. Pr. 459; 34 Barb. 430, aff'd 2 Keyes, 670. See also *Stahl v. Hammontree*, 72 Ind. 103; *Hill v. Butler*, 6 Ohio St. 207.

²⁰ *STRONG, J.*, in *Grant v. Tallman*, 20 N. Y. 191.

²¹ *Kouwenhoven v. Gifford*, 144 App. Div. 355; 128 N. Y. Supp. 1129.

²² *Smith v. Fiting*, 37 Mich. 148.

vey in fee simple, whose possession has not been disturbed, cannot resist foreclosure of purchase-money mortgage given by him on the ground that the grantor had, in fact, but a life estate, no fraud being shown.²³

And in an action to foreclose a purchase-money mortgage given by the grantee to the grantor, the fact that the latter has only a mortgagee's interest in the premises conveyed is held to be no defense, in the absence of an eviction.²⁴

A mortgage executed upon a title derived by fraudulent agreement with executors under the execution of a power of sale, though void for all other purposes is held to be enforceable in the hands of an innocent mortgagee.²⁵

Again, where one who holds the record title to property to whom it is conveyed in pursuance of a verbal understanding that the grantee will convey it to a third party upon certain conditions, executes a mortgage thereon to one for a valuable consideration while in possession of the record title, the validity of such mortgage cannot be assailed by such third party though the parol trust so created may be enforced against the trustee or his heirs.²⁶

§ 915. Mortgage on one parcel of land as consideration for another, the title of which fails.—Where a mortgage is given upon one parcel of land as security for the purchase price of another conveyed with warranty and the grantor had no title to the latter parcel, the consideration for the mortgage fails, and the same rules will apply as in other cases of failure of consideration, and the mortgagor may be accorded a deduction, or may be entirely relieved, as justice requires.²⁷ But where a purchase of three tracts of land was made for a round sum and the purchase price was secured by mortgage on only one of them conveyed by a separate deed, it was held that the purchaser could not set up

²³ *Moyer v. Shoemaker*, 5 Barb. 322. See also *Rantlet v. Herren*, 20 N. H. 102; *Clementson, Ex'r, v. Streeter*, 59 Wis. 429; 18 N. W. 340; *Oakes v. Estate of Buckley*, 49 Wis. 592; 6 N. W. 321; *Noonan v. Ilsey*, 22 Wis. 27.

²⁴ *Merchants' Nat. Bank v. Snyder*, 52 App. Div. 606; 65 N. Y. Supp.

994, aff'd 170 N. Y. 565; 62 N. E. 1097.

²⁵ *Rosenbaum v. Silverman*, 22 Misc. R. 589; 50 N. Y. Supp. 860, citing *Benedict v. Arnoux*, 154 N. Y. 715.

²⁶ *McClellan v. Grant*, 83 App. Div. 599; 82 N. Y. Supp. 208, aff'd 181 N. Y. 581; 74 N. E. 119.

²⁷ *Smith v. Newton*, 38 Ill. 230.

as a defense that the title to the lots not included in the mortgage had failed.²⁸

§ 916. Consideration of purchase-money mortgage fails upon eviction.—Upon an eviction under paramount title the consideration for a note or bond given by a purchaser for the purchase money, the title to the land wholly fails, and covenants of title in the deed cannot be regarded as a consideration which will support a promise to pay. This doctrine is in accordance with the general current of authority.²⁹ In *Rice v. Goddard* (14 Pick. 293), the court says: "The promise is not made for a promise, but for the land; the moving cause is the land; and, if that fails to pass, the promise is a mere *nudum pactum*;" and this statement has been approved by our Court of Appeals.³⁰

§ 917. What constitutes an eviction.—It was at one time held that, to constitute an eviction which would give a defense upon the covenants contained in the conveyance which constituted the consideration for the mortgage, there must be a disturbance of the possession by legal process. Such is not now the rule; possession without a struggle to maintain it may be surrendered to one having a paramount title, with the same right to resort to the grantor's covenants of warranty that would have been brought about by an eviction under process of law,³¹ though in such case the person evicted must stand ready to show that the title to which he surrendered was a good one.³²

A breach by the grantor of a covenant in his deed may preclude him from maintaining an action to foreclose a purchase-money mortgage. So, where a grantor sought to foreclose such a mortgage it was decided that he was precluded from maintaining the action by a breach by him of the covenant of quiet and peaceable possession contained in his deed to the purchaser, his acts not constituting a mere trespass but an entry on the property to the exclusion of his grantee.³³

²⁸ *Fisk v. Duncan*, 83 Pa. St. 196.

²⁹ *Knapp v. Lee*, 3 Pick. (Mass.) 452; *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Trask v. Vinson*, 20 Pick. (Mass.) 105; *Rawle on Covenants for Title*, 607.

³⁰ Per *ANDREWS*, J., in *Dunning v. Leavitt*, 85 N. Y. 30, *rev'g sub*

nom. *Dunning v. Fisher*, 20 Hun, 178.

³¹ Per *GRAY*, Com., in *Cowdrey v. Coit*, 44 N. Y. 382, 392; *Greenvault v. Davis*, 4 Hill, 643; *Simers v. Salatus*, 3 Den. 214; *Curtis v. Bush*, 39 Barb. 661.

³² *York v. Allen*, 30 N. Y. 104.

³³ *Cassada v. Stabel*, 98 App. Div.

The surrender of property under and in pursuance of a judgment directing the delivery of possession is an eviction. A forcible dispossession or an actual physical expulsion is not necessary to constitute it,³⁴ and the peaceable yielding of possession in obedience to a judgment which the mortgagor is unable to resist shows a failure of the consideration for which the bond was given. He may, indeed, be evicted without suffering any actual change of possession, as by a purchase of the property under the foreclosure of a mortgage which was a prior lien, or by acquiring a paramount title.³⁵

A constructive eviction exists where the covenantee has compulsorily purchased or taken a lien under the paramount title without any actual change of possession.³⁶

§ 918. Where mortgagor is unable to obtain possession.—The fact that there was an adverse claim being pressed at law would afford no defense where there had been no absolute disturbance of possession;³⁷ but if the mortgagor was prevented by the adverse claimants from getting possession, there being a failure of title, this would constitute a defense so far as the action sought to charge the mortgagor personally with the debt.³⁸ And in the absence both of fraud and of covenants for title, if the mortgagor derives no benefit from the purchase, equity would require that he should be charged with no deficiency.³⁹

If there be an entire failure of title in the conveyance to the mortgagor, and if he is unable to obtain possession under it, he will be relieved from the payment of the consideration, even in the absence of covenants of title, on the ground of the failure of consideration;⁴⁰ but if there be no fraud, the purchaser cannot

600; 90 N. Y. Supp. 533, holding also that the purchaser could recover back the amount of the principal paid by him on account of the purchase price.

34 Dyett v. Pendleton, 8 Cow. 727.

35 Cowdrey v. Colt, 44 N. Y. 382.

36 Tucker v. Cooney, 34 Hun, 227, 231. See also Whitney v. Dinsmore, 6 Cush. (Mass.) 124; Loomis v. Bedell, 11 N. H. 74; Brown v. Dickerson, 12 Pa. St. 372.

37 Platt v. Gilchrist, 3 Sandf. 118;

Banks v. Walker, 2 Sandf. Ch. 344; aff'd 3 Barb. Ch. 438; Miller v. Avery, 2 Barb. Ch. 582. *Contra*, Johnson v. Gere, 2 Johns. Ch. 546.

38 Withers v. Powers, 2 Sandf. Ch. 350, n.; Shattuck v. Lamb, 65 N. Y. 500.

39 Sandford v. Travers, 40 N. Y. 140.

40 Banks v. Walker, 2 Sandf. Ch. 344, aff'd 3 Barb. Ch. 438; Shattuck v. Lamb, 65 N. Y. 500.

have any relief if he acquires even so much as possession under the purchase.⁴¹

§ 919. Foreclosure ordered without judgment for deficiency.—The fact that there may be a judgment against the mortgagor for a deficiency does not enable him to defend against the foreclosure because of a failure of title in a purchase-money mortgage, he being in undisturbed possession;⁴² but it does not follow that the mortgagor should be held for deficiency, and the court has in such a case ordered a foreclosure and sale, without any judgment for deficiency, and with leave to the complainant to sue on the bond.⁴³

§ 920. Fraud practiced on mortgagor.—The case of fraud is an exception, and if the purchaser was imposed upon by any intentional misrepresentation or concealment, he may have redress in equity, in addition to and beyond his covenants.⁴⁴

A mortgagor is entitled, in a suit by the mortgagee on a purchase-money mortgage to set up a counter-claim for damages by reason of the fraud of the mortgagee in concealing from him material facts as to the situation and extent of the premises.⁴⁵ But a fraudulent misrepresentation does not invalidate the mortgage for its whole amount if there is any value at all in the property, and the property must first be restored, or a reconveyance tendered, before the mortgage can be rescinded.⁴⁶ And the defense of fraudulent representations may be precluded by a subsequent ratification of the transaction by the mortgagor.⁴⁷ Nor can the mortgagor avail himself of the fraud of one who acted as his agent,⁴⁸ since in this as in other cases the loss should fall upon him whose act permitted the wrong to be done.⁴⁹ The

⁴¹ *Abbott v. Allen*, 2 Johns. Ch. 519.

⁴² *Edwards v. Bodine*, 26 Wend. 109; *Davison v. De Freest*, 3 Sandf. Ch. 456.

⁴³ *Withers v. Morrell*, 3 Edw. 500.

⁴⁴ *Abbott v. Allen*, 2 Johns. Ch. 519; *Belknap v. Sealey*, 2 Duer, 570. See also *Cornell v. Corbin*, 64 Cal. 197; 30 Pac. 629; *Shorb v. Beaudry*, 56 Cal. 446. See *Crowe v. Malba Land Co.*, 76 Misc. R. 676.

⁴⁵ *Baughman v. Gould*, 45 Mich.

481; 8 N. W. 73; *Burchard v. Fraser*, 23 Mich. 224; *Dayton v. Melick*, 32 N. J. Eq. 570; *Pierce v. Tiersch*, 40 Ohio St. 168; *Allen v. Shackelton*, 15 Ohio St. 145.

⁴⁶ *Mattair v. Card*, 18 Fla. 761; *Sanborn v. Osgood*, 16 N. H. 112.

⁴⁷ *Jacobs v. Edelson*, 83 App. Div. 363; 82 N. Y. Supp. 270.

⁴⁸ *Heucken v. Schwicker*, 174 N. Y. 298; 66 N. E. 971.

⁴⁹ *Austen v. Richardson*, 67 App. Div. 166; 73 N. Y. Supp. 731.

representations must be as to facts, and a misrepresentation merely as to the value of the property will not be sufficient.⁵⁰

Where a purchaser was induced by false representations to accept a deed of property to which his grantor had no title, and to assume a mortgage thereon, this fact was held to constitute a defense against the mortgagee to the covenant to assume.⁵¹

It has been held that a deduction from a purchase-money mortgage on foreclosure, in favor of the vendee of the land, on the ground of a misstatement of the number of acres, can only be made where the mortgagee and such vendee are privies in contract, and that such deduction will not be made in favor of C on foreclosure by A, where A sold to B, misstating the number of acres, taking the mortgage for part of the consideration, and B sold with similar misstatements to C, C assumed payment of the mortgage.⁵²

§ 921. **Mutual mistake as to title of grantor.**—In a case in which the vendors, under a misapprehension of their legal rights, sold and received part payment for a lot which was already dedicated to the public, and which, for that reason, was worth nothing to the owners, or those whose interests they represented in the transaction; and where the purchaser, relying upon the information of the adverse party, purchased and in part paid for a lot which was, in fact, of no value either to him or to the vendors, it was held to be just and equitable, after the purchaser had been evicted by the opening of a street across the lot, to decree a discharge of the bond and mortgage, and a return of the purchase money which had been paid toward the lot under such a misapprehension of the facts.⁵³

§ 922. **Mistake as to quantity of land conveyed.**—But where lands are sold, and both grantor and grantee are mistaken as to the number of acres conveyed, and the grantee executes a mortgage on such lands for the purchase money, it will not be any defense to an action to foreclose the mortgage to show that there was considerably less land than was supposed, if there was no fraud or misrepresentation by the grantor.⁵⁴

⁵⁰ Sanborn v. Osgood, 16 N. H. 112.

⁵¹ Benedict v. Hunt, 33 Iowa, 27.

⁵² Davis v. Clark, 33 N. J. Eq. 579.

⁵³ Champlin v. Laytin, 6 Paige, 189, aff'd 18 Wend. 407.

⁵⁴ Northrop v. Sumney, 27 Barb. 196. See also Clark v. Davis, 32 N. J. Eq. 530; Coursen v. Canfield, 6

An abatement from the purchase-money mortgage will be allowed if, by mutual mistake, less land was conveyed than was intended, there being an error in the boundary line as described in the deed.⁵⁵ But in the absence of fraud or of gross mistake in the quantity, no allowance will be made merely because, at the end of a particular description, the quantity of land conveyed is overstated.⁵⁶

§ 923. Agreement to protect mortgagor against prior claims.—Where a mortgage for purchase money contained a clause to the effect that no part of the mortgage debt was to be payable until all incumbrances had been removed from the mortgaged premises, and it appeared that certain taxes assessed against the land before the execution of the mortgage remained unpaid, it was held that no action for the foreclosure of the mortgage would lie until such taxes were fully discharged.⁵⁷ The same rule has been declared where a stipulation executed with the mortgage required that it should not be enforced until a quitclaim of an outstanding title had been obtained.⁵⁸

§ 924. Remedies of mortgagor.—It is manifestly just not to permit the maker of a purchase-money mortgage to resist the enforcement of the lien. He should either pay as he has agreed or permit the sale of the security in order that payment may be made out of its proceeds. And if he continues in the possession and enjoyment of the property he should not be allowed to refuse payment of the stipulated price for the land merely because of adverse claims which may never be enforced.⁵⁹

In cases of fraud, one remedy of the mortgagor is to allege damages for such fraud, and to recoup them by way of counterclaim.⁶⁰ Another remedy is to ask to have the whole transaction set aside, and this would of necessity involve a surrender of all claim to the land.⁶¹

Where there is no fraud, but there are covenants as to title, the

C. E. Green (N. J.) 92; Tichenor v. Dodd, 3 Gr. Ch. (N. J.) 454. *Examine Stickles v. Miller*, 143 App. Div. 763; 128 N. Y. Supp. 487.

⁵⁵ *Nelson v. Hall*, 60 N. H. 274.

⁵⁶ *Melick v. Dayton*, 34 N. J. Eq. 245.

⁵⁷ *Stewart v. Clark*, 8 Kans. 210.

⁵⁸ *Ryerson v. Willis*, 81 N. Y. 277.

⁵⁹ *Grant v. Tallman*, 20 N. Y. 191.

⁶⁰ *Aiken v. Morris*, 2 Barb. Ch. 140; *Grant v. Tallman*, 20 N. Y. 191; *Lathrop v. Godfrey*, 6 N. Y. Sup. (T. & C.) 96; 3 Hun, 739; *Abbott v. Allen*, 2 Johns. Ch. 519; *Ludington v. Slauson*, 6 J. & S. 81.

⁶¹ *Ferrer v. Pyne*, 81 N. Y. 281.

remedy of the mortgagor is to be found in reliance upon those covenants. If the defect in the title is because of liens, the grantor should be asked to discharge them, and if he fails to do so, the mortgagor may pay them, and, after such payment, he may assert it as a counter-claim on the bond and as a proper reduction of the amount which he ought to pay for the land.⁶²

If the defect is one of title, and extends only to a portion of the land, this constitutes a breach of the covenants of seizin, if not also of the covenant of warranty,⁶³ and a counter-claim for damages for such breach would, under our system of practice, be proper in the action to foreclose.

COUNTER-CLAIMS IN FORECLOSURE CASES.

§ 925. **Counter-claim on contract.**—An action to enforce a mortgage, although denominated an action for the foreclosure of a mortgage, is in law and in fact an action for the recovery of the amount owing on the obligation of the mortgagor, or other person liable for the debt; first, by an order for the sale of the premises mortgaged for that purpose, and the application of the avails of the sale to that purpose, and then for a judgment against him for the deficiency. It is not only an action against the mortgagor upon his contract to pay the amount specified in his bond, to which an offset might have been pleaded before the Code,⁶⁴ but one in which under the Code a several judgment may be had as between the plaintiff and the person liable for the debt, and hence is subject to a counter-claim of any other cause of action arising also on contract which the person so liable has against the plaintiff at the time of the commencement of the action.⁶⁵

§ 926. **Who may set up counter-claim.**—A counter-claim when established must, in some way, qualify or defeat the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit a defendant who is personally liable for the debt, or whose land is

⁶² Lee v. Porter, 5 Johns. Ch. 268.

⁶³ Tallmadge v. Wallis, 25 Wend. 107. See also Rice v. Goddard, 14 Pick. (Mass.) 293; Latham v. McCann, 2 Neb. 276.

⁶⁴ 2 R. S., § 1, sub. 1.

⁶⁵ Code, §§ 501, 502; National Fire Ins. Co. v. McKay, 21 N. Y.

191, 196; Hunt v. Chapman, 51 N. Y. 555; Bathgate v. Haskin, 59 N. Y. 533; Chapman v. Robertson, 6 Paige, 627; Holden v. Gilbert, 7 Paige, 208. See also Goodman v. Keney, 49 Conn. 563; Harrison v. Bray, 92 N. C. 488.

bound for the lien, may properly introduce an offset to reduce or extinguish the claim;⁶⁶ but where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, he cannot demand a judgment against the plaintiff on a note, a bond, or a covenant.⁶⁷ It has also been said that, where the defendant is not liable for the debt, his right to a counter-claim is limited to matters arising out of the subject of the action;⁶⁸ but this would not apply where the defendant owning the equity desired to set up a claim which he had against the plaintiff, in order that his demand might offset a portion of the debt charged upon his estate.⁶⁹

§ 927. Requisites of counter-claim.—In order to be permissible under the Code, a counter-claim must be one existing against a plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment might be had in the action.⁷⁰

And allegations in the answer which do not constitute a defense to the action coupled with a demand for a money judgment against the plaintiff do not constitute a counter-claim, there being no demand in the complaint for a personal judgment against the answering defendant, as in such a case the alleged cause of action will not tend to diminish or defeat the plaintiff's recovery.⁷¹ Where the debt is evidenced by the joint bond of two of the defendants, one of whom is as between themselves a surety for the debt, and the mortgaged premises being the property of the principal debtor, claim due from the plaintiff to the principal debtor may be used to offset the amount due upon the mortgage.⁷² In such a case the fact that one of the obligors was surety for the other may be shown by extrinsic evidence, and in equity this can always be done to let in a defense or to establish a right founded

⁶⁶ *Lathrop v. Godfrey*, 3 Hun, 739; 6 N. Y. Sup. (T. & C.) 96.

⁶⁷ *National Fire Ins. Co. v. McKay*, 21 N. Y. 191.

⁶⁸ *Agate v. King*, 17 Abb. 159.

⁶⁹ *Bathgate v. Haskin*, 59 N. Y. 533.

⁷⁰ Code of Civ. Pro. § 501; *City Real Estate Co. v. Foster*, 44 App. Div. 144; 60 N. Y. Supp. 577.

⁷¹ *Merchants' National Bank v. Snyder*, 52 App. Div. 606; 65 N. Y. Supp. 904, *aff'd* 170 N. Y. 565; 62 N. E. 1097.

⁷² *Bathgate v. Haskin*, 59 N. Y. 533; *Holbrook v. The Receivers of the American Fire Ins. Co.*, 6 Paige, 220. See also *Ex parte Hanson*, 12 Ves. 346.

upon that relation.⁷³ But one who holds a mechanic's lien subordinate to the mortgage and against whom, though he is made a defendant, no personal judgment is asked, cannot counter-claim for the amount due on his lien.⁷⁴ Nor in an action to recover possession of a deed to the plaintiff from the defendant, to whom a deed had previously been given as security for a debt can the latter have, by way of counter-claim, the foreclosure of the prior deed as a mortgage.⁷⁵ The "several judgment" which the statute requires may be had, may be a judgment for a part of the relief asked for, as to extinguish the right of one of the defendants in the land. That a joint personal judgment may also be given does not exclude the allowance of the counter-claim.⁷⁶

Under the Code an affirmative judgment for an excess over the plaintiff's claim is not authorized.⁷⁷

§ 928. Counter-claims for damages.—There can be no doubt that, if the mortgagee be guilty of a fraud whereby the mortgagor is induced to purchase a defective title and to pay for it with a mortgage, the mortgagor may recoup in the foreclosure suit to the extent of his actual damage, and if that shall equal or exceed the amount of the mortgage, it will constitute an entire defense.⁷⁸

The personal representatives of a deceased mortgagor may counter-claim for an injury to the mortgaged premises caused by the mortgagee.⁷⁹

If the mortgage be given for a portion of the purchase money, the grantee who has assumed the payment of it, may interpose a cause of action for damages for false representations as to the character and convenience of the property made to the mortgagor to induce him to make the purchase, as a counter-claim; and he may also be allowed to show that an assignment of the bond and

⁷³ Bathgate v. Haskin, 59 N. Y. 533; Archer v. Douglass, 5 Den. 509; Barry v. Ransom, 12 N. Y. 466.

⁷⁴ Lipman v. Jackson Agricultural Iron Works, 128 N. Y. 58; 27 N. E. 975.

⁷⁵ House v. Lockwood, 137 N. Y. 259; 33 N. E. 595.

⁷⁶ Bathgate v. Haskin, 59 N. Y. 533.

⁷⁷ United States Trust Co. v. Stanton, 139 N. Y. 531; 34 N. E. 1098; Code Civ. Proc. §502, sub'd 3.

⁷⁸ Grant v. Tallman, 20 N. Y. 191; Lathrop v. Godfrey, 6 N. Y. Sup. (T. & C.) 96; 3 Hun, 739; Abbott v. Allen, 2 Johns. Ch. 519; Ludington v. Slauson, 6 J. & S. (38 N. Y. Super.) 81. See also Parker v. Hartt, 32 N. J. Eq. 225.

⁷⁹ Fort Miller Pulp & Paper Co. v. Bratt (No. 2), 119 App. Div. 685; 104 N. Y. Supp. 350; 39 Civ. Proc. R. 373.

mortgage from the mortgagee was only colorable, and that the mortgagee was still the equitable owner.⁸⁰

But it has been decided that persons who have purchased land expressly subject to a mortgage thereon, cannot set up as a counter-claim a fraud practiced upon them by the mortgagor several years subsequent to the time when the mortgage was given where there is nothing to connect the plaintiff with the fraud of the mortgagor.⁸¹

If a mortgage be made to secure future advances under an agreement by the mortgagee to make the advances, and only a portion of the money is advanced, the mortgage is a lien only to the extent of the amount actually advanced, and, though the mortgagor be injured seriously by failing to receive the balance of the money, he can recover only nominal damages by way of counter-claim.⁸² And, where it appeared that a fourteen thousand dollar purchase-money mortgage was satisfied, and a new one for seventeen thousand given on an agreement by the mortgagee to advance three thousand dollars more which sum was never advanced, it was decided in an action to foreclose the mortgage that to the extent of the sum of fourteen thousand dollars, to which extent only it was sought to exercise the right to foreclose, such mortgage was in the same position as the original purchase-money mortgage, that the plaintiff had the sanction of the law therefor in case of default in payment and that a defendant, who was holder of a mechanic's lien filed against the mortgaged premises subsequent to the giving of such mortgage, could not avail himself as a defense of the failure of the mortgagee to carry out his part of the agreement as to making the advance.⁸³ But it is said that damages sustained by the mortgagee's refusal to release portions of the premises on sales by the mortgagor, may be matter of equitable set-off.⁸⁴

§ 929. What are proper counter-claims.—The counter-claim must be due when the foreclosure is commenced, or when a subsequent instalment grows due, and is attempted to be enforced in the action.⁸⁵

⁸⁰ Lathrop v. Godfrey, 3 Hun, 739; 6 N. Y. Sup. (T. & C.) 96.

⁸¹ Reed v. Latson, 15 Barb. 9.

⁸² Dart v. McAdam, 27 Barb. 187.

⁸³ Price v. Alyea, 13 App. Div. 184; 43 N. Y. Supp. 355.

⁸⁴ Warner v. Gouverneur, 1 Barb. 36.

⁸⁵ Holden v. Gilbert, 7 Paige, 208. See Richards v. La Tourette, 119 N. Y. 54; 23 N. E. 531.

Where there are several suits to foreclose different mortgages, the defendant cannot be compelled to elect in which he will set up his counter-claim.⁸⁶

An answer which alleged, in substance, that the mortgage sought to be foreclosed was executed as part of a transaction by which \$38,000 was to be loaned, and that the mortgage and a conveyance of another parcel of land had been given as security therefor, and asking for a reconveyance upon payment of the whole sum, has been held a proper counter-claim.⁸⁷

Where an answer sets up facts tending to show that the bond and mortgage are void for usury, and demands judgment that they be delivered up and cancelled without explicitly stating that such facts are alleged as a counter-claim, this does not constitute a counter-claim, but merely a defense to the action, and no reply thereto is necessary.⁸⁸

So, when facts are alleged in an answer tending to show that a mortgage sought to be foreclosed has no validity for any reason, such facts do not constitute a counter-claim which call for a reply.⁸⁹

And where there is also a second mortgage, the holder of the latter, who is made a party to the action, cannot by counter-claim raise the objection that the plaintiff must first resort to other property covered by his mortgage and not subject to a lien in favor of the defendant.⁹⁰

§ 930. Litigation between defendants.—By section 521 of the Code of Civil Procedure, it is provided as follows: "Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must, at least twenty days before the trial, serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants so to be affected who have not duly appeared

⁸⁶ *McLane v. Geer*, 3 Edw. Ch. 245.

⁸⁷ *Bernheimer v. Willis*, 11 Hun, 16.

⁸⁸ *Equitable Life Assurance Co. v. Cuyler*, 12 Hun, 247, aff'd 75 N. Y. 511; *Barthet v. Elias*, 2 Abb. N. C. 364.

⁸⁹ *Caryl v. Williams*, 7 Lans. 416; *Bates v. Rosekrans*, 37 N. Y. 409; *Agate v. King*, 17 Abb. 159; *Vassear v. Livingston*, 13 N. Y. 249.

⁹⁰ *New York Co.-Op. Building & Loan Ass'n v. Brennan*, 62 App. Div. 610; 70 N. Y. Supp. 916.

therein by attorney. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled unless the court otherwise directs." ⁹¹

§ 931. Substitute for cross-bill.—This provision is a substitute for a cross-bill under the practice in equity, which prevailed before the Code, when rights were required to be adjusted between the defendants. As an example of the use of a cross-bill, it was held before the Code to be proper for a defendant to set up and maintain by a cross-bill, an equitable right to have another security in the hands of the plaintiff first enforced, before resorting to a sale of the mortgaged premises.⁹² If the necessary parties were before the court the judgment might do equity in the premises, as for example by directing the order in which different parcels of land may be sold; but, if other parties were necessary, the cross-bill could not be used to convert the original action into a distinct suit relative to other lands, or become the foundation of a decree concerning matters not embraced in the original suit.⁹³ But there might be a decree in such a case that, after satisfying the complainant's claims out of the mortgaged premises, the defendant should be subrogated to the rights of the complainant under the collateral security.⁹⁴ It is believed that under the Code the same relief could be obtained in proper cases by means of the provision now being considered.⁹⁵

§ 932. What may be litigated between defendants.—It is not every matter of difference between the defendants in an action to foreclose a mortgage that can be litigated in the way indicated by section 521 of the Code, and it is doubtful whether it was intended to go further than the former practice in chancery, where it was required that the cross-bill should be within the proper scope and object of the action as exhibited in the complaint. The relief sought by the cross-bill could not be obtained unless it raised questions, the determination of which was essential to the accomplishment of the very object sought by the bill itself.⁹⁶

⁹¹ Code of Civ. Pro. § 521, as am'd by Laws of 1884, ch. 400; *Revoir v. Barton*, 71 Hun, 457.

⁹² *King v. McVicker*, 3 Sandf. Ch. 192.

⁹³ *Gallatian v. Cunningham*, Hopk. 48, aff'd 8 Cow. 361.

⁹⁴ *King v. McVicker*, 3 Sandf. Ch. 192.

⁹⁵ *Currie v. Cowles* 6 Bosw. 453; *Cramer v. Benton*, 4 Lans. 291; *Gleason v. Moen*, 2 Duer, 639; *Leavenworth v. Packer*, 52 Barb. 132.

⁹⁶ *Equitable Life Assurance Co. v.*

A defendant in an action to foreclose cannot call upon the court to determine between him and another defendant jointly liable with him as to which is the principal and which is the surety.⁹⁷ And one defendant owning an undivided interest in the equity of redemption cannot by means of a cross-bill, or of an answer praying for affirmative relief against his co-defendants, procure a judgment for the partition of the property in an action to foreclose.⁹⁸ On a like principle a mortgagee cannot be delayed in his foreclosure to permit two defendants to litigate between each other as to whether the specific performance of an alleged contract of sale of the equity of redemption ought to be enforced.¹ So a mortgagor, joined as a defendant in an action to foreclose with another defendant claiming title to the equity of redemption under a sheriff's deed after a sale upon execution, cannot litigate in that action as to the validity of such sheriff's deed.²

The same principle will prevent the owner of a second mortgage, who is a defendant in an action to foreclose a first mortgage, from obtaining in that action a judgment for the satisfaction of his lien out of the proceeds of the property and a judgment for deficiency against the mortgagor.³

And in general, defendants cannot settle their rights as between themselves until after the entry of judgment, unless those rights grow directly out of the claim made by the plaintiff and consist in qualifying the rights of the plaintiff, so as to make the remedies of the plaintiff apply with more or less vigor against the defendants respectively.⁴

However proper the answer interposed by way of cross-bill may be, it will not aid the defendant interposing it, unless it has been duly served upon his co-defendants.⁵

Cuyler, Abb. Ct. App. Dec. 253, 257;
 Kay v. Whittaker, 44 N. Y. 565, 576;
 Norbury v. Seeley, 4 How. Pr. 73;
 Woodworth v. Bellows, 4 How. Pr. 24;
 Mechanics' and Traders' Bank v. Roberts, 1 Abb. Pr. 381; Stephens v. Hall, 2 Robt. 674.

97 Hovenden v. Knott, 12 Or. 267;
 7 Pac. 30.

98 Matthews v. Lindsay, 20 Fla. 962;
 Buckmaster v. Kelly, 15 Fla. 199;
 Mattair v. Payne, 15 Fla. 685.

1 Handly v. Munsell, 109 Ill. 362.

2 Tutwiler v. Dunlap, 71 Ala. 126.

3 Gallatian v. Cunningham, Hopk. 48;
 Griffith v. Merritt, 19 N. Y. 529.
 See also Sebring v. Conkling, 32 N. J. Eq. 24.

4 Newman v. Dickson, 1 Abb. N. C. 307;
 Miller v. Case, Clark. Ch. 395;
 Hovenden v. Knott, 12 Oreg. 267;
 7 Pac. 30.

5 Meigs v. Willis, 66 How. Pr. 466.

WHEN A GRANTEE MAY DEFEND WHO HAS TAKEN SUBJECT TO THE
MORTGAGE.

§ 933. **Conveyance subject to mortgage void for usury.**—When, in a conveyance of land, it is described as being subject to a mortgage, the question may be raised as to whether, and to what extent, this will limit the grantee in questioning the validity or the amount due on said mortgage. It is settled that such a clause in the deed operates as a waiver of the defense of usury, and as a provision made by the mortgagor for the payment of the usurious debt, which he is not suffered at any time afterward to question,⁶ such grantee cannot compel the application of a usurious bonus paid by his grantor, so as thereby to procure a reduction of the mortgage.⁷

But where the mortgagor and second mortgagee have a right to the defense of usury, against a first mortgage, a purchaser under the foreclosure of the second mortgage is not precluded from making such defense by a clause in the deed of the sheriff, reciting that the property is subject to the prior lien.⁸ And where property subject to a mortgage is conveyed by a deed absolute on its face, containing no reference to the mortgage, and such deed is to secure notes, which are subsequently paid and the property reconveyed to the grantor's wife, by a deed in which without her knowledge or her husband's, a clause is inserted by which the wife assumed and agreed to pay the mortgage, it is held that, as there is no priority between her grantor and the holder of the mortgage and no obligation resting on him to pay it, the mortgagees acquired no right by reason of such clause inserted in the deed to the wife, and that both she and her husband can defend an action to foreclose on the ground of usury, she as a subsequent grantee of the premises not bound as between her and the mortgagees for

⁶ Hartley v. Harrison, 24 N. Y. 170; Smith v. Cross, 16 Hun, 487;. See also Baskins v. Calhoun, 45 Ala. 382; Loomis v. Eaton, 32 Conn. 550; Studabacker v. Marquardt, 55 Ind. 341; Pinnell v. Boyd, 33 N. J. Eq. 190; Jones v. Insurance Co., 40 Ohio St. 583; Cramer v. Lepper, 26 Ohio St. 59; Austin v. Chittenden, 33 Vt. 553. If the mortgagor afterward re-

purchases the property, he can set up usury. Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 153; 7 Abb. N. C. 170; 13 Hun, 321; Bennett v. Bates, 94 N. Y. 354, 371. See as to force and effect of a "subject clause" in a deed, Collins v. Rowe, 1 Abb. N. C. 97 n.

⁷ Root v. Wright, 21 Hun, 344.

⁸ Pinnell v. Boyd, 33 N. J. Eq. 600.

the debt, and he, because he was the giver of the bond and mortgage and liable for any deficiency which might be left after a sale on the mortgage.⁹

§ 934. General rule where conveyance is subject to mortgage.—If the equity of redemption of mortgaged premises is conveyed by a deed in which the mortgage is recognized and the title is declared to be subject to it, the general rule is that the purchaser is thereby precluded from urging any defense against the mortgage,¹⁰ even though made without consideration,¹¹ or defectively executed.¹² And this rule also applies as against a second mortgagee, if the prior mortgagee is protected by such a clause in his mortgage.¹³ This principle has been applied to a case where the recital was erroneous in fact, the prior mortgage being on an entirely different parcel of real estate, and the grantee's property was held bound by it.¹⁴ And where a mortgagor died, and the purchaser at the administrator's sale for the payment of debts, took the property "subject to mortgage and widow's dower," it was held that the widow might have dower assigned on making *pro tanto* redemption of the mortgage, although she had released her dower in the mortgage.¹⁵

Where a conveyance of mortgaged premises purports to convey the whole estate, and is not, by its terms, subject to the mortgage, and no deduction from the price is made because of the mortgage, the grantee may have all defenses against the mortgage which were available to the mortgagor.¹⁶ But not if the full amount of the mortgage was credited to him by the mortgagor.¹⁷

§ 935. Distinctions to be observed.—In *Russell v. Kinney* (1 Sandf. Ch. 34), it was held that such a clause in a deed operates

9 *Smith v. Cross*, 16 Hun, 487.

10 *Howard v. Robbins*, 100 N. Y. 498; *Purdy v. Coar*, 109 N. Y. 448; *Freeman v. Auld*, 44 N. Y. 50; *Home Trust Co. v. Baughens*, 151 App. Div. 46. See also *Holden v. Rison & Co.*, 77 Ala. 515; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; *Delaware & H. Canal Co. v. Bonnell*, 46 Ind. 9; *Losey v. Bond*, 94 Ind. 67; *Hill v. Minor*, 79 Ind. 48; *Smith v. Graham*, 34 Mich. 302.

11 *McConihie v. Fales*, 107 N. Y.

404; 14 N. E. 285; *Barker v. International Bank of Chicago*, 80 Ill. 96.

12 *Grether v. Alexander*, 15 Iowa, 470; *Riley v. Rice*, 40 Ohio St. 441.

13 *Bronson v. La Crosse & Milwaukee R. R. Co.*, 2 Wall. (U. S.) 283.

14 *Sweetzer v. Jones*, 35 Vt. 317.

15 *Kenyon v. Segar*, 14 R. I. 490.

16 *Bennett v. Keehn*, 57 Wis. 582; 15 N. W. 776.

17 *Fuller v. Hunt*, 48 Iowa, 163.

as an admission of the existence of the mortgage, and as subjecting the grantee to its force exactly as it is in truth. If it is a mortgage with a condition or defeasance contained in another writing, or if it is partly paid, the grantee is entitled to the benefit of the defeasance or the payment, and his admission by accepting the deed is not inconsistent with his availing himself of such defense. In other words, the clause merely operates to qualify the covenants of the grantor as to the title.

In *Jewell v. Harrington* (19 Wend. 471), the deed conveyed the premises "subject, nevertheless, to the right of dower of Chloe Jewell, who was the widow of Samuel Nash, deceased, who was the former proprietor of the above described premises," and the court held that the grantee was not estopped from contesting the plaintiff's claim for dower. In *Hartley v. Tatham* (26 How. 158; 1 Robt. 246),¹⁸ *Jewell v. Harrington* (*supra*) was cited and approved, and the principle of the case was applied to the defense of part payment as against a mortgage recited in a deed under which the defendant claimed. It was not necessary to the decision, however, for in *Hartley v. Tatham* the part payment had been made subsequent to the acceptance of the conveyance in which the lien of the mortgage was recognized.

In *Lester v. Barron* (40 Barb. 297), a deed contained a clause to the effect that the grantee assumed all liability in relation to a party wall, and it was held that the grantee merely assumed such legal liability as existed against his grantor in respect to such wall.

In *Reed v. Latson* (15 Barb. 9), it was held, upon the other hand, that one who purchases land expressly subject to a mortgage, cannot set up against the mortgage that, prior to the sale, it had been extinguished by a merger. In *Freeman v. Auld* (44 N. Y. 50, reversing 25 How. Pr. 327; 43 Barb. 14; 37 Barb. 587), the defendants had had the full amount of the mortgage deducted from their purchase money, and they took expressly subject to it. The court said that the grantors had the right, which no purchaser from them could lawfully gainsay, to pay or provide for the payment of the full amount specified in the mortgage, and that the grantee taking subject to the mortgage must pay it if he has agreed to do so, and if not, he must allow the lands con-

¹⁸ *Hartley v. Tatham*, *aff'd* 1 Keyes, 222; 2 Abb. Dec. 333.

veyed subject to it to be applied to its payment. The same rule is affirmed in *Ritter v. Phillips* (53 N. Y. 586).¹⁹

In *Johnson v. Parmely* (14 Hun, 398), the money due on a mortgage was paid by a person not liable thereon at the request of the mortgagor, and a receipt taken for its full payment. Thereafter the mortgagor conveyed the property subject to the mortgage, and it was held that this operated to recognize the mortgage as a subsisting lien, and that the grantee could not contend that it was paid.

§ 936. Conveyances which permit defense by grantee.—If mortgaged land be conveyed by an instrument which transfers all of the interest of the mortgagor without specially designating the mortgage security or affirming its validity, as by sale under an execution or upon the foreclosure of a junior incumbrance, the purchaser may set up any defense to the mortgage which would have been available to the mortgagor.²⁰

Where a conveyance was made which contained the following clause: "Subject to a certain mortgage executed by the party of the first part to Thomas E. Allen for the sum of \$15,000, bearing date May 10, 1876, if there shall be found anything owing or unpaid on the same," it was held that the purchaser stood in the same condition as if he had purchased the premises subject to the mortgage as it was in truth, without regard to the amount of the purchase price, and a defense was sustained which largely diminished the amount claimed.²¹ It was said that where a grantor conveys a limited right in his property while possessing the power of conveying a greater interest, it follows that such interest as is not thereby conveyed still remains in the grantor, and is capable of being subsequently transferred by him through a conveyance vesting his grantee with the title discharged of the obligation to pay invalid incumbrances.²² The cases which hold that a grantee of premises who obtains title thereto under a conveyance making them subject to a mortgage cannot contest the validity of such mortgage, do so upon the theory that he labors under a

¹⁹ See also *Haile v. Nichols*, 16 Hun, 37; *Parkinson v. Sherman*, 74 N. Y. 88; 30 Am. R. 268.

²⁰ *Nichols v. Hill*, 6 N. Y. Sup. (T. & C.) 335; less fully, *sub nom. Nichols v. Iremonger*, 3 Hun, 609.

²¹ *Bennett v. Bates*, 26 Hun, 364, *aff'd* 94 N. Y. 354.

²² *Cope v. Wheeler*, 41 N. Y. 311; *Berdan v. Sedgwick*, 44 N. Y. 626; *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 153, *aff'g* 13 Hun, 321.

disability imposed upon him by his grantor, who has intentionally retained to himself the privity which enables a party to dispute the validity of an apparent lien upon the premises granted. There is no reason why the grantor does not possess the power to remove this disability by afterward conferring the right which by his prior conveyance he simply withheld from his grantee.²³

A purchaser at an execution sale, "subject to whatever may be due upon the property by virtue of a certain mortgage," cannot allege that the mortgage is utterly void, though he is not precluded from inquiring as to what amount is due upon it.²⁴

§ 937. Propositions reconciling the cases.—The following propositions appear to reconcile the cases and to be sustained by reason and by authority:

1. If the mortgage be without consideration, in whole or in part, as between the mortgagee and the mortgagor, the grantee of the mortgagor will not be precluded from defending against the mortgage *on the mere ground of an estoppel* created by the subject clause in the deed. The reason of this is, that an estoppel is unavailing except as between the parties to the deed and their privies in blood or estate. To a stranger it is wholly unavailable.²⁵

2. If the grantor is indebted on the mortgage in such a way that if he paid it he could not afterward recover the money, as, for instance, if the debt be usurious or if it be barred by the statute of limitations, the conveyance of the land subject to the lien shuts off any defense as effectually as payment would, and operates as an appropriation of the land to pay the debt.

3. It is competent for the grantor to create a lien upon the land in favor of any person, either with consideration as between him and such person or without any consideration whatever, and if it is part of his agreement with the grantee that this lien shall be paid, it is not competent for the grantee to question claims by the recognition of which, and in express subordination to which, he acquired his title. This is a question of agreement between the grantor and grantee, and is to be determined by the language of the conveyance, which is presumed to show the agreement between

²³ Per RUGER, Ch. J., in *Bennett v. Bates*, 94 N. Y. 354, 371, aff'd 26 Hun, 364.

²⁴ *Conkling v. Secor Sewing Machine Co.*, 55 How. Pr. 269.

²⁵ *Jackson v. Bradford*, 4 Wend. 619; *Jewell v. Harrington*, 19 Wend. 471.

the parties, but which is subject to correction by parol evidence of the real intention and bargain, in cases of fraud or mistake.

DEFENSE OF DEFECT OF TITLE TO THE MORTGAGE.

§ 938. **Invalid assignment.**—A third person, where obligation, valid in its inception, and against which, in the hands of a legal holder, he could have no available defense, may defend himself on the ground of the illegality of the transaction through which plaintiff derives title.²⁶

If the nominal holder and owner of the mortgage has obtained title to it by practicing a fraud on the real owner, a defendant who has paid the real owner and received an acquittance from him may allege this fact as a complete defense.²⁷ So, also, a defendant may insist that an assignment of the mortgage security upon which the plaintiff bases his claim of title to it is absolutely void for want of power in the assignor to execute it; as, for instance, in the case of a corporation.²⁸ He may show against an assignee of a bond and mortgage that they were to be "invalid, void and of no effect" until a certain sum had been advanced and that no advances were made.²⁹

And a defendant may show that the mortgage was made by him for a particular purpose, and that the assignment was a diversion from that purpose and unauthorized and fraudulent as against him.³⁰

A defendant who has some interest in the mortgage itself may also allege facts concerning the assignment to entitle himself to a portion of the moneys to be collected on it, as that the assignment was by way of pledge or the like.³¹

So, also a defendant may attack an assignment as having been made for the purpose of shutting him out from a defense or to prevent him from asserting a proper counter-claim.³²

²⁶ *DeWitt v. Brisbane*, 16 N. Y. 508. See *Johnson v. Bush*, 3 Barb. Ch. 207; *Talmage v. Pell*, 3 Seld. 328; *Green v. Seymour*, 3 Sandf. Ch. 285.

²⁷ *Hall v. Erwin*, 60 Barb. 349; 57 N. Y. 643; 66 N. Y. 649.

²⁸ *Johnson v. Bush*, 3 Barb. Ch. 207; *Talmage v. Pell*, 7 N. Y. 328. See *Kortright v. Smith*, 3 Edw. Ch. 402.

²⁹ *Rapps v. Gottlieb*, 142 N. Y. 164; 36 N. E. 1052.

³⁰ *Craver v. Wilson*, 14 Abb. N. S. 374. *Examine Lewis v. Duane*, 141 N. Y. 302; 36 N. E. 322; 57 St. R. 410.

³¹ *De Witt v. Brisbane*, 16 N. Y. 508.

³² *Lathrop v. Godfrey*, 3 Hun, 739; 6 N. Y. Sup. (T. & C.) 96; *contra*, *Reed v. Latson*, 15 Barb. 9.

It is permissible for a defendant to allege title to the bond and mortgage in a person other than the plaintiff. If that fact is established it will of necessity prevent a judgment in the plaintiff's favor.³³

But where an assignment of a mortgage is voidable only, and not absolutely void, it seems that in an action to foreclose the mortgage the mortgagor cannot avail himself of the question of invalidity as a defense. Thus the assignment of a mortgage by the administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually is held to be not void but voidable at the election of the next of kin of the intestate. Therefore in an action by the administrator in his own name as owner, to foreclose the mortgage, an objection to the validity of such assignment is not available to the mortgagor or his successors in interest as a defense.³⁴ And it is held to be no defense to an action to foreclose a mortgage that the plaintiff orally agreed to act as agent of the defendant in procuring an assignment of the mortgage on terms favorable to the latter, and that instead he took the assignment in his own name and refused to transfer it to the defendant or to give him the advantage of the transaction, for such a contract would be void under the statute of frauds.³⁵

§ 939. Consideration for assignment is immaterial.—But it does not lie in the mouth of a mortgagor or of a person, joined as a defendant to an action to foreclose a mortgage admitted to be valid, to assail the consideration of a transfer of the security from the mortgagee to the plaintiff. If that transfer was voluntarily made by the mortgagee, it does not concern the defendant that its purpose was to defraud the creditors of the mortgagee or to evade the payment of taxes,³⁶ or that it was assigned as security for a usurious loan,³⁷ or that the consideration for the assignment has failed.³⁸ And where the administrator of a deceased mortgagee

33 *Fougera v. Moissen*, 16 Hun, 237.

34 *Read v. Knell*, 143 N. Y. 484; 39 N. E. 4, aff'd 69 Hun, 541; 23 N. Y. Supp. 941.

35 *Jenkins v. Bishop*, 62 Misc. R. 87; 115 N. Y. Supp. 1011, modified 136 App. Div. 104; 120 N. Y. Supp. 825, wherein such agreement was held to be void for lack of consid-

eration and mutuality between the parties.

36 *Nichols v. Weed Sewing Machine Co.*, 27 Hun, 200, overruling *Drexell v. Tyrrell*, 15 Nev. 114.

37 *Biedler v. Malcolm*, 121 App. Div. 145; 105 N. Y. Supp. 642.

38 *Biedler v. Malcolm*, 121 App. Div. 145; 105 N. Y. Supp. 642.

assigned the mortgage to a third person who re-assigned it to the administrator individually such assignment was held to be voidable only at the election of the next of kin. In such a case in an action by the administrator as owner to foreclose the mortgage the mortgagor and his successors in interest may not controvert plaintiff's title.³⁹

The motives of a former owner of the mortgage in selling, or of the plaintiff in buying it, are not material, and the mortgagor has no concern with the consideration of the assignment. It is sufficient if the mortgage debt is due and has been transferred to and is owned by the plaintiff. He may have bought it from motives of malice toward the mortgagor, and solely with a view to sue upon it, and the former owner, from a like motive, may have transferred it without consideration, but this would not constitute a defense to the action. The mortgagor can only arrest the action by paying the amount due or tendering the same and bringing it into court.⁴⁰ So it is said that it is no concern of the debtor how the person holding the legal title acquired it, or whether he paid value for it or not, as the debtor may not complain since he is obligated to pay, and payment to the holder of the legal title discharges the debt. The holder of such a title has a right to enforce it and it is a matter of indifference whether he has paid value therefor or not.⁴¹

The plaintiff in foreclosing a mortgage for a default in payment of interest is exercising a legal right and in the absence of fraud or collusion upon his part or that of his attorney, by which the mortgagor was prevented from paying the interest or misled in that respect, the motives of the mortgagee or his attorney are immaterial.⁴²

So the fact that the plaintiff in an action to foreclose a mortgage, although he purchased it with his own money, yet did so, and commenced the action to foreclose it, both at the instance of one of the defendants therein, who was engaged in a litigation with one of his co-defendants in reference to their respective

³⁹ Read v. Knell, 143 N. Y. 484; 39 N. E. 4.

⁴⁰ *Per curiam* in Morris v. Tut-hill, 72 N. Y. 575, cited in Weis v. Levy, 106 App. Div. 496; 94 N. Y. Supp. 857.

⁴¹ Weis v. Levy, 106 App. Div. 496; 94 N. Y. Supp. 857, citing Sheridan v. Mayor, 68 N. Y. 30; Hays v. Hathorn, 74 N. Y. 486.

⁴² Trenor v. Le Count, 84 Hun, 426; 32 N. Y. Supp. 412 (1895).

rights in the mortgaged premises was held not to justify the granting of an order staying the proceedings in the foreclosure action until the determination of an appeal to the Court of Appeals from a judgment rendered in the action between such co-defendants.⁴³

The rule, however, is recognized as different where the rights of creditors intervene, or of persons having legitimate claims against the property which would be injuriously affected by the enforcement of the mortgage, and this is said to be especially true where the person holding the beneficial interest and who has been guilty of fraud, would profit by the enforcement of the claim.⁴⁴

43 *Swift v. Finnigan*, 53 App. Div. 76; 65 N. Y. Supp. 723. PARKER, P. J., said: "Even though Swift did purchase it at Tarbell's suggestion, yet, if he paid his own money for it, he is the legal owner thereof; he is the real party in interest in this action, and may prosecute or not as he alone shall desire. Now concede that he is inspired to commence and force this action by the desire to assist Tarbell, he is nevertheless, exercising no more than his strict legal

right. He owns the mortgage debt, and it is his right to have the mortgaged premises sold in satisfaction of it. And, the mortgage being past due, it is his right to have them sold as soon as the usual and regular form of proceedings will allow. The fact that he is influenced by an unworthy motive to demand his money does not at all affect his legal rights."

44 *Weis v. Levy*, 106 App. Div. 496; 97 N. Y. Supp. 857.

CHAPTER XXIV.

RECEIVERS OF RENTS.

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WHEN A RECEIVER WILL BE APPOINTED.

§ 940. **General principles.**—The right of entry by the mortgagee having been abolished, the mortgagor is, both at law and in equity, entitled to the complete enjoyment of the mortgaged premises and of their rents and profits until the debt is due, unless such rents are by a stipulation contained in the mortgage expressly pledged for the payment of the debt.¹ If no proceedings are taken for the appointment of a receiver, his right to the rents continues until it has been divested by a foreclosure sale, and until the purchaser has become entitled to possession under the sheriff's deed.²

Where the security is insufficient, and the mortgagor or other person who is personally liable for the payment of the debt is in-

¹ Bank of Ogdensburgh v. Arnold, 5 Paige, 38.

² Astor v. Turner, 11 Paige, 436; Clason v. Corley, 5 Sandf. 447;

Mitchell v. Bartlett, 51 N. Y. 447; Argall v. Pitts, 78 N. Y. 239; Lofsky v. Maujer, 3 Sandf. Ch. 69; Howell v. Ripley, 10 Paige, 43.

solvent, the mortgagee may apply for a receiver of the rents and profits of the mortgaged premises which have not yet been collected, and this relief will be granted unless the person in possession shall give security to account for such rents in case there shall be a deficiency.³

Upon the appointment of a temporary receiver it is held that he is entitled to possession of the mortgaged property and an order therefor should be granted where nothing appears in the record to show any ground for denying it.⁴

§ 941. Statute provisions.—The Court of Chancery exercised the power of appointing a receiver when there was an insufficient security, and there was no adequate remedy upon the bond, long after the act of 1828, which provided that no action of ejectment should thereafter be maintained by a mortgagee for the possession of the mortgaged premises.⁵

The power, of appointing a receiver, *pendente lite*, is incidental to the jurisdiction of a court of equity. Such a receiver is a mere temporary officer of the court; he does not possess the power of, a permanent receiver or any legal power except such as is specifically conferred upon him by order of the court; his functions are limited to the care and preservation of the property committed to his charge.⁶ The Code of 1848 expressly authorized receiverships, in certain specified cases, by section 244; and to these, subdivision 5 of that section added: "In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act." Under this general provision the power of appointing receivers in mortgage cases continued to be exercised. Section 713 of the Code of Civil Procedure took the place of section 244 of

³ Howard v. Robbins, 170 N. Y. 498; 63 N. E. 530; Sea Ins. Co. v. Stebbins, 8 Paige, 565; Howell v. Ripley, 10 Paige, 43; Astor v. Turner, 11 Paige, 436; Frelinghuysen v. Colden, 4 Paige, 204; Shotwell v. Smith, 3 Edw. 588; Warner v. Gouverneur, 1 Barb. 36; Syracuse Bank v. Tallman, 31 Barb. 201; Myers v. Estell, 48 Miss. 373; Smith v. Tiffany, 13 Hun, 671; Clark v. Binniger, 39 How. Pr. 363; Miller v. Bowles, 2 T. & C. 568. See also

Main v. Ginthert, 92 Ind. 180; Connelly v. Dickson, 76 Ind. 440.

⁴ Citizens' Savings Bank v. Wilder, 11 App. Div. 63; 42 N. Y. Supp. 481, holding that an order requiring the owner to surrender possession should not be denied on the ground that such owner had not appeared in the action and that service by publication had not been completed.

⁵ Post v. Dorr, 4 Edw. Ch. 412.

⁶ Decker v. Gardner, 124 N. Y. 334; 26 N. E. 814.

the Code of 1848. The language of section 713 is not prohibitory nor exclusive, but permissive and declaratory, and although it did not in terms re-enact subdivision 5 of section 244, an analogous provision is substantially included in the general terms of section 4 of the Code of Civil Procedure, which provides that each of the courts therein mentioned, including the Supreme Court, "shall continue to exercise the jurisdiction and powers now vested in it by law according to the course and practice of the court, except as otherwise prescribed in this act." The power to appoint receivers in mortgage cases was inherent in the Court of Chancery before the Code of 1848. It was continued by that Code under subdivision 5 of section 244, and it was again reaffirmed by the general provision of section 4 of the Code of Civil Procedure, there being nothing to the contrary in that Code.⁷

§ 942. Right to receiver depends upon equitable considerations.

—The right to this relief does not result from the relations of the parties, but from equitable considerations alone. It is not a matter of strict right, and each application is addressed to the sound discretion of the court;⁸ as is also the question as to the management and control of the property through a receiver.⁹ No absolute right to a receiver is conferred by the receiver clause in a mortgage.¹⁰ The court will not grant such an application in a summary manner where there are no obligations justifying such action.¹¹ A receiver will not be appointed where the property is of sufficient value to pay the debt,¹² nor, in general,

⁷ *Hollenbeck v. Donell*, 94 N. Y. 342; 29 Hun, 94.

⁸ *New York Building Loan Co. v. Begly*, 75 App. Div. 308; 78 N. Y. Supp. 169; 11 Ann. Cas. 473; *Syracuse Bank v. Tallman*, 31 Barb. 201; *Rider v. Bagley*, 84 N. Y. 461. See also *Cone v. Combs*, 5 McC. (Ark.) 651; *Sales v. Lusk*, 60 Wis. 490; 19 N. W. 362. Proof of insolvency is not always required. *Pouder v. Tate*, 96 Ind. 330.

⁹ *Farmers' Loan & T. Co. v. Staten Island Belt Line R. R. Co.*, 17 Misc. R. 168; 39 N. Y. Supp. 872, *aff'd* 6 App. Div. 148; 39 N. Y. Supp. 996.

¹⁰ *Jarmulowsky v. Rosenbloom*, 125 App. Div. 542; 109 N. Y. Supp. 968; *Eidlitz v. Lancaster*, 40 App. Div. 446; 59 N. Y. Supp. 54; *United States Life Ins. Co. v. Ettinger*, 32 Misc. R. 378; 66 N. Y. Supp. 1; 8 Ann. Cas. 110; *Brick v. Hornbeck*, 19 Misc. R. 218; 43 N. Y. Supp. 301; compare *Browning v. Sire*, 56 App. Div. 399; 67 N. Y. Supp. 798; 9 Ann. Cas. 127.

¹¹ *Jarvis v. McQuaide*, 24 Misc. R. 17; 53 N. Y. Supp. 97; 6 Ann. Cas. 303.

¹² *Shotwell v. Smith*, 3 Edw. 588; *Burlingame v. Parce*, 12 Hun, 144.

if the mortgagor is solvent.¹³ In estimating the price which the property is likely to produce on a sale, the amount of rents, fixing as they do its value as an investment, is, in populous cities especially, a fair test,¹⁴ though much may depend upon other circumstances. The burden of proving inadequacy of security, and insolvency of the mortgagor, is on the applicant for the receiver.¹⁵

A receiver may be appointed in an action brought by a vendor against his vendees to foreclose a contract for the sale of land upon the failure of the vendees to pay a balance due of the purchase money.¹⁶

§ 943. **Solvency of mortgagor.**—The appointment of a receiver is made in order that the rents of the property which is pledged for the payment of the debt may not be received by an insolvent mortgagor, leaving the mortgagee to suffer a loss from the delay in the proceedings necessary to determine the rights of the parties. Special cases might arise where the appointment of a receiver ought to be made, even though the mortgagor were solvent, as, for instance, if the rents were being collected by an insolvent grantee who had assumed the payment of the debt, or by a solvent person who had assumed no such personal liability, for the rights of all the parties are before the court, and the mortgagor is as much entitled to protection as the mortgagee.¹⁷ And a mortgagee may be entitled to a receiver irrespective of the solvency of the mortgagor where the mortgage so provides;¹⁸ at least in such a case the clause should have some weight upon the application.¹⁹ A receiver may even be appointed on the application of the mortgagor, whether he be a defendant in an action to foreclose, or a plaintiff in an action for an accounting, a mortgagee or a grantee being in possession and insolvent or committing waste, and it appearing probable that the rents and profits will be lost.²⁰

¹³ *Jenkins v. Hinman*, 5 Paige, 309; *Syracuse Bank v. Tallman*, 31 Barb. 201.

¹⁴ *Shotwell v. Smith*, 3 Edw. 588.

¹⁵ *Burlingame v. Parce*, 12 Hun, 144.

¹⁶ *Smith v. Kelly*, 31 Hun, 387.

¹⁷ *Frelinghuysen v. Colden*, 4 Paige, 204.

¹⁸ *Pizer v. Herzig*, 121 App. Div. 609; 106 N. Y. Supp. 370; *Browning v. Sire*, 56 App. Div. 399; 67 N. Y.

Supp. 798; 9 Ann. Cas. 127; *Fletcher v. Krupp*, 35 App. Div. 586; 55 N. Y. Supp. 146; compare *United States Life Ins. Co. v. Ettinger*, 32 Misc. R. 378; 66 N. Y. Supp. 1; 8 Ann. Cas. 110.

¹⁹ *Browning v. Sire*, 33 Misc. R. 503; 68 N. Y. Supp. 875; 9 Ann. Cas. 240.

²⁰ *Bolles v. Duff*, 35 How. Pr. 481. See also *Williams v. Robinson*, 16 Conn. 517, 524.

§ 944. **Rule where mortgagee is in possession.**—Ordinarily, where a mortgagee is in possession, and anything remains due to him, he will not be disturbed in his possession by the appointment of a receiver; and particularly is this so when the mortgagee is responsible, and is able to account for and pay any excess of rents and profits after payment of his debt, or will give security to do so. If he will swear that anything remains due, the court will not try the question of indebtedness upon affidavits, and a receiver will not be appointed.²¹

The rule that a receiver will not be appointed as against a mortgagee in possession is applied where the mortgagee in possession is the first mortgagee whose claim is unsatisfied, and the parties applying for the receiver hold liens subsequent to his mortgage. The rule has not been applied against the holder of a prior mortgage, and in favor of a subsequent mortgagee, if there be any doubt as to the mortgaged premises being adequate security for the first mortgage, interest on it and taxes. The subsequent mortgagee is entitled to a receiver if the first mortgagee be not in possession, but without prejudice to the latter taking possession; but if the first mortgagee be in possession, he must redeem.²²

Where possession of mortgaged premises was taken by the first mortgagee without objection on the part of the mortgagor, and the first mortgage was afterward declared void at the instance of the second mortgagee in a suit seeking an account and foreclosure, it was held that the rents accruing during the possession of the mortgagee from the date of the filing of the bill might be claimed and intercepted by the second mortgagee at any time before they had been paid over to the mortgagor.²³

§ 945. **The mortgage debt must be due in whole or in part.**—A receiver should not be appointed until some default has been made by the mortgagor, so that, as to a part of the debt, or interest at least, the mortgagee has a right to foreclose.²⁴ Upon

²¹ *Bolles v. Duff*, 35 How. 481; *Quinn v. Brittain*, 3 Edw. Ch. 314; *Patton v. The Accessory Transit Co.*, 4 Abb. 237; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565.

²² Per JOSEPH F. DALY, J., in *New York Life Ins. Co. v. Glass*, 50 How. Pr. 88; *Quinn v. Brittain*, 3 Edw. Ch. 314. See also *Fisher on Mortg.*

407; *Trenton Baking Co. v. Woodruff*, 3 N. J. Eq. (2 Green) 210.

²³ *Falkner v. Printing Co.*, 74 Ala. 359.

²⁴ *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38; *Lofsky v. Maujer*, 3 Sand. Ch. 69; *Quincy v. Cheeseman*, 4 Sand. Ch. 405.

this principle, where a mortgage was payable in instalments, and only a portion of the mortgage debt was due, and it appeared that the mortgaged premises consisted of a farm which was divided by a road into two parcels which were not far from equal, either one of which being of sufficient value to pay the portion of the debt which was due, and the papers showed that these parcels could be sold separately without injury to the parties interested, it was held that the plaintiff was not entitled to a receivership for the protection of that portion of the mortgage debt which was not yet due, or of that portion of the premises as to which his right to sell had not yet accrued.²⁵

If a part only of the mortgage debt is due, and the mortgaged premises are so situated that they may be sold in parcels, a receiver will not be appointed if a sale of part of the land will produce enough to satisfy the portion of the debt then due;²⁶ but if the premises are so situated that they must be sold entire, and they are an inadequate security for the mortgage debt, and the personal security is worthless, a receiver may be appointed of the rents of the entire property.²⁷

§ 946. Inadequacy of security.—It may be stated generally that a receiver will ordinarily be appointed where it appears, or there is a substantial doubt, that the mortgage security is inadequate.²⁸

The fact, however, that the property is not sufficient in value to satisfy all claims upon it, will not be sufficient. It must be made to appear that it is insufficient to discharge the claim of the person making the application²⁹ and all prior liens.³⁰ However, where the bond and mortgage pledge and assign the rents and profits in the event of a default, the weight of authority favors the doctrine

²⁵ *Hollenbeck v. Donell*, 94 N. Y. 342, rev'g 29 Hun, 94.

²⁶ *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38.

²⁷ *Quincy v. Cheeseman*, 4 Sandf. Ch. 405.

²⁸ *Thomas v. Davis*, 90 App. Div. 1; 85 N. Y. Supp. 661; *Veirhoff v. Miller*, 30 App. Div. 355; 51 N. Y. Supp. 1048.

²⁹ *Sickles v. Canary*, 8 App. Div. 8; 40 N. Y. Supp. 948; *Smith v.*

Kelley, 31 Hun, 387; *Welche v. Schoenberg*, 45 Misc. R. 126; 91 N. Y. Supp. 880; *Jarvis v. McQuaide*, 24 Misc. R. 17; 53 N. Y. Supp. 97; 6 Ann. Cas. 303; *Brick v. Hornbeck*, 19 Misc. R. 218; 43 N. Y. Supp. 301.

This must appear with reasonable certainty. *Ross v. Vorman*, 6 App. Div. 246; 39 N. Y. Supp. 1031.

³⁰ *Warner v. Gouverneur*, 1 Barb. 36.

that the mortgagee is entitled to a receiver of the rents, *pendente lite*, without showing inadequacy of security.³¹

The application may be made by a junior incumbrancer even though he is a defendant, if his claim is due.³²

§ 947. **Defense to application for receiver.**—It has been said that a receiver will not be appointed if the validity of the mortgage is impeached on probable grounds;³³ but in order to defeat an application for a receiver, the nature of the defense must be disclosed.³⁴

An application for a receiver will not be denied on the mere ground that the mortgagor asserts facts claimed to constitute a defense, unless it appears to the court from the facts presented that such defense is likely to prevail.³⁵

A receiver will not be appointed in an action to prevent waste where no sale is asked for.³⁶

After a mortgagor has parted with the mortgaged premises, and no longer receives the rents, he is not in a position to oppose an application for a receiver. Opposition to such an application should be offered, if at all, by the persons whose rights would be affected by it.³⁷

The fact that the trustee in bankruptcy of a mortgagor has commenced a suit in equity in the United States District Court to set aside as fraudulent a conveyance of the mortgaged premises by the bankrupt, to which action, however, he did not make the holder of the mortgage a party, and the fact that an interlocutory judgment has been rendered in his favor in such action, is no reason for vacating an order appointing a receiver of the mortgaged premises in a suit of foreclosure brought in the State courts.³⁸

§ 948. **Where a corporation owns the equity of redemption.**—It is provided by statute that a receiver of the property of a corporation can be appointed only by the court, in an action brought for the foreclosure of a mortgage upon the property of which the

31 Sage v. Mendelson, 42 Misc. R. 137; 85 N. Y. Supp. 1008.

32 Bolles v. Duff, 35 How. Pr. 481.

33 Leahy v. Arthur, 1 Hogan, 92; Darcy v. Blake, 1 Molloy, 247; Shepherd v. Murdock, 2 Molloy, 231, 531.

34 Sea Ins. Co. v. Stebbins, 8 Paige, 565.

35 Mackellar v. Rogers, 52 N. Y. Super. (20 J. & S.) 360.

36 Robinson v. Preswick, 3 Edw. Ch. 246.

37 Wall St. Fire Ins. Co. v. Loud, 20 How. Pr. 95.

38 Mutual Life Insurance Co. v. Fleischman, 149 App. Div. 23.

receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation, and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.³⁹

It is not necessary to give notice to the attorney-general of a motion made in an action to foreclose a mortgage for the appointment of a receiver pending the action, even though the equity of redemption is owned by a corporation. The statute requiring such notice concerns only an action or proceeding for the dissolution of a corporation or the distribution of its assets.⁴⁰

A receiver appointed under a foreclosure of a mortgage executed by a corporation, has paramount rights to rents to a receiver appointed in an action to sequester the property of the corporation.⁴¹ Such a receiver will, in proper case, be appointed, notwithstanding the fact that a receiver of property was previously appointed in an action to foreclose a junior mortgage.⁴²

It is exclusively within the discretion of the court whether or not to appoint the same person a receiver in an action to foreclose a mortgage on property owned by a corporation, and a receiver in an action brought by the attorney-general.⁴³ Where a mortgagee receives a deficiency judgment in an action to foreclose a mortgage assumed by a corporation which subsequently became insolvent, he is entitled to a dividend from the receiver upon the whole amount of the debt at the time of the latter's appointment provided such dividend does not exceed the deficiency judgment.⁴⁴

§ 949. Who may be appointed receiver.—No clerk, deputy clerk, special deputy clerk, or assistant in the clerk's office of a court of record within the county of New York, shall be appointed a receiver, except by the written consent of all the parties to the ac-

³⁹ Gen. Corp. Law, § 306.

⁴⁰ Gen. Corp. Law, § 312; *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 164, 174.

⁴¹ *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 164.

⁴² *Holland Trust Co. v. Consoli-*

dated Gas, etc., Co., 85 Hun, 454; 32 N. Y. Supp. 830.

⁴³ *Herring v. New York Lake Erie, etc., R. R. Co.*, 63 How. Pr. 497.

⁴⁴ *Matter of Simpson*, 36 App. Div. 562; 55 N. Y. Supp. 697, *aff'd* 158 N. Y. 720; 53 N. E. 1132.

tion or special proceeding other than the parties in default for failure to appear or plead.⁴⁵

§ 950. When application for receiver may be made.—A receiver may be appointed at any time after the commencement of the action and before a title has been conveyed to the purchaser.⁴⁶ Ordinarily no such appointment should be made until after service of the summons upon the mortgagor or other person in possession of the property, notice to the owner of the equity of redemption, or the issuance of an order providing for service by publication⁴⁷ especially where the mortgage provides for notice;⁴⁸ but, in special cases, as, for instance, if the residence of such person cannot be ascertained or he keeps himself concealed, a receiver may be appointed before service of summons upon him and without notice.⁴⁹ In such a case notice of the application may be given to the person in actual possession of the property, though not claiming title otherwise than as a tenant or agent of the mortgagor.

Where inadequacy of security is shown, the appointment of a receiver after judgment is almost a matter of course.⁵⁰

The power of a receiver continues after the sale of the property and until the delivery of the deed.⁵¹

§ 951. What rents may be reached by receiver.—The plaintiff cannot call upon the owner of the equity of redemption to refund rents which the latter or his legal representatives has collected and received before the appointment of a receiver,⁵² neither can he

45 Code of Civ. Pro. § 90.

46 Code of Civ. Pro. § 713.

47 Conroy v. Polstein, 150 App. Div. 832; Greybill v. Heylman, 139 App. Div. 898; 123 N. Y. Supp. 622; Jarmulowsky v. Rosenbloom, 125 App. Div. 542; 109 N. Y. Supp. 968; Dazian v. Meyer, 66 App. Div. 575; 73 N. Y. Supp. 328; Coleman v. Goodman, 37 Misc. R. 517; 75 N. Y. Supp. 973.

Notice to receiver of property of owner in proceedings supplementary to execution held unnecessary. Grover v. McNeely, 72 App. Div. 575; 76 N. Y. Supp. 559.

48 Werishoffer v. Peoples, 120 App. Div. 319; 105 N. Y. Supp. 506.

49 McCarthy v. Peake, 9 Abb. 164.

In the absence of strong reasons a receiver will not be appointed before answer or default. Oliver v. Decatur, 4 Cranch, 458.

50 Astor v. Turner, 11 Paige, 436. Where, after order of sale on foreclosure, a stay was procured by a third person attacking the mortgagee's title to the mortgage, a receiver was granted on application of subsequent mortgagees, the mortgagor being in possession and insolvent and there being insufficient security. Warwick v. Hammell, 32 N. J. Eq. 427.

51 Buchanan v. Ins. Co., 96 Ind. 510.

52 Rider v. Bagley, 84 N. Y. 461, *aff'g sub nom.* Rider v. Vrooman, 12

obtain rents which a junior mortgagee has collected by superior diligence in procuring the appointment of a receiver of the same rents in a suit to which he was not a party.⁵³

A mortgagee has no claim as such to the receipts of the rents and profits of the mortgaged property. In a proper case upon foreclosure he may have a receiver of such rents, etc., appointed, who will then be entitled to collect and apply them in reduction of the mortgage debt; and in such a case the receiver may be authorized to collect such rents as have theretofore accrued, but have not yet come to the hands of the owner of the equity of redemption. It is not, however, within the power of the court to order rents already collected and in the possession of the owner to be paid over and applied upon the mortgage debt. The lien of the mortgagee thereon dates only from the appointment of the receiver, and his right to collect rents extends only to such as are unpaid at the time of his appointment.⁵⁴

But a tenant who pays rent in advance for premises upon which there is a recorded mortgage does so at his peril. If the mortgagor defaults and a receiver is appointed, the latter may recover from the tenant rent accruing subsequent to his appointment though it has already been paid to the mortgagor. The tenant's remedy is against the landlord.⁵⁵ At the time of filing his complaint for foreclosure in a proper case, the mortgagee may obtain an order restraining the owner from the further collection of rents, and in such case he may be authorized to collect such as then remain unpaid. It was held in a case where the owner had taken security from a tenant for the payment of rent, that the receiver could enforce such security and collect the rent remain-

Hun, 299; *Astor v. Turner*, 11 Paige, 436. See also *Johnston v. Riddle*, 70 Ala. 219; *Falkner v. Printing Co.*, 74 Ala. 359; *Corner v. Sheehan*, 74 Ala. 453; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378; 2 S. Ch. 911.

⁵³ *Howell v. Ripley*, 10 Paige, 43; *Post v. Dorr*, 4 Edw. 412; *Washington Life Ins. Co. v. Fleischauer*, 10 Hun, 117; *Hayes v. Dickinson*, 9 Hun, 227; *Rider v. Vrooman*, 12 Hun, 299.

⁵⁴ Per RUGER, Ch. J., in *Wyckoff*

v. Scofield, 98 N. Y. 475, 477; *Argall v. Pitts*, 78 N. Y. 239, 242; *Hollenbeck v. Donell*, 94 N. Y. 342; *Rider v. Bagley*, 84 N. Y. 461; *Howell v. Ripley*, 10 Paige, 43; *Stillman v. Van Buren*, 100 N. Y. 439; 3 N. E. 671.

⁵⁵ *Home Life Ins. Co. v. O'Sullivan*, 151 App. Div. 535; *Fletcher v. McKeon*, 71 App. Div. 278; 75 N. Y. Supp. 817, rev'g 35 Misc. R. 230; 71 N. Y. Supp. 812; *Moll v. McKeon*, 35 Misc. R. 551; 71 N. Y. Supp. 1127. But see *Krakower v. Lavelle*, 37 Misc. R. 423; 75 N. Y. Supp. 779.

ing unpaid at the time of his appointment;⁵⁶ but the principles of that case do not authorize the collection of rents by a receiver which have already been paid and come to the possession of the owner of the equity of redemption.⁵⁷

A mortgagee has no right as such to rents of the mortgaged premises paid into court by a receiver appointed in a suit by legatees for administration of the estate of the mortgagor, even though the mortgagee has obtained a decree for foreclosure, and has sold the premises, and part of the debt is unsatisfied. He should have applied to have a receiver appointed in his own suit, and failing to do this, his rights are the same as those of any other creditor.⁵⁸

A mortgagee who has not procured the appointment of a receiver has no lien upon rents collected by an assignee of the mortgagor for the benefit of creditors.⁵⁹ And an assignment by the mortgagor to the first mortgagee of rents and profits vests a right in the former which is superior to that of a receiver appointed in an action to foreclose brought by the second mortgagee.⁶⁰

Where a receiver in foreclosure of a mortgage including future earnings is appointed at the same time as a receiver in a sequestration action instituted by a general judgment creditor of a corporation, the latter is held to have a superior right in debts and accounts due to the corporation accruing between the time of the execution of the mortgage and the appointment of either receiver.⁶¹

A receiver of rents and profits in foreclosure has a right to such rents and profits, superior to and exclusive of, that of a receiver of the property of the owner of the mortgaged premises

⁵⁶ *Lofsky v. Maujer*, 3 Sandf. Ch. 71.

⁵⁷ Per RUGER, Ch. J., in *Wyckoff v. Scofield*, 98 N. Y. 475, 478, rev'g 49 N. Y. Super. (17 J. & S.) 221. It has been said that the mortgagee will be confined to the rents and profits accruing during the pendency of the suit. *Argall v. Pitts*, 78 N. Y. 239, 243; per PATTERSON, J., in *Mutual Life Ins. Co. v. Belknap*, N. Y. *Daily Register*, February 9, 1887. This is doubted and is contrary to the current of authority. See text and cases cited.

⁵⁸ *Coddington v. Bispham*, 36 N. J. Eq. 574.

⁵⁹ *Upson v. The Milwaukee Nat. Bank of Wisconsin*, 57 Wis. 526; 15 N. W. 834.

⁶⁰ *Harris v. Taylor*, 35 App. Div. 462; 54 N. Y. Supp. 864. Compare *Abrahams v. Berkowitz*, 70 Misc. R. 319; 127 N. Y. Supp. 224.

⁶¹ *New York Security & Tr. Co. v. Saratoga G. & El. Co.*, 159 N. Y. 758, rev'g 30 App. Div. 89; 51 N. Y. Supp. 749.

appointed in proceedings supplementary to execution.⁶² A tenant who was not made a party to an action to foreclose a mortgage cannot be adjudged guilty of contempt for refusing to comply with the provisions of an order made in the action appointing a receiver of rents and profits unless a copy of such order was formally served upon him.⁶³ But where a lessee and his subtenants were made parties and the lessee, while an appeal from an order appointing a receiver was pending, tried to evict the subtenants for refusing to pay rent to him, he was held guilty of contempt of court.⁶⁴

§ 952. Grantee of mortgagor delaying litigation.—Where the equity of redemption is owned by a grantee of the mortgagor, not personally liable for the payment of the mortgage debt, he cannot, by delaying the litigation by vexatious appeals and the like, take the rents and profits to the injury of the mortgagee, even though no receiver be appointed. If he attempts to do so and is finally defeated, and there is a deficiency, he may be directed to pay to the plaintiff the amount of rents received by him, or so much thereof as will be sufficient to satisfy the plaintiff's claims for principal, interest, and costs.⁶⁵

§ 953. Who entitled to rents collected by receiver.—By the appointment of a receiver the mortgagee obtains an equitable specific lien upon the rents unpaid by the tenant, as well those which are accrued at the time of the appointment as those which become due subsequently, to pay any anticipated deficiency⁶⁶ inclusive of the expenses incidental to the action for foreclosure.⁶⁷

So, where an action to foreclose a mortgage was commenced, and a receiver was appointed, the plaintiff was held to be entitled to the rents collected by such receiver, although the defendant was

⁶² *Grover v. McNeely*, 72 App. Div. 575; 76 N. Y. Supp. 559.

⁶³ *American Mortgage Co. v. Sire*, 103 App. Div. 396; 92 N. Y. Supp. 1082.

⁶⁴ *Coffin v. Burstein* (No. 1), 68 App. Div. 22; 74 N. Y. Supp. 274.

⁶⁵ *Bank of Plattsburgh v. Platt*, 1 Paige, 464; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Ferguson v. Kimball*, 3 Barb. Ch. 616.

⁶⁶ *Cincinnati National Bank v.*

Tilden, 50 N. Y. St. Rep. 366, *aff'd* 140 N. Y. 620; *Continental Insurance Co. v. Reeve*, 149 App. Div. 635; *Lofsky v. Maujer*, 3 Sand. Ch. 69; *Post v. Dorr*, 4 Edw. Ch. 412; *Rider v. Vrooman*, 12 Hun, 299; *Howell v. Ripley*, 10 Paige, 43; *Ranney v. Peyser*, 83 N. Y. 1; *Volkening v. Brandt*, 14 Misc. R. 156; 35 N. Y. Supp. 797.

⁶⁷ *Bushwick Savings Bank v. Traum*, 26 App. Div. 532, *aff'd* 158 N. Y. 668.

adjudged a bankrupt on a petition filed after the commencement of the action, and before the receiver's appointment, and the assignee in bankruptcy also claimed the fund.⁶⁸

It has also been held that, where a junior incumbrancer procures the appointment of a receiver, by an order which recites that such appointment is for his benefit, the prior lienors, though parties to the same suit, cannot claim any part of the rents collected by such receiver. Ordinarily, it is true that a receiver is appointed for the benefit of all parties in the action; but that is so only where all are interested and have the probable right to participate in the subject of litigation. That, in a foreclosure suit, does not directly include the rents and profits while the suit is pending. They can be impounded only because the property itself is an inadequate security for the debt, and then only by means of a special application to the court for that purpose. The parties each have their election whether that should be made or not. Those who see fit not to make or join in such an application cannot share in its fruits.⁶⁹

Where the order appointing the receiver is not made by its terms for the benefit of a particular party to the action, but is in general language, the rents collected are to be applied for the benefit of all the parties to the action in the order of their seniority.⁷⁰

§ 954. Payment of taxes by receiver.—In an action to foreclose a second mortgage upon a leasehold estate, an order was entered, upon the consent of the owner of the equity of redemption, appointing the plaintiff receiver, which order contained the following provision: "That as such receiver he (plaintiff) have power, which is hereby given to him, to rent and manage said buildings and premises, and to rent the same or any part thereof from time to time for terms not exceeding one year, to collect and receive the rents thereof, and out of the same to keep said buildings insured against loss or damage by fire, and in repair, and to

⁶⁸ Hayes v. Dickinson, 9 Hun, 277.

Title of receiver in supplementary proceedings not affected by discharge in bankruptcy. Pickert v. Eaton, 81 App. Div. 423; 81 N. Y. Supp. 50.

⁶⁹ Kroehle v. Ravitch, 148 App. Div. 54; Abrahams v. Berkowitz, 146 App. Div. 563; Madison Trust Co. v.

Axt (No. 1), 146 App. Div. 121; Washington Life Ins. Co. v. Fleischer, 10 Hun, 117.

⁷⁰ Keogh v. McManus, 34 Hun, 521. See also Williamson v. Gerlach, 41 Ohio St. 682. See Ranney v. Peyser, 20 Hun, 11, 13, rev'd 83 N. Y. 1.

pay the ground rent and taxes." It was held at General Term that this order not only empowered but required the receiver to pay ground rent and taxes, and that he might be compelled to do so after the holder of the first mortgage had acquired title by a sale under a judgment of foreclosure, for a price which was insufficient to satisfy the prior lien.⁷¹ The Court of Appeals took a different view, however, and held that the language of the order was permissive merely, and not mandatory; that the first mortgagee was not a party to the proceeding, and was not entitled to its benefits; that the plaintiff, by his superior diligence, acquired a specific lien upon the rents in question, superior to any equities of the first mortgagee, and that he was entitled to retain them to apply upon his mortgage.⁷²

§ 955. Disposition of the fund collected.—No disposition of the fund collected by the receiver can, ordinarily, be made, otherwise than by an application in the suit in which the receiver was appointed. If the rents are claimed by a stranger to the action, by title paramount to all of the parties, an adjudication in respect to his rights should be claimed in an action to which all parties are joined, and affirmative relief excluding all of them from participation in the fund should be demanded. In such an action it will be necessary for the plaintiff to allege the fact upon which his superior title depends, and to establish them by proof.⁷³ A receiver should ordinarily be directed to retain rents collected by him to abide the result of sale.⁷⁴ If the parties to the action have agreed as to the disposition of the rents collected, a receiver subsequently appointed should dispose of them in the mode agreed upon.⁷⁵ An order determining the petition of a claimant for payment from a receiver appointed in proceedings to foreclose a corporate mortgage is not a final order in a special proceeding and an appeal therefrom to the Court of Appeals does not lie as a matter of right.⁷⁶

⁷¹ *Ranney v. Peyser*, 20 Hun, 11.

⁷² *Ranney v. Peyser*, 83 N. Y. 1, rev'g 20 Hun, 11.

⁷³ *Sheridan v. Jackson*, 10 Hun, 89.

⁷⁴ *Putnam v. Henderson*, Hull & Co., 49 App. Div. 361; 63 N. Y. Supp.

250; *Hains v. Taylor*, 22 App. Div. 109; 47 N. Y. Supp. 913.

⁷⁵ *Bradley, Currier & Co. v. Hoffman*, 70 App. Div. 77; 74 N. Y. Supp. 1076.

⁷⁶ *Guarantee T. & S. D. Co. v. Philadelphia R. & N. E. R. R. Co.*, 160 N. Y. 1; 54 N. E. 575.

§ 956. Stipulation pending motion for receiver.—A stipulation between the parties pending an application for the appointment of a receiver, that the rents then due and those that shall become due prior to the decision of the motion, shall be collected by the attorneys for the mortgagor, if appointed, but otherwise to be held by them, has all the effect, so far as the rights of the receiver are concerned, of an injunction pending the motion, and such a stipulation does not create a preference such as is prohibited by the Bankrupt Act.⁷⁷ If such a stipulation be made, and the motion is thereafter denied, the possession of the rents by the attorney for the mortgagor is his possession, and they cannot be obtained by a receiver appointed on a subsequent motion.⁷⁸

Where upon the withdrawal of a motion for a receiver it was stipulated that the rents should be deposited and applied “solely to the payment of taxes, ground rent and insurance premiums affecting the premises” “any sum or sums remaining thereafter to be held to abide the event of this action,” the event on which the application of the rents depended was held to be the determination of the plaintiff’s mortgage and the right to have the premises sold under foreclosure.⁷⁹

POWERS AND DUTIES OF THE RECEIVER.

§ 957. Party to action appointed receiver.—The fact that a person is a party to the suit, or that he is in possession of the premises, does not disqualify him from acting as receiver; and in many cases the appointment of such a person is the best thing that can be done for all concerned. If, however, a party to the action is appointed, and if he accepts the trust, his duties will be the same as though he were a stranger to the property, and he will not be suffered to manage the estate for his own benefit merely. It is his duty to make the fund of which he has charge produce the largest possible revenue, and he will be held to the strictest good faith.⁸⁰

§ 958. General duties of receiver.—As an officer of the court, the receiver represents the interests in the property of all of the

⁷⁷ Meigs v. Rinaldo, 8 Daly, 295; Hayes v. Dickinson, 9 Hun, 277.

⁷⁹ Rutherford Realty Co. v. Cook, 198 N. Y. 29; 90 N. E. 1112.

⁷⁸ Wyckoff v. Scofield, 98 N. Y. 475, rev’g 49 N. Y. Super. (17 J. & S.) 221.

⁸⁰ Bolles v. Duff, 37 How. Pr. 162.

parties to the suit, which interests are often various and conflicting, and sometimes involved in doubt. It is his duty to protect the property intrusted to him to the best of his ability for all those interests, without being controlled by the representations or directions of any one of them; though where the plaintiff is a principal party interested, his views and advice are entitled to corresponding weight.⁸¹ A receiver in possession has very little discretion allowed him, and he must apply to the court, from time to time, for authority to do such acts as may be beneficial to the estate.⁸²

A receiver is under no obligation to take forcible or violent means for the assertion of his rights as receiver, without an express order of the court to do so; and the court will not protect him in any attempt to obtain possession by violence further than the law will protect him.⁸³ As was said by Chancellor WALWORTH: "If the property is in the possession of a third person who claims the right to retain it, the receiver must proceed by suit in the ordinary way, to try his right to it, or the complainant should make such third party a party to the suit, and apply to have the receivership extended to the property in his hands; so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if it is not obeyed."⁸⁴

A receiver may rent the mortgaged premises for such term as is usual, and the lease made by him will not be limited or terminated by the duration of the suit,⁸⁵ and cannot be summarily cancelled by the court.⁸⁶ And though a receiver may have been erroneously authorized to lease the property, yet the question whether he should have received such authority is too important to be settled by a motion but must be determined in an action.⁸⁷

After the appointment of a receiver in an action for the fore-

⁸¹ *Iddings v. Bruen*, 4 Sandf. Ch. 417.

⁸² *Parker v. Browning*, 8 Paige, 388.

⁸³ *Parker v. Browning*, 8 Paige, 388.

⁸⁴ *Parker v. Browning*, 8 Paige, 388, 390.

⁸⁵ A lease for one year was sustained, *Shrieve v. Hankinson*, 34 N. J. Eq. 413, and note by the reporter.

See Code of Civ. Pro., § 716, as to power of receiver. A receiver of a debtor in supplementary proceedings may not make a lease for a term exceeding one year. Rule 78.

⁸⁶ *Witthaus v. Capstick*, 117 App. Div. 212; 102 N. Y. Supp. 166.

⁸⁷ *Farmers' Trust Co. v. Staten Island R. Co.*, 6 App. Div. 148; 39 N. Y. Supp. 996.

closure of a mortgage, and after the lessee has paid rent to the receiver, the mortgagor has no authority to accept a surrender from the lessee, or to execute a new lease, during the continuance of the receivership.⁸⁸

§ 959. **Enforcing payment of rent to receiver.**—The court will not undertake, by its officers, to collect the rent of the mortgaged property, if the person in possession or entitled to the rent is not either a party to the suit or the tenant of a party,⁸⁹ and even if a receiver is appointed, such appointment will not affect the rights of persons who are not parties. In *Zeiter v. Bowman* (6 Barb. 133), the owner of the equity of redemption took a chattel mortgage from the tenant in possession as security for rent not yet due, and then assigned such chattel mortgage, and the rents which it was intended to secure. An action was commenced to foreclose the prior mortgage, to which the assignee of the chattel mortgage was not made a party. A receiver of the rents was appointed in that action, to whom the tenant attorned. It was held that the assignee of the chattel mortgage was not affected by these proceedings.

If the owner of the equity of redemption is in possession, he may be compelled either to attorn to the receiver, and pay a rental to be fixed by the court, or to surrender the premises.⁹⁰

The proper practice in foreclosure cases, where a receiver has been appointed, and where the tenant is not a party, is either to secure the attornment of the tenant, or to extend the action by amendment so as to make the tenant a party. If any person not a party claims the rent by an assignment from the owner, or otherwise, he also should be made a party to the action. The court can then protect the person paying, as well as the officer claiming the rent, from the improper influences of other persons. But where the tenant and person claiming the rent are not parties to the action, and no attornment to the receiver has taken place, the jurisdiction over the subject by way of process for contempt cannot be maintained.⁹¹

⁸⁸ *Nealis v. Bussing*, 9 Daly, 305.

⁸⁹ *Sea Ins. Co. v. Stebbins*, 8 Paige, 565.

⁹⁰ *Astor v. Turner*, 3 How. Pr. 225; 2 Barb. 444; *Frelinghuysen v. Col-den*, 4 Paige, 204; *Mutual Life Ins. Co. v. Spicer*, 12 Hun, 117; *Reid v.*

Middleton, 1 Turner & Russ, 455; *Randfield v. Randfield*, 7 Weekly Rep. 651; *Lloyd v. Mason*, 2 Milne & Craig, 487.

⁹¹ *Bowery Savings Bank v. Richards*, 3 Hun, 366; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565.

By making the appointment of a receiver of the rents, the court becomes virtually the landlord of the property, collecting the rents by its officer;⁹² and the court will not let the possession of the receiver, which is its own possession, be disturbed by any one without its permission.⁹³ Nor will the court, where it has made an order for the appointment of a receiver of real estate, and the tenants have attorned to such receiver under an order of the court, permit the tenants or any other persons to question the right of the court to grant such receivership by disturbing the possession of its officer.⁹⁴

And a tenant who continues in possession after the appointment of a receiver is liable to him for rent, and cannot in an action therefor by the receiver offset damages alleged to have resulted from a breach by the lessor of covenant in the lease.⁹⁵

§ 960. Actions by receiver.—The receiver cannot proceed in ejectment against the tenants without the authority of the court, and the possession of the tenants will not ordinarily be disturbed where a receiver is appointed. But although not themselves parties to the suit, the tenants of a party who have attorned to the receiver, may be compelled to pay rent to him.⁹⁶

In an action brought by or against an executor or administrator in his representative capacity, or the trustee of an express trust, or the assignee of a receiver, the court may in its discretion require the plaintiff to give security for costs.⁹⁷ By rule 79 of the courts, it is provided that in all cases where a receiver other than a receiver appointed under proceedings supplementary to execution, applies to the court for leave to bring an action, he shall show in such application that he has sufficient property in his actual possession to secure the person against whom the action is to be brought for any costs which he may recover against such receiver; otherwise the court may require the receiver to give a bond with sufficient security and properly acknowledged and approved by the court, to the person against whom the action

92 *Steele v. Sturges*, 5 Abb. Pr. 442; *Foster v. Townshend*, 2 Abb. N. Cas. 29, 36.

93 *Noe v. Gibson*, 7 Paige, 513; *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Foster v. Townshend*, 2 Abb. N. Cas. 29, 36.

94 *Albany City Bank v. Schermerhorn*, 9 Paige, 372.

95 *Derby v. Brandt*, 99 App. Div. 257; 90 N. Y. Supp. 980.

96 *Sea Ins. Co. v. Stebbins*, 8 Paige, 565.

97 Code of Civ. Pro. § 3271.

is to be brought, conditioned for the payment of any costs which may be recovered against such receiver.

A receiver has no absolute right to defend an action as such receiver, and the granting permission to make defense is in the discretion of the court.⁹⁸

Nor does a receiver acquire a right to a cause of action in favor of the mortgaged railroad corporation which accrued prior to his appointment.¹

§ 961. Liability of receiver.—The receiver appointed in an action to foreclose a mortgage is not the owner of the property; he is simply an officer of the court to collect the rents and profits of the mortgaged premises for the benefit of the mortgagee. For this reason he is not subject to a liability imposed by statute on the owner of a building, to preserve or protect its walls, and to keep the same secure and safe.²

Nor is he liable to a lessee for damages for failure to perform an act not authorized by the order of his appointment even though a claim that the mortgagor orally agreed to perform such act is not disputed.³

So, a common-law receiver in a foreclosure action acquires no title to the mortgaged property but only a right of possession as an officer of the court to secure the property pending the litigation. This applies where the mortgage covers a leasehold estate in which case there is no privity of estate between such a receiver and the lessor so as to render him liable as assignee of the premises upon the covenant to pay rent.⁴

§ 962. Compensation of receiver.—The Code of Civil Procedure provides that “a receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his lawful expenses, to such commissions, not exceeding five per centum, upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case

⁹⁸ Patrick v. Eels, 30 Kans. 680; 2 Pac. 116.

¹ Griffin v. Long Island R. R. Co., 102 N. Y. 449; 7 N. E. 735.

² Wyckoff v. Scofield, 103 N. Y. 630; 9 N. E. 498; 24 Weekly Dig. 339.

³ Dow v. Nealis, 47 Misc. R. 165; 93 N. Y. Supp. 379.

⁴ Stokes v. Hoffman House, 167 N. Y. 554; 60 N. E. 667. Compare Frank v. New York, Lake Erie & Western R. R. Co., 122 N. Y. 197; 25 N. E. 332.

Liability of mortgagee for rent, see ante § 165.

the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may in its or his discretion, allow said receiver such a sum, not exceeding one hundred dollars, for his commissions as shall be commensurate with the services rendered by said receiver.”⁵ The compensation of a receiver in a foreclosure case is regulated by this provision, even though the defendant be a corporation.⁶

⁵ Code of Civ. Pro. § 3320.

N. Y. 478; 5 N. E. 316; 9 N. Y. Civ.

⁶ United States Trust Co., N. Y., v.
New York W. S. & B. R. R. Co., 101

Pro. Rep. 113; 33 Alb. L. J., 297.

CHAPTER XXV.

COSTS.

COSTS IN ACTIONS TO FORECLOSE.

- § 963. Costs are in the discretion of the court.
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965. Rules controlling the granting of costs.
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COSTS IN SURPLUS PROCEEDINGS.

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COSTS IN ACTIONS TO FORECLOSE.

§ 963. Costs are in the discretion of the court.—An action for the foreclosure of a mortgage, in common with all other actions for equitable relief, falls within the provision of section 3230 of the Code of Civil Procedure, under which in all actions other than those mentioned in sections 3228 and 3229, costs may be allowed or not, in the discretion of the court.¹ This rule applies to actions for strict foreclosure as well as to actions for foreclosure by a sale of the property,² and to actions to foreclose a mortgage in which a judgment for a deficiency is sought against a guarantor.³

Costs in suits and proceedings in equity have always been held

¹ Lewis v. Robinson, 78 App. Div. 579; 79 N. Y. Supp. 607; Gallagher v. Egan, 2 Sandf. 742; Losee v. Ellis, 13 Hun, 655; Stevens v. Weiss, 25 Misc. R. 457; 55 N. Y. Supp. 562. See Paley v. Smith, 74 Misc. R. 560; 132 N. Y. Supp. 153.

² O'Hara v. Brophy, 24 How. Pr. 379; Bartow v. Cleveland, 16 How. Pr. 364; 7 Abb. Pr. 339.

³ Newcomb v. Hale, 12 Abb. N. C. 338.

to be discretionary,⁴ and the awarding of costs in equity cases stands on the same footing now as before the Code.⁵

The discretion as to security for costs which is given by section 3271 of the Code is held to be vested in the Appellate Division as well as in the Special Term.⁶

If the action is tried before a referee, the referee stands in the place of the court, and the question of costs is in his discretion.⁷ The only way to review his decision as to costs is by an appeal from the judgment.⁸

When it is said that the giving of costs in equitable actions is entirely discretionary, it must not be supposed that a court of equity is not governed by definite principles in its decisions respecting costs. All that is meant by the dictum is, that courts of equity are not, like courts of law, held inflexibly to the rule of giving the costs of the suit to the successful party, but that they will, in awarding costs, take into consideration the circumstances of a particular case, and the situation and conduct of the parties, and exercise their discretion in reference to those points. In exercising this discretion, however, courts of equity are governed by certain fixed principles which they have adopted on the subject of costs; and do not, as is frequently supposed, act upon the mere caprice of the judge before whom the cause is heard. The discretion to be exercised is a sound discretion.⁹

§ 964. Appeal from discretion of trial court as to costs.—The discretion exercised in an equity action as to costs cannot be reviewed upon a motion, and must be challenged by an exception to the finding, and an appeal from the judgment.¹⁰

It was early decided that the discretion of the judge at special term with regard to costs might properly be reviewed by the General Term, since the litigants were entitled to the discretion of

⁴ *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 65; *Garr v. Bright*, 1 Barb. Ch. 157.

⁵ *Law v. McDonald*, 9 Hun, 23; *Pratt v. Stiles*, 17 How. Pr. 211; *Phelps v. Wood*, 46 How. Pr. 1; *Church v. Kidd*, 3 Hun, 254.

⁶ *Hagar v. Radam Microbe Killer Co.*, 119 App. Div. 839; 104 N. Y. Supp. 896.

⁷ *Pratt v. Stiles*, 17 How. Pr. 211; 9 Abb. Pr. 150; *Graves v. Blanchard*,

4 How. Pr. 300; 3 Code R. 25; *Ludington v. Taft*, 10 Barb. 447; *Taylor v. Root*, 48 N. Y. 687; *Losee v. Ellis*, 13 Hun, 655; *Law v. McDonald*, 9 Hun, 23; *Couch v. Millard*, 3 How. N. S. 22.

⁸ *Losee v. Ellis*, 13 Hun, 655.

⁹ 2 Barb. Ch. Pr. 322; *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Law v. McDonald*, 9 Hun, 23.

¹⁰ *Woodford v. Bucklin*, 14 Hun, 444; *Rosa v. Jenkins*, 31 Hun, 384.

both branches of the court upon matters which concern substantial rights, but that the Court of Appeals would not interfere with the exercise of this discretion unless it appeared that it was exercised under erroneous views of the law affecting the rights of the parties.¹¹ Where, however, the court below allowed costs under a mistaken idea of the law, it was held to be the duty of the Court of Appeals to correct the error.¹²

Thus where the holder of an inchoate right of dower has not been made a party to the foreclosure, and thereafter brings her action to redeem, and recovers judgment, it was held by the Court of Appeals that a provision allowing costs to the defendant who was the holder of the mortgage and had purchased the property on the foreclosure sale, was improper.¹³

It was also decided that the discretion of the trial court in an equity action would not be interfered with by the General Term on appeal, except in cases of abuse or of palpable error, in disregard of recognized equities and rights.¹⁴

§ 965. Rules controlling the granting of costs.—Ordinarily, costs will be granted to a successful litigant, and the cases in which costs are refused to him, or are granted to an unsuccessful party to the action, are exceptional.¹⁵

A mortgagee is ordinarily allowed costs, whether plaintiff or defendant.¹⁶

Where, however, a purchaser at a foreclosure sale refuses to take title until the determination of a prior suit of ejectment brought by the mortgagee it has been held proper to charge the mortgagee, in case the suit is determined against him, with the costs of the winning party accruing after the sale.¹⁷

Where plaintiff succeeds in part and defendant succeeds in part, no costs should be allowed to either party as against the other,¹⁸ though in some cases costs may be apportioned.¹⁹

Where a mortgagor or any other party to the action unreason-

¹¹ Taylor v. Root, 48 N. Y. 687.

¹² Morris v. Wheeler, 45 N. Y. 708.

¹³ MacKenna v. Fidelity Trust Co., 184 N. Y. 411; 77 N. E. 721.

¹⁴ House v. Eisenlord, 30 Hun, 90.

¹⁵ Garr v. Bright, 1 Barb. Ch. 157.

¹⁶ Benedict v. Gilman, 4 Paige, 58; Slee v. Manhattan Co., 1 Paige,

48; Vroom v. Ditmas, 4 Paige, 526.

See also Litthauer v. Royle, 17 N. J. Eq. 40.

¹⁷ Sand v. Church, 32 App. Div. 139; 52 N. Y. Supp. 854; 27 Civ. Pro. 405; 6 Ann. Cas. 45.

¹⁸ Law v. McDonald, 9 Hun, 23.

¹⁹ Sternbach v. Friedman, 75 App. Div. 419; 78 N. Y. Supp. 318.

ably defends, he may be charged personally with the costs for the benefit of those entitled to the surplus,²⁰ as may also a subsequent mortgagee claiming under a mortgage which is found to be fraudulent.²¹

So, also, a plaintiff who improperly impleads the purchaser under the foreclosure of a prior mortgage, alleging that he is a junior incumbrancer, may be charged with the costs of such defendant.²²

Where except for the amount claimed an action would have laid in the City Court of the City of New York or in the County Court of Kings County in which personal service could have been made, and the amount recovered by the plaintiff is less than five hundred dollars, it is held that no allowance will be made to him for costs or disbursements under subdivision 5 of section 3228 of the Code.²³

The court may be controlled by an agreement with the plaintiff in respect to the amount which will be allowed.²⁴

§ 966. Two foreclosures against the same property.—Where there are two separate mortgages on the same property, and an action to foreclose is commenced by the holder of the first mortgage against the holder of the second mortgage, and all junior incumbrancers, an action subsequently commenced to foreclose the second mortgage, would, in general, be both unnecessary and improper, and in a case where both of such actions were commenced by the same solicitor, he was compelled to elect in which action he would take his decree, in order that the owners of the equity of redemption should be charged with only one bill of costs.²⁵ The principle of the decision is, that where an action is unnecessarily commenced, and where the relief prayed for might be obtained on motion in an action already pending, the plaintiff will not be entitled to costs.²⁶ In a case where the second mortgagee could

²⁰ *Jones v. Phelps*, 2 Barb. Ch. 440; *Barnard v. Bruce*, 21 How. Pr. 360.

²¹ *Bemus v. Thrall*, 35 Misc. R. 137; 70 N. Y. Supp. 463.

²² *Salmon v. Allen*, 11 Hun, 29.

²³ *Ponce De Leon v. Brooklyn Heights R. R. Co.*, 125 App. Div. 752; 110 N. Y. Supp. 571.

²⁴ *Kunath v. Bremer*, 53 App. Div.

271; 65 N. Y. Supp. 830. See *Bowery Bank v. Hart*, 77 App. Div. 121; 79 N. Y. Supp. 46, rev'g 37 Misc. R. 412; 75 N. Y. Supp. 781.

²⁵ *Wendell v. Wendell*, 3 Paige, 509; *Roosevelt v. Ellithorp*, 10 Paige, 415.

²⁶ *De La Vergne v. Evertson*, 1 Paige, 181.

not procure the satisfaction of his mortgage under the action already pending, as where a judgment of foreclosure upon the first mortgage had been stayed by appeal, the principle would not apply.²⁷

§ 967. Notice of no personal claim as affecting right to costs.—

A person unnecessarily or improperly joined as a defendant, who is served with a notice of no personal claim, and who unreasonably defends, will not be awarded costs.²⁸

The failure to serve a notice of no personal claim under section 423 of the Code of Civil Procedure, does not deprive the court in equity cases of the power to award costs against a defendant who unreasonably defends. It is not necessary to serve such a notice,²⁹ and the defendant who receives a copy of the complaint is more fully informed of the nature and object of the action than he would be from a mere abstract such as the notice under the statute is.³⁰

Prior to the framing of the 133d rule of the Court of Chancery, a subsequent mortgagee or judgment creditor who, being made a party defendant, answered and disclaimed any interest, was entitled to costs, to be paid out of the fund if that were sufficient, but by the plaintiff if it were insufficient, on the ground that such defendant should be called upon before suit brought, and requested to release, or otherwise disclaim.³¹ But this was changed by the 133d rule, which was known as Chancellor SANFORD's rule. Under this rule a complainant was allowed to serve with the subpoena a notice of the object of the action and of no personal claim. If the defendant on whom such notice had been served appeared and disclaimed, he could not recover costs, but was required to pay costs to the complainant; and if the complainant neglected to serve such notice, by reason whereof a defendant was put to unnecessary costs in employing a solicitor to defend the suit, such costs might be charged personally on the complainant in the discretion of the court.³² The object of this rule was to relieve the complainants, in mortgage cases, from the

²⁷ See *Bache v. Purcell*, 6 Hun, 518, aff'd 51 How. Pr. 270.

²⁸ *Barker v. Burton*, 67 Barb. 458; *Adams v. Myers*, 61 Wis. 385; 21 N. W. 250.

²⁹ *Gallagher v. Egan*, 2 Sandf. 742.

³⁰ *O'Hara v. Brophy*, 24 How. Pr. 379.

³¹ *Catlin v. Harned*, 3 Johns. Ch. 61; *Titus v. Velie*, 6 Johns. Ch. 435.

³² *Rules of N. Y. Court of Chancery*, pp. 102, 103; note to *Jay v. Ensign*, 9 Paige, 231.

expense of unnecessary disclaimers, put in by defendants who were merely formal parties to the suit, and against whom no personal decree was sought. To entitle a defendant to costs under the rule, where he appeared by a solicitor but did not disclaim, he was required to satisfy the court that he had been misled as to the object of the suit and the relief sought against him, in consequence of the neglect of the complainant to give the usual notice; and that his sole object in employing a solicitor was to protect himself or his property from an unjust claim which he supposed that the complainant might have made against him in the bill.³³

§ 968. When costs are payable out of the fund.—If the circumstances of the case require it, the court may direct that the costs be paid out of any moneys in the custody of the court belonging to any of the parties litigant and subject to the lien of the mortgage.³⁴

A prior mortgagee, if made a party for the purpose of having the amount of his claim ascertained, is entitled to his costs, to be paid out of the fund, or by the plaintiff personally if the answer was unreasonably called for by him.³⁵

A party who is improperly joined as a defendant may have costs adjudged in his favor against the plaintiff personally,³⁶ but such costs should not be paid out of the fund.³⁷

Where, upon the trial by the court of an action to foreclose a mortgage, the complaint is directed to be dismissed, as to some of the defendants, "with twenty-five dollars costs," this means that these costs are to be paid by the plaintiff, and the clerk has no authority to enter a judgment directing them to be paid out of the proceeds of the sale.³⁸

A referee to sell is bound to take notice of a writing at the end of a foreclosure decree and above the initial signature of the justice which directs an allowance of costs to a party.³⁹

33 Jay v. Ensign, 9 Paige, 230.

34 Bushwick Savings Bank v. Traum, 26 App. Div. 532; 50 N. Y. Supp. 452, aff'd 158 N. Y. 668; 52 N. E. 1123; Falkner v. Printing Co., 74 Ala. 359.

35 Boyd v. Dodge, 10 Paige, 42; Mayer v. Salisbury, 1 Barb. Ch. 546; Jones v. Phelps, 2 Barb. Ch. 440;

Chamberlain v. Dempsey, 36 N. Y. 144, 147.

36 Millandon v. Brugiere, 11 Paige, 163.

37 Nelson v. Montgomery, 1 Edw. 657.

38 Rosa v. Jenkins, 31 Hun, 384.

39 Seitz v. Schrell, 30 App. Div. 211; 51 N. Y. Supp. 608.

A tender after suit brought and without a tender of costs, and without an order permitting a tender without costs, does not constitute a defense.⁴⁰

But, although a tender of taxes and costs was made in the form of a certified check, it is held that a plaintiff in foreclosure proceedings cannot take advantage of the fact that money was not tendered, if it did not refuse the tender upon the ground.⁴¹

§ 969. Tender after action brought and before judgment.—If the defendant wishes to pay the mortgage debt after the commencement of the action to foreclose, he cannot then either make or plead a tender, for a tender is incomplete without including in it all the costs, and the right to costs is not absolute, but depends upon the discretion of the court.⁴² The statute allowing a defendant to tender to the plaintiff or his attorney an amount sufficient to satisfy the demand with costs to the time of tender, and providing that if it shall appear on the trial that the amount so tendered was sufficient to pay the demand and costs, the plaintiff should not be entitled to costs subsequent to the tender, is confined to actions at law, and does not affect actions for the foreclosure of mortgages.⁴³

In an action of foreclosure, where tender is made before judgment, if the parties do not voluntarily adjust the costs, either party may apply to the court for that purpose.⁴⁴ But before do-

40 *Eaton v. Wells*, 82 N. Y. 576, aff'g 22 Hun, 123. In this case the defendant in foreclosure set up in his answer a tender subsequent to the commencement of the action, of a sum stated "in payment of the mortgage debt evidenced and secured by the bond and mortgage." The amount so alleged to have been tendered was more than the amount claimed in the complaint to be due and payable, with interest up to the time of the tender. There was no averment of tender of costs or order for the tender of the debt without costs. The court decided on appeal that by the pleadings, if the plaintiff and the court chose to take the averments of the answer as true, there was no issue of fact to be tried, but that the tender alleged was

insufficient, as plaintiff was entitled to costs; that the plaintiff was therefore entitled to judgment and that motion for judgment on the pleadings was properly granted.

41 *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814; 109 N. Y. Supp. 435, rev'g 57 Misc. R. 204; 107 N. Y. Supp. 912.

42 *Bartow v. Cleveland*, 16 How. Pr. 364; 7 Abb. 339; *Pratt v. Ramsdell*, 16 How. 59; *Thurston v. Marsh*, 14 How. Pr. 572; 5 Abb. 389; *Lewis v. Robinson*, 78 App. Div. 579; 79 N. Y. Supp. 607; 12 Ann. Cas. 340.

43 Code of Civ. Pro. § 731; *N. Y. Fire & Marine Ins. Co. v. Burrell*, 9 How. Pr. 398.

44 *Pratt v. Ramsdell*, 16 How. Pr. 59; *Bartow v. Cleveland*, 16 How. Pr.

ing this it would be prudent for the defendant to offer to pay the amount due upon the mortgage, and such costs as he may think proper, and upon refusal to accept the amount, he may apply to the court for leave to pay the amount due, and such costs as the court may in its discretion allow. The court will entertain the application and permit the payment, fixing the costs, and upon the payment being made will order a discontinuance or stay of the action as may be just.⁴⁵

When costs are allowed, the items are those which are specified by the statute,⁴⁶ and, in general, those items are the only ones which will be imposed. But if the court shall be of opinion that the circumstances of the case demand it, the plaintiff may be permitted to take judgment, notwithstanding the tender, and thus become entitled to the additional allowance under section 3252 of the Code of Civil Procedure; or if the equities of the case require it, the court may refuse costs to the plaintiff, or even award them to the defendant.⁴⁷

Where foreclosure proceedings have been commenced against several persons owning real estate as tenants in common and during their pendency one of such owners, or a person representing him to the knowledge of the plaintiff, tenders to the latter the amount of principal and interest due upon the mortgage and the costs if he will execute and deliver to such person an assignment of the mortgage, it is proper to order an assignment to be made upon certain terms and conditions.⁴⁸

An averment of tender admits the cause of action stated in the complaint to the amount tendered. The defendant is bound by the averment and the plaintiff or the court may accept it as an admission establishing the fact that a tender was made.⁴⁹

§ 970. Offer of judgment in foreclosure cases.—It was held in *Stevens v. Veriane* (2 Lans. 90), that the same reasons which prevent a valid tender from being made after the commencement

364; 7 Abb. 339; *Morris v. Wheeler*, 45 N. Y. 708; *Stevens v. Veriane*, 2 Lans. 90.

⁴⁵ *Bartow v. Cleveland*, 16 How. Pr. 364; 7 Abb. 339.

⁴⁶ Code of Civ. Pro. § 3251.

⁴⁷ *Pratt v. Ramsdell*, 16 How. Pr. 59, 61; *Bartow v. Cleveland*, 16 How. Pr. 364; 7 Abb. 339.

⁴⁸ *Simonson v. Lanck*, 105 App. Div. 82; 93 N. Y. Supp. 965.

⁴⁹ *Eaton v. Wells*, 82 N. Y. 576, aff'g 22 Hun, 123, citing *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; *Spalding v. Vandercook*, 2 Wend. 431; *Roosevelt v. New York & H. R. R.*, 45 Barb. 554.

of a foreclosure suit, would also prevent an offer of judgment under section 738 of the Code, from limiting the amount of costs which the plaintiff may recover. But the Court of Appeals took a different view in *Bathgate v. Haskin* (63 N. Y. 261, rev'g s. c. 5 Daly, 361), and held that such an offer would have the same effect in an action to foreclose a mortgage as in any other action.⁵⁰

§ 971. Additional allowance awarded as part of the costs under the Code.—Where an action is brought to foreclose a mortgage upon real property, the plaintiff, if a final judgment is rendered in his favor and he recovers costs, is entitled to recover, in addition to the costs prescribed for actions in general, the following percentages, to be estimated upon the amount found to be due upon the mortgage: Upon a sum not exceeding \$200, ten per centum; upon an additional sum not exceeding \$400, five per centum; and upon an additional sum not exceeding \$1,000, two per centum. Where such an action is settled before judgment the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement at one-half of those rates. In an action to foreclose a mortgage upon real property where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, as prescribed in section 1637 of the Code of Civil Procedure, on the ground that it appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, the percentages above specified must be computed upon the whole sum unpaid upon the mortgage. But if it directs the sale of a part only, as prescribed in section 1636 of the Code of Civil Procedure, on the ground that the mortgage debt is not all due, and the mortgaged property is so circumstanced that it can be sold in parcels without injury to the interests of the parties, the said percentages must be computed upon the sum actually due; and if the court thereafter grants an order directing the sale of the remainder, or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not exceed the sum which would have been allowed if the entire sum

⁵⁰ An offer of judgment in a foreclosure suit held not sufficient. *Penfield v. James*, 56 N. Y. 659. See as to effect of offer of judgment in fore-

closure case on right to extra allowance under former Code, *Astor v. Palache*, 49 How. Pr. 231.

secured by the mortgage had been due when final judgment was rendered.⁵¹

Under this provision the plaintiff, who is awarded costs, may tax percentages up to \$60, if the mortgage debt amounts to \$1,600 or more, and his right to such percentages does not depend upon any discretion of the court other than the discretion which might grant or refuse him costs in the action. The percentages are taxable just as any other item of costs is taxable.⁵² These percentages can be given only to the plaintiff, and a defendant cannot be awarded them under any circumstances.⁵³

§ 972. Discretionary additional allowance.—It is also provided by section 3253 of the Code of Civil Procedure as follows:

“In an action brought to foreclose a mortgage upon real property or for the partition of real property, or in a difficult and extraordinary case, (where a defense has been interposed in an action), or, except in the first and second judicial districts, in a special proceeding by certiorari to review an assessment under article thirteen of the tax law, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due upon the mortgage, or the aggregate sum of two hundred dollars.

2. In any action, or special proceeding, specified in this action where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject matter involved.”

By decisions under the present form of the statute additional allowances in actions to foreclose a mortgage may be granted to an amount not exceeding five per centum of the amount involved, whether or not that amount exceeds two hundred dollars.⁵⁴ And decisions under earlier forms are superceded.⁵⁵

⁵¹ Code of Civ. Pro. § 3252.

⁵² Hunt v. Middlebrook, 14 How. Pr. 300.

⁵³ Williams v. Hernon, 13 Abb. 297; Downing v. Marshall, 37 N. Y. 380, 385.

⁵⁴ Long Island Loan & Trust Co.

v. Long Island City & Newtown R. Co., 85 App. Div. 36; 82 N. Y. Supp. 644. See Warren v. Warren, 203 N. Y. 250; MacFarlane v. Brower, 63 Misc. R. 183; 116 N. Y. Supp. 34.

⁵⁵ See Hunt v. Chapman, 62 N. Y.

In an action to foreclose the lien of a vendee under an executory contract for the sale of land, for a portion of the purchase price paid by him, or for sums expended in improvements, the extra allowance should be limited to five per cent. upon the sum sought to be recovered, and should not be figured on the agreed purchase price.⁵⁶

Where the defendants are in default for failure to answer, a motion property noticed for final judgment, brings up all questions as to every matter proper to be inserted in the judgment, and the court may thereupon, without the service of a special notice of motion therefor, grant the extra allowance, provided for in section 3253 of the Code.⁵⁷

But a further notice of an application therefor is held not to be required where the notice of the application for judgment is sufficiently broad and has been served upon the defendants who have appeared in the action.⁵⁸

It is also decided that the attorney for the defeated party is not entitled to notice of a motion for an extra allowance where such motion was made before the judge who tried the case and on the day following the trial.⁵⁹

§ 973. The Code contemplates but one allowance, and that only upon final judgment. An additional allowance after it is properly granted becomes a part of the costs of the action which the successful party is entitled to recover. The test must be that the action has terminated in such form that the successful party can lawfully claim the payment of the costs on such termination, and enforce their payment. An additional allowance cannot therefore be granted upon sustaining or overruling a demurrer with leave to answer over on payment of costs, but only, if at all, when the final judgment is pronounced that unconditionally terminates the action and fixes the right of the successful party to tax his costs absolutely under the Code.⁶⁰

333; *Rosa v. Jenkins*, 31 Hun, 384; *O'Neil v. Gray*, 39 Hun, 566.

⁵⁶ *Occidental Realty Co. v. Palmer*, 117 App. Div. 505; 102 N. Y. Supp. 588, aff'd 102 N. Y. 648.

⁵⁷ *Walsh v. Weidenfeld*, 3 Daly, 334.

⁵⁸ *Badger v. Johnston*, 106 App. Div. 237; 94 N. Y. Supp. 421.

⁵⁹ *Mantner v. Pike*, 32 Misc. R. 500; 66 N. Y. Supp. 387.

⁶⁰ *De Stuckle v. Tehuantepec R. Co.*, 30 Hun, 34; *McDonald v. Mallory*, 46 N. Y. Super. Ct. (14 J. & S.) 58; *Hackett v. Equitable Life Assur. Soc.*, 30 Misc. R. 530; 63 N. Y. Supp. 853, aff'd 50 App. Div. 266; 63 N. Y. Supp. 1092. See Was-

By rule 45, it is required that applications for an additional allowance can only be made to the court before which the trial is had, or the judgment rendered, and shall in all cases be made before final costs are adjusted.⁶¹

A taxation of costs inadvertently procured by a party, may be set aside to enable him to apply for an additional allowance.⁶²

No additional allowance can be granted after the amount due on the mortgage, and a sum adjusted for costs, have been paid.⁶³

An additional allowance may be given in a foreclosure suit, where tender has been made before judgment, of the amount due, with interest and costs to the time of making the tender, since the additional allowance is not in the nature of costs incurred subsequent to the tender.⁶⁴

A voluntary payment on a settlement of a mortgage foreclosure of a sum not exceeding two and one-half per cent. of the amount due, by way of additional allowance, although such allowance has never been made by the court, and the payment is made under protest, cannot be recovered back.⁶⁵

The burden is on a plaintiff who claims costs in excess of \$200 under section 3252 of the Code as amended by chapter 61 of the Laws of 1898, to show that the action was difficult and extraordinary. If this is not established costs in excess of such sum will not be allowed.⁶⁶

§ 974. Amount of costs in judgment by default.—In a foreclosure case, where judgment is taken by default, the plaintiff is entitled, on application for judgment, to \$25; for each defendant served with process, not exceeding ten defendants, \$2; for each defendant exceeding ten defendants, \$1; for attending and taking deposition of a witness, conditionally, or to perpetuate his testimony, \$10; for drawing interrogatories to annex to a commis-

son v. Hoff, 27 Misc. R. 55; 57 N. Y. Supp. 953, holding that court on final judgment may so provide where not allowed in interlocutory judgment.

⁶¹ See Wilber v. Williams, 4 App. Div. 446; 38 N. Y. Supp. 893; Toch v. Toch, 9 App. Div. 501; 41 N. Y. Supp. 353.

⁶² Dietz v. Farish, 43 N. Y. Super. (9 J. & S.) 87.

⁶³ Lockman v. Ellis, 58 How. Pr. 100.

⁶⁴ N. Y. Fire & Marine Insurance Co. v. Burrell, 9 How. Pr. 398.

⁶⁵ Bliss v. Wallis, 3 How. N. S. 325.

⁶⁶ Riesgo v. Glengariffe Realty Co., 114 App. Div. 172; 99 N. Y. Supp. 592.

sion for taking testimony, \$10; for attending examination of a party before trial, \$10; for appointment of a guardian for an infant defendant (but only one in any one action), \$10; for procuring an injunction order, \$10; for procuring an order directing the service of the summons by publication thereof, or personally, without the State, on one or more defendants, \$10.

The plaintiff is also entitled to ten per cent. on the recovery for any amount not exceeding \$200, \$20; for any additional amount not exceeding \$400, five per cent., \$20; for any additional amount, not exceeding \$1,000, two per cent., \$20.

If the action is settled before judgment, the same allowance upon the amount paid or secured is to be allowed at one-half of the above rates.

The clerk is not authorized to tax any other items to be included in a bill of costs for the foreclosure of a mortgage (exclusive of disbursements) in case of default. No trial fee is allowed, and no costs of motion are allowed, from the commencement of the proceedings in the action to the entry of the decree or judgment. The services performed are all *ex parte*, and the costs and allowances above provided are such costs and allowances as the statute has provided to cover the plaintiff's expenses for the services performed. If the services in any case are worth more to the attorney who performs them, he must look to the party who employs him.

The necessary disbursements must be adjusted by the clerk, and must be stated in detail, and verified by affidavit. This includes fees allowed by law to sheriffs, clerks, and other officers, witnesses' fees, referee's fees, expenses of publication of summons and notice, compensation of commissioners in taking depositions, expenses paid for affidavits and postage.⁶⁷

The cost of obtaining an unofficial search of title whether made by an individual or a corporation is not one of the necessary expenses which are taxable as costs under section 3256 of the Code,⁶⁸ except that "searches affecting property situate in any county in which the office of county clerk or register is a salaried one, when made and certified to by title insurance, abstract or searching companies, organized and doing business under the

⁶⁷ Code Civ. Pro. §§ 3251, 3256.
Per Noxon, J., in *Armstrong v. Murdock*, 17 Alb. L. J. 429.

⁶⁸ *Equitable Life Ins. Soc. v. Hughes*, 125 N. Y. 106; 26 N. E. 1.

laws of this State, may be used in all actions or special proceedings in which official searches may be used, in place of and with the same legal affect as such official searches, and the expenses of searches so made by said companies shall be taxable at rates not exceeding the cost of similar official searches.”⁶⁹

COSTS IN SURPLUS PROCEEDINGS.

§ 975. The only costs allowable in these proceedings are the costs of the motion for the reference (\$10), the costs of the motion to confirm the report (\$10), and disbursements, including the fees of the referee. The court has no power to grant an extra allowance.⁷⁰

If a creditor makes claim to a larger amount than, upon trial, is found to be owing to him, or if he adopts an unusual and expensive mode of procedure, costs may be refused to him.⁷¹

Persons failing to establish their claims may be charged with the unnecessary costs which have been incurred by their litigating.⁷² A claimant who litigates a prior lien unsuccessfully, but in good faith, is not chargeable with costs; but if he files exceptions, and they are overruled, he must pay the costs produced by the exceptions.⁷³

If a junior incumbrancer knowing, or having reason to believe, that the previous liens will exhaust the whole surplus, makes a claim, and subjects the prior incumbrancers to unnecessary costs, he may be charged with them; but if the claim is made in good faith, upon grounds from which he had reason to believe that the prior claim could not be sustained, he may be excused.⁷⁴

The widow of the mortgagor cannot be charged with costs, but she is entitled to have the costs of the proceedings, and her own costs, paid out of the balance of the surplus moneys then in court, after her share thereof shall be set apart.⁷⁵

⁶⁹ Code Civ. Pro. § 3256.

⁷⁰ *McDermott v. Hennessy*, 9 Hun, 59; *Elwell v. Robbins*, 43 How. Pr. 108; *Rensselaer & Saratoga R. R. v. Davis*, 55 N. Y. 145; *German Savings Bank v. Sharer*, 25 Hun, 409; *Wellington v. Ulster Co. Ice Co.*, 5 Week. Dig. 104; *Matter of Gibbs*, 58 How. Pr. 502.

⁷¹ *De La Vergne v. Evertson*, 1 Paige, 181.

⁷² *Lawton v. Sager*, 11 Barb. 349; *Bevier v. Schoonmaker*, 29 How. Pr. 422.

⁷³ *Norton v. Whiting*, 1 Paige, 578.

⁷⁴ *Farmers' Loan & Trust Co. v. Millard*, 9 Paige, 620.

⁷⁵ *Tabele v. Tabele*, 1 Johns. Ch. 45.

The court cannot be deprived of its discretion in the matter of costs, by the stipulation of the parties.⁷⁶

COSTS IN ACTIONS TO REDEEM.

§ 976. **Principles controlling.**—As in other equitable actions, costs in actions to redeem are within the discretion of the court or the referee.⁷⁷

Usually, the party claiming the right to redeem premises from a mortgage, whether he is a plaintiff or defendant, must pay the costs of the proceedings, as well as the amount due on the mortgage, before he can be permitted to redeem.⁷⁸ The plaintiff, therefore, will, customarily, be compelled to pay costs to the defendant, although he ultimately succeeds in obtaining the relief prayed for. But if the defendant has behaved inequitably or improperly, he may be deprived of or even compelled to pay costs.⁷⁹

In a case where a party entitled to redeem under a statute foreclosure, had tendered the amount due with costs, he was not charged with costs on his subsequent bill to redeem,⁸⁰ and it has also been held that a party entitled to redeem, who tenders the whole amount due before filing his bill, will be excused from paying the costs of his adversary though an administrator.⁸¹

Where the defendant interposes an unconscientious defense,⁸² or is the cause of the litigation by unreasonable or oppressive conduct, he may be charged with costs.⁸³ So, also, if the mortgage has actually been satisfied before the action to redeem is commenced.⁸⁴

⁷⁶ Cowen v. King, 54 App. Div. 331; 66 N. Y. Supp. 621.

⁷⁷ Pratt v. Stiles, 17 How. Pr. 211.

⁷⁸ Benedict v. Gilman, 4 Paige, 58; Brockway v. Wells, 1 Paige, 617; Vroom v. Ditmas, 4 Paige, 526; Slee v. Manhattan Co., 1 Paige, 48. See also Saunders v. Frost, 5 Pick. (Mass.) 259; 16 Am. Dec. 394; Belden v. Slade, 26 Hun, 635, 642.

⁷⁹ Slee v. Manhattan Co., 1 Paige, 48; Brockway v. Wells, 1 Paige, 617; Vroom v. Ditmas, 4 Paige, 526, 535.

See also Saunders v. Frost, 5 Pick. (Mass.) 259; 16 Am. Dec. 394; Naylor v. Colville, 20 App. Div. 581; 47 N. Y. Supp. 267; Parker v. Austin, 15 Week. Dig. 474.

⁸⁰ King v. Duntz, 11 Barb. 191.

⁸¹ Van Buren v. Olmstead, 5 Paige, 9.

⁸² Slee v. Manhattan Co., 1 Paige, 48.

⁸³ Barton v. May, 3 Sandf. Ch. 450.

⁸⁴ Calkins v. Isbell, 20 N. Y. 147.

CHAPTER XXVI.

HOW THE SALE UNDER THE JUDGMENT OF FORECLOSURE SHOULD BE MADE.

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| § 977. Prior to the judiciary act of 1847. | § 989. Payment of taxes and assessments out of proceeds of sale. |
| 978. Under the Code. | 990. Terms of sale cannot qualify judgment as to payment of taxes. |
| 979. Who may be referee. | 991. Proper provisions in terms of sale as to payment of taxes. |
| 980. The sale must be made by the officer designated. | 992. Terms of sale where title is incumbered by prior rights or liens. |
| 981. Publication and posting of the notice of sale. | 993. Adjourning the sale. |
| 982. Local regulations. | 994. Restraining sale by order of court. |
| 983. What is a sufficient publication. | 995. Conveyance to state name of party. |
| 984. Form and contents of the notice of sale. | 996. Fees of the officer extending the sale. |
| 985. Presumption as to regularity. | 997. Local regulations. |
| 986. The officer appointed to sell must proceed. | 998. Fees of the auctioneer. |
| 987. Order of sales in parcels. | |
| 988. Duties of officer at the sale. | |

§ 977. Prior to the judiciary act of 1847, sales under the decrees of the Court of Chancery were made by masters in chancery, but the office of master in chancery was abolished by that act, and, under its provisions, the sheriff of the county in which the land was to be sold was the proper officer to sell under a decree of foreclosure, the court having power, under the 77th section, whenever it was deemed proper, to appoint a suitable person to make the sale instead of the sheriff. Where any controversy had arisen, or was likely to arise, between the parties as to the order in which different portions of the premises should be sold, a referee was commonly appointed to make the sale instead of the sheriff.¹

§ 978. Under the Code.—By section 1242 of the Code of Civil Procedure it is enacted that, except where special provision is

¹ Knickerbacker v. Eggleston, 3 How. Pr. 130.

otherwise made by law, real property adjudged to be sold must be sold in the county and borough where it is situated by the sheriff of the county or by a referee, appointed by the court for that purpose, who must execute a conveyance to the purchaser. If such real property is situated partly in one county or borough and partly in another and is so circumstanced that a sale of the whole will be most beneficial to the parties, the court rendering judgment may direct in which county and borough the whole of such real property shall be sold.

Where a referee is appointed by the court to sell real property, the court may provide for his giving such security as the court deems just for the proper application of the money received upon the sale; or for the payment thereof by the purchaser, directly to the person or persons entitled thereto, or their attorneys.²

§ 979. Who may be referee and duties of.—Except when the referee is agreed upon by a written stipulation, as provided for by section 1011 of the Code of Civil Procedure, no person, unless he is an attorney of the court in good standing, can be appointed sole referee for any purpose in any pending action or proceeding. Nor can any person be appointed a referee who is the partner or clerk of the attorney or counsel of the party in whose behalf the application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel.³

All moneys received by a referee appointed to sell real property shall be forthwith deposited by the referee in his own name as referee in a bank or trust company authorized to receive on deposit court funds; and if there be no such depository in the city or town in which the referee resides, then he shall deposit such moneys forthwith in a depository located in an adjoining city or town, or with the County Treasurer of the county in which the action or special proceeding is pending; and such moneys so deposited shall not be withdrawn, except upon order of the court.

No person holding the office of clerk, deputy clerk, special deputy clerk, or assistant in the clerk's office of a court of record, within the county of New York, can be appointed a referee except by the written consent of all the parties to the action other than parties in default for failure to appear or plead.⁴

² Code of Civ. Pro. § 1243.

³ Rule 79.

⁴ Judiciary Law § 251.

By the 61st General Rule of Practice the sale is also required to be made by the sheriff of the county or a referee, and it is also provided that the referee to be appointed in foreclosure cases, to compute the amount due or to sell mortgaged premises, shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action or his counsel.

The lax enforcement of this rule has been commented upon.⁵ The final judgment may provide for the appointment of a referee where the interlocutory judgment fails to so provide.⁶

§ 980. The sale must be made by the officer designated, or it will be void. A sale which was directed to be made by a master in chancery residing in New York, having been made by a master residing in Brooklyn, was set aside, though the purchaser had taken his deed.⁷ A sale by a person deputed by the officer authorized to make the sale, in his absence, would be irregular,⁸ though this would not apply to the sheriff, who may lawfully act by his under-sheriff and deputies.

An auctioneer may act for the officer in his presence,⁹ and if the sale is made in his absence a deed executed by him to the purchaser is voidable only and not void.¹⁰

Where a decree of foreclosure provides for a sale by the sheriff, it should be made by the sheriff in office when the publication of the notice of sale is commenced, though he goes out of office before the sale takes place.¹¹

§ 981. Publication and posting of the notice of sale.—By section 1678 of the Code of Civil Procedure it is provided that notice of a sale in an action relating to real property must be given by the officer making it, as prescribed by section 1434 of the Code, for the sale by a sheriff of real property by virtue of an execution, unless the property is situated wholly or partly in a city in which a daily, semi-weekly or tri-weekly newspaper is published, and,

⁵ *Finn v. Smith*, 45 Misc. R. 240; 92 N. Y. Supp. 168.

⁶ *Wasson v. Hoff*, 27 Misc. R. 55; 57 N. Y. Supp. 195.

⁷ *Yates v. Woodruff*, 4 Edw. 700.

⁸ *Heyer v. Deaves*, 2 Johns. Ch. 154.

⁹ *Blossom v. R. R. Co.*, 3 Wall. (U. S.) 205.

¹⁰ *Meyer v. Bishop*, 27 N. J. Eq. 141; *Meyer v. Patterson*, 28 N. J. Eq. 249.

¹¹ *Union Dime Savings Inst'n v. Andariese*, 19 Hun, 310, aff'd 83 N. Y. 174; 23 Alb. L. J. 115.

in that case, by publishing notice of the sale in such a daily, semi-weekly or tri-weekly paper, at least twice in each week for three successive weeks, or in a weekly paper published in a city, once in each of the six weeks, immediately preceding the sale, or in the counties of New York and Kings in two such daily papers. If the officer appointed to make such sale does not appear at the time and place where such sale has been advertised to take place, then in that case the attorney for the plaintiff may postpone or adjourn such sale, not to exceed four weeks, during which time such attorney may make application to the court to have another person appointed to make such sale. Notice of the postponement of the sale must be published in the paper or papers wherein the notice of sale was published. The terms of the sale must be made known at the sale, and if the property, or any part thereof, is to be sold subject to the right of dower, charge or lien, that fact must be declared at the time of the sale. If the property consists of two or more distinct buildings, farms or lots they shall be sold separately, unless otherwise ordered by the court; and provided, further, that where two or more buildings are situated on the same city lot, they be sold together.

Section 1434, above referred to, requires the sheriff who sells property by virtue of an execution, previously to give public notice of the time and place of sale as follows:

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places in the town or city where the property is situated, if the sale is to take place in another town or city.

2. A copy of the notice must be published, at least once in each of the six weeks immediately preceding the sale, in a newspaper published in the county, or published in an incorporated village, a part of which is within the county; if there is a newspaper published in such county or village; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.¹²

In each of such notices the real property to be sold must be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any,

or by some other appropriate description. The validity of a sale is not affected by the fact, that the property sold is part only of the property advertised to be sold.¹³

A sale of real property, pursuant to the directions contained in a judgment or order must be made at public auction, between the hour of nine o'clock in the morning and sunset.¹⁴

§ 982. Local regulations.—Rule 62 of the General Rules of Practice provides that, where the lands in the county of New York or the County of Kings are sold under a decree, order, or judgment of any court, they shall be sold at public auction, between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specifically directed. Such sales in the county of New York, unless otherwise specifically directed, shall take place at the Exchange Sales Rooms, now located at Nos. 14 and 16 Vezey Street, in the City of New York. The Appellate Division of the Supreme Court in the first department is authorized to change the place at which said sales shall be made, may make rules and regulations in relation thereto and may designate the auctioneers or persons who shall make the same.

Such sales in the City of Buffalo shall take place at the Real Estate Exchange Rooms, between the hours of nine and eleven in the forenoon and two and three o'clock in the afternoon, unless the court ordering the sale shall otherwise direct. Such sales shall, however, be made subject to such regulations as the justices of the Supreme Court of the eighth district shall establish.

In addition to complying with the requirement of section 1678 of the Code, all referees or officers making sale of real estate in New York or Kings County, or of an interest or estate therein, pursuant to any judgment, decree, order or direction of the court, shall cause to be published with the notice of sale, a diagram of the property to be sold or in which an interest is to be sold, showing the street or avenue upon which such property is located, its street or avenue number, if any, and specifying the number of feet to the nearest cross street or avenue, and also, where such sale is made to satisfy any lien or charge upon the real property sold, the approximate amount of such lien or charge shall be stated in a note annexed to such notice of sale; and where there are taxes, assessments, or other liens upon the said property which

13 Code Civ. Pro. § 1435.

14 Code Civ. Pro. § 1384.

are to be allowed to the purchaser out of the purchase money, or which are to be paid by the referee, the referee or officer making such sale shall also state, at the foot of such notice, the approximate amount of such charge or lien.

An unintentional error, however, in such diagram or in the amount of the lien or charge for which the property shall be sold, or the amount of such taxes or other lien to be allowed to the purchaser upon the sale, shall not invalidate the sale nor authorize the court to relieve the purchaser or to order a new sale.¹⁵

§ 983. What is a sufficient publication.—Where a notice of sale of real property in the city of New York, under a decree of foreclosure to take place on the twentieth day of May, 1881, was published in two newspapers on April twenty-seventh (Wednesday) and thirtieth (Saturday), May fourth (Wednesday), seventh (Saturday), eleventh (Wednesday), and fourteenth (Saturday), and in one of them on May twentieth, it was objected that during the week “immediately preceding the sale,” there was but one publication. It was held that the notice was sufficient. A week is a period of seven days, commencing at twelve o’clock on Saturday night and ending at the same hour on the following Saturday night. The first day is called Sunday and the seventh Saturday. The period of a week, therefore, is seven full days, and when a publication is directed to be made twice a week for three weeks, it means that there shall be a period of twenty-one days before the sale, calculated by weeks, during each of which two publications shall be made, and this shall occur without regard to the day of the week when the publication was commenced. The publication having been made twice within the period of seven days and extending over a period of twenty-one days, it was held that the statute had been complied with.¹⁶

Where the notice of sale was published on Tuesday, December 18th, Friday, December 21st, Wednesday, December 26th, and Friday, December 28th, 1906, and on Wednesday, January 2nd, Friday, January 4th, and on Tuesday January 8th, 1907, the day of the sale, it was held that the last publication was of no conse-

¹⁵ Special Term Rules, First District, Rule 15. Appellate Division Rules, Second Department. Last rule, unnumbered.

¹⁶ Valentine v. McCue, 26 Hun, 456.

quence and that the requirements of the Code had been complied with. The first publication need not be twenty-one days before the sale, though in this case it was.¹⁷ In computing the required period of three weeks the first and last days need not be excluded.¹⁸

So, where the publication of notice is to be made for three weeks, twice in each week, it is not necessary that twenty-one days shall elapse between the time of the first publication and the sale, and where it is to be made once in each week for six weeks, the full space of six weeks need not elapse from the first publication before a sale can be made. If in the one case a notice is inserted twice in each week for three weeks, and in the other case once in each week for six weeks, the statute is complied with.¹⁹ For example, a sale in foreclosure in the city of New York was advertised for December 28th, and a publication in a daily paper on the 9th, 12th, 16th, 19th, 23d, and 26th of that month was held to be sufficient.²⁰

Publication of the notice in only one of several editions of a paper issued on the same day has been held to be sufficient.²¹

And, although a paper is not sold on the news-stands it is decided that it is a newspaper within the meaning of the statute where it has a large home and foreign subscription circulation, contains several columns of advertising and has two editions daily.²²

The statutory publication may not be a sufficient notice to the attorneys for the defendant by the provisions contained in the notice of appearance by them.²³

In the county of New York, the New York Law Journal has been designated by the justices of the Appellate Division, in the First Department as the official paper in which every notice or ad-

17 Cortland Savings Bank v. Lighthall, 53 Misc. 423; 104 N. Y. Supp. 1022.

18 Cortland Savings Bank v. Lighthall, 53 Misc. R. 423; 104 N. Y. Supp. 1022.

19 Olcott v. Robinson, 21 N. Y. 150, rev'g 20 Barb. 148; Wood v. Morehouse, 45 N. Y. 368, aff'g 1 Lans. 405; Sheldon v. Wright, 5 N. Y. 497.

20 Chamberlain v. Dempsey, 22 How. Pr. 356; 13 Abb. 421.

21 Guest v. The City of Brooklyn, 9 Hun, 198; Everson v. Johnson, 22 Hun, 115.

22 Williams v. Colwell, 18 Misc. R. 399; 43 N. Y. Supp. 720, aff'd 14 App. Div. 26; 43 N. Y. Supp. 1167. See also Le Massena v. Storm, 62 App. Div. 153; 70 N. Y. Supp. 882.

23 Eidlitz v. Doctor, 24 Misc. R. 209; 53 N. Y. Supp. 525. Compare Collins v. McArthur, 32 Misc. R. 538; 67 N. Y. Supp. 460; 8 Am. Cas. 357.

vertisement in legal proceedings which may be required by law to be published in one or more papers in said county, shall be published.²⁴

§ 984. Form and contents of the notice of sale.—There is no law and no rule of the court rendering it absolutely necessary that the title of the cause should be inserted in the notice of sale; but it is proper that the title should be briefly stated in the notice for the purpose of attracting the attention of parties who may be interested in the premises.²⁵

The facts that a prior mortgage has been held void, the record cancelled by order of court, and an appeal from such judgment has been taken should be stated, as should also the date, record and term of years of a lease upon the property.²⁶ The notice should contain nothing which might unduly enhance the value of the property or mislead the purchaser;²⁷ neither should it contain a statement calculated to impair the price which would be offered.²⁸

When a piece of land composed of several lots is described together in the decree, the notice of sale may properly follow the same description, though the sale may be intended to be made in separate parcels. The notice is simply such as is required by law that the premises described in the judgment will be sold. But how, whether in block or in parcels, is left for further inquiry.²⁹

Trifling inaccuracies in the notice of sale, not tending to mislead, are not fatal; as, for instance, where the year when the property was to be sold, was stated to be "1761" instead of 1861.³⁰ Slight discrepancies in the description of the property in the notice of sale, if not rendering the description uncertain, will not invalidate the sale.³¹

The lien or prior mortgages is not, however, cut off where the notice of sale and deed given thereon purport to convey only the

24 Judiciary Law § 97.

25 Ray v. Oliver, 6 Paige, 489.

26 Carter v. Builders' Construction Co. (No. 2), 129 App. Div. 318; 113 N. Y. Supp. 816.

27 Veeder v. Fonda, 3 Paige, 94.

28 Marsh v. Ridgway, 18 Abb. 262.

29 Hoffman v. Burke, 21 Hun, 580.

30 Jensen v. Weinlander, 25 Wis. 477.

31 Kingsland v. Fuller, 157 N. Y. 507; 52 N. E. 562; Dickerson v. Small, 64 Md. 395; 1 Atl. 870; Reeside v. Peter, 30 Md. 120; Kaufman v. Walker, 9 Md. 229; Alexander v. Walter, 8 Gill (Md.) 239.

“right, title and interest of the receivers . . . subject, however, to all mortgages, liens, and incumbrances thereon.”³²

§ 985. Presumption as to regularity.—In the absence of proof to the contrary, the proper posting and publishing of the notices of sale will be presumed. Neglect of duty on the part of the officer intrusted with making the sale must be proved, if at all, by affirmative evidence.³³

If the purchaser has no knowledge of irregularity in posting or publishing the notices, and pays the purchase money in good faith, his title will not be affected thereby.³⁴

§ 986. The officer appointed to sell must proceed.—It is the duty of the officer in whose hands the judgment or decree is placed, to proceed and execute it without delay, notwithstanding any directions he may receive from the plaintiff or his attorney, if he is requested to do so by any of the parties to the suit who will be injured by a delay. The court will interfere upon motion of any party in interest, and will either commit the execution of the judgment to a junior incumbrancer, or if it is already in the hands of the officer, will direct a sale without delay. Where a sale is discontinued by the plaintiff without sufficient cause, and without the consent of the defendants, he will be charged personally for the expense incurred.³⁵

§ 987. Order of sales in parcels.—The plaintiff has no right to control the officer in relation to the order of sales in parcels, more especially if the judgment contains a direction that he shall ascertain in what order the different parcels should be sold, in order to protect the equitable rights of the several persons claiming to have interests therein, or liens upon the respective parcels, for in this respect he would act judicially. In an ordinary case, where the judgment contains no such provision, the officer performs a ministerial act, in the same manner as a sheriff who has an execution against two lots of land would act ministerially in determining which lot he would sell first. Where special judicial powers and duties are conferred upon the officer, it is possible that he

³² *Mayer v. Burr*, 133 App. Div. 604; 118 N. Y. Supp. 203.

³³ *Wood v. Morehouse*, 45 N. Y. 368, 375; *Clute v. Emmerich*, 21

Hun, 128. See *Hart v. Wandle*, 50 N. Y. 381.

³⁴ *Wood v. Morehouse*, 45 N. Y. 368, 375; Code of Civ. Pro. § 1386.

³⁵ *Kelly v. Israel*, 11 Paige, 147.

would come within the equity of a provision of law which declares that no judge of any court can sit in any cause in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties.³⁶ Where the decree directs that the sale be made in parcels, the notice of sale need not so state.³⁷

§ 988. Duties of officer at the sale.—It is the duty of the sheriff or referee making the sale to attend at the time and place of sale, and: 1. To announce the terms of sale, if they are not contained in the notice of sale. 2. To offer the premises to the highest bidder, and receive bids so long as they are offered, waiting a reasonable time after a bid is made for another, and if no other is made, to strike off the premises to the highest bidder. 3. After marking down the premises to the highest bidder, to require him to sign a memorandum of the sale, and agreement to complete the same. 4. If at the time appointed for the sale there are no bidders, or if from the numbers in attendance, or other sufficient cause, the officer is satisfied that a fair price cannot be obtained, it is his duty to postpone the sale, and not sacrifice unnecessarily the property.³⁸ The officer in making the sale must conform to the provisions in the terms of sale.³⁹

If the highest bid is withdrawn, it is the duty of the officer making the sale to put up the premises at the next lowest bid, and if the person who made that bid has left, and no one present will give so much, the sale should be suspended until that bidder is notified.⁴⁰

If the sale be made to a bidder who offers to pay in current funds or in a draft, and legal tender or specie is demanded from him, it is the duty of the officer to suspend the sale for a reasonable time in order to allow the bidder to comply.⁴¹

If the purchaser does not comply with the terms of sale, the referee may put the property up for sale again, but this must be done on such notice that no one will be misled by it.⁴²

³⁶ *Snyder v. Stafford*, 11 Paige, 71. As to sales in parcels see Chap. XXVII.

³⁷ *Hoffman v. Burke*, 21 Hun, 580.

³⁸ Per MULLIN, J., in *Bicknell v. Byrnes*, 23 How. Pr. 486.

³⁹ *Termansen v. Matthews*, 49 App. Div. 163; 63 N. Y. Supp. 115.

⁴⁰ *May v. May*, 11 Paige, 201.

⁴¹ *Baring v. Moore*, 5 Paige, 48. See also *Leslie v. Saratoga Brewing Co.*, 59 App. Div. 400; 69 N. Y. Supp. 581.

⁴² *Lents v. Craig*, 13 How. Pr. 72; 2 Abb. 294.

If the officer making the sale assumes to take the check of the purchaser for the instalment of the bid in lieu of cash, he will make himself responsible for the amount, and the check will be treated as money in his hands.⁴³

Where lands of an intestate, subject to a mortgage, were sold by a sheriff under an order of a court, which directed that the proceeds be paid into the court subject to its order, and the sheriff embezzled a portion of the proceeds, it was held that the amount embezzled could not be credited upon the mortgage, as the sheriff was not in any sense the agent of the mortgagee.⁴⁴

As against the widow of the mortgagor it is held that the referee may execute a deed within twenty years after the judgment as no presumption arises until the expiration of that period that the mortgage debt has been paid or the judgment satisfied. Where the purchaser is dead at the time of the execution of the deed the proper practice is to have it run to his personal representatives.⁴⁵

The referee may reject the bids of parties who are not able to perform, or who have refused to take up their bids on prior sale.⁴⁶

§ 989. Payment of taxes and assessments out of proceeds of sale.—It is provided by section 1676 of the Code of Civil Procedure that where a judgment, rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates which have not apparently become absolute. The sums necessary to make these payments and redemptions are deemed expenses of the sale.

This was practically, the rule before the statute.⁴⁷

This provision is for the benefit of the purchaser at the sale

⁴³ Robinson v. Brennan, 90 N. Y. 208.

⁴⁴ Chalmers v. Turnipseed, 21 S. C. 126.

⁴⁵ Catlin v. Rea, 35 Misc. R. 535; 71 N. Y. Supp. 1117.

⁴⁶ Irving Savings Bank v. Robinson, 35 Misc. 449; 71 N. Y. Supp.

193; Leslie v. Saratoga Brewing Co., 31 Misc. R. 129; 64 N. Y. Supp. 1069.

⁴⁷ Lawrence v. Cornell, 4 Johns. Ch. 542. Taxes unpaid on leasehold estate allowed to purchaser. Moller v. Duryee, 21 W. Dig. 459.

only, and it cannot be enforced by the municipality which has levied an assessment.⁴⁸ Only such incumbrances as are liens at the time of the auction sale may be paid,⁴⁹ and not such as become liens thereafter, although prior to the execution of the deed.⁵⁰

Where the premises have been sold for taxes, and the time for redemption has not expired, it is proper for the referee to pay the sum which may lawfully be demanded to effect such redemption out of the purchase money; and this, although the plaintiff in the foreclosure is also the holder of the certificate of tax sale. There is nothing in the relation of the mortgagee toward the owner that prevents him from holding and enjoying the rights of a purchaser at a sale for taxes.⁵¹ The referee has no right to require indemnity agreements from parties to whom he makes payments in pursuance of the provisions of the judgment.⁵²

§ 990. Terms of sale cannot qualify judgment as to payment of taxes.—The duties of a referee upon a sale of mortgaged premises are ministerial in their character. He is required, in the ordinary form in which judgments of foreclosure are made, to sell the premises to the highest bidder, and after receiving the purchase money, to pay therefrom his own fees and expenses on such sale, and then all liens upon said premises existing at the time of the sale for taxes, assessments, or prior mortgages, and from the residue to pay the costs awarded to the several parties, and the amount reported due to the plaintiff, with the interest thereon, or so much thereof as the purchase money will pay of the same. If such are the directions of the judgment, and if, without or before paying the prior liens, he pays the plaintiff and other parties the amounts awarded to them, he does so at his peril and in his own wrong. The terms of sale cannot vary the judgment, or relieve the referee from the performance of his duties. The appropriate remedy of the purchaser is by a motion in the action.⁵³

⁴⁸ *Morgan v. Fullerton*, 9 App. Div. 233; 41 N. Y. Supp. 465.

⁴⁹ *Ainslee v. Hicks*, 13 App. Div. 388; 43 N. Y. Supp. 47; *Equitable Life Ass'n Soc. v. Toplitz*, 69 Misc. R. 457; 128 N. Y. Supp. 153; *Grabfelder v. Tallman*, 36 Misc. 287; 73 N. Y. Supp. 282.

⁵⁰ *Coudert v. Huerstel*, 60 App. Div. 83; 6 N. Y. Supp. 778.

⁵¹ *Cornell v. Woodruff*, 77 N. Y. 203.

⁵² *Finn v. Smith*, 45 Misc. R. 240; 92 N. Y. Supp. 168.

⁵³ *People ex rel. Day v. Bergen*, 53 N. Y. 404; *Easton v. Pickersgill*,

If, however, the referee pays money to the plaintiff before paying the taxes, at the request of the purchaser, such purchaser cannot thereafter require the referee to pay out a greater amount than he has received. If the referee has varied the order of payments at the request of the purchaser, he cannot be punished therefor on the purchaser's motion.⁵⁴

If the referee in such a case, in ignorance of the existence of taxes, pays the whole amount of the purchase price to the plaintiff, without deduction, the court will, on motion of the purchaser, compel the plaintiff to pay the taxes.⁵⁵

Where the attorney for the holder of a second mortgage released the purchaser from immediate payment to the extent of his lien, this was held to discharge the sheriff from further liability.⁵⁶

The payment of the taxes directed to be made by the referee is for the protection of the purchaser, and not to indemnify the owner of a prior lien not a party to the action; and where the owner of a second mortgage foreclosed and purchased at the sale, and expressly waived the payment of taxes, the owner of the first mortgage, who thereafter foreclosed, was held not to be entitled to any relief.⁵⁷

§ 991. Proper provision in terms of sale as to payment of taxes.

—It is to be observed that the direction in the judgment does not indicate how the referee shall ascertain and satisfy himself as to the existence, number, ownership, and amount of the taxes and prior liens. It is at once apparent that the person most interested in ascertaining those facts correctly is the purchaser, who ordinarily will take his title subject to any lien which has not been discovered and satisfied. It is therefore, with proper limitation, a reasonable article to be inserted in the terms of sale that "all taxes, assessments, and other incumbrances which at the time of sale are liens or incumbrances upon said premises, will be allowed by the referee out of the purchase money, provided the purchaser shall, previously to the delivery of the deed, produce to the referee proof of such liens, and duplicate receipts for the payment thereof." It is reasonable, for by a compliance with it the referee

75 N. Y. 599; *Weseman v. Wingrove*, 85 N. Y. 353.

⁵⁴ *Easton v. Pickersgill*, 75 N. Y. 599.

⁵⁵ *Poughkeepsie Savings Bank v. Winn*, 56 How. Pr. 368.

⁵⁶ *Dickson v. Frazer*, 9 Hun, 191.

⁵⁷ *Mutual Life Ins. Co. v. Sage*, 28 Hun, 595.

may safely discharge his duty, and the purchaser has his best reliance, himself and his counsel, that his title shall not be incumbered. Moreover, it is believed that this article, or one like it, has for many years been inserted in terms of sale where express terms have been used, and has been made the mode agreed upon in which the referee should discharge his duty.⁵⁸ General usage has great force, and the practical construction of the law by so many public officers has much of the weight of judicial decision.⁵⁹ There is, however, this qualification to be made: this article in the terms of sale may not be held to override or limit the direction of the order of sale, which is mandatory. The referee is excused from the duty of making examination for the existence and amount of the liens, and for responsibility for accuracy therein. But if there are to his knowledge such liens in existence, it would be absurd to say that he may disregard the order under which he acts, and pay over the money as if there were not. And the remedy, in case of inaction by the purchaser, is by application to the court for its direction.⁶⁰

It is in conformity with the settled practice of the court to have taxes and assessments which are liens on the premises sold, deducted and paid out of the purchase money.⁶¹ This is sometimes done under special directions given in the judgment, but it is more frequently provided for by the terms of sale. If the mortgaged premises are leasehold, it is necessary to secure the full value of the property, that the purchaser should acquire title free and discharged from all arrears of rent. These arrears should be paid from the purchase money, and if this is not provided for by the judgment, it should be by the terms of sale, so that the amount of the purchaser's bid should represent the value of the premises with arrears of rent paid.⁶²

§ 992. Terms of sale where title is incumbered by prior rights or liens.—"The terms of the sale must be made known at the time of the sale, and if the property, or any part thereof, is to be sold subject to the right of dower, charge, or lien, that fact must be declared at the time of the sale. If the property consist of two or more distinct buildings, farms, or lots, they shall be sold

⁵⁸ *Post v. Leet*, 8 Paige, 336.

⁵⁹ *Troup v. Haight*, Hopk. 239.

⁶⁰ *Per FOLGER, J.*, in *Easton v.* 363.

⁶¹ *Code of Civ. Pro.* § 1676.

⁶² *Catlin v. Grissler*, 57 N. Y.

Pickersgill, 55 N. Y. 310.

separately, unless otherwise ordered by the court; and provided further, that where two or more buildings are situated on the same city lot, they may be sold together.”⁶³

The suggestion that a sale upon credit may produce a higher price is equally applicable to all sales, but judicial sales are not in general made upon credit without the consent of parties. On the motion of the plaintiff, however, an order may be made that the sale be upon credit to the extent of the sum due to him.⁶⁴ The terms of sale may properly require an immediate payment of cash to an amount sufficient to guarantee the good faith of the purchaser and to indemnify the mortgagee for the expenses of a resale if the purchaser fails to complete. Ten per cent. of the amount of the bid is usually required, and an interval of twenty or thirty days is commonly permitted to allow the purchaser to investigate the title. No reported case in this State fixes any arbitrary rule, but in Maryland a deposit of \$300, required on a sale for \$5,600, was held to be reasonable.⁶⁵

Where there are interests in the property paramount to the mortgage, the terms of sale may properly be drawn so as to sell subject to these interests, and this without any authority contained in the decree.⁶⁶

Where persons holding prior mortgages are not made parties, and no provision as to them is made in the judgment, the sale must be made subject to such prior mortgages, and no portion of the proceeds of the sale can be applied to their payment.⁶⁷

If the priority or validity of an incumbrance is disputed, the sale should be subject to the alleged claim, in such form that the purchaser may contest it.⁶⁸

Where a junior mortgage to the one foreclosed is owned by the plaintiff, it is cut off by the sale, and it is irregular to insert a clause in the terms of sale requiring a purchaser to take subject to it.⁶⁹

The terms of sale should not contain a clause requiring the purchaser to take the title “subject to all legal and prior incum-

63 Code of Civ. Pro. § 1678.

64 Sedgwick v. Fish, Hopk. 594.

65 Maryland Perm. Land & Build. Soc. v. Smith, 41 Md. 516.

66 Cromwell v. Hull, 97 N. Y. 209.

67 Bache v. Doscher, 67 N. Y. 429;

Trayser v. Trustees of Ind. Asbury University, 39 Ind. 556.

68 Moller v. Muller, 12 Hun, 674.

69 Homeopathic Mutual Life Ins. Co. v. Sixbury, 17 Hun, 424.

brances," and particularly is this the case where, by the terms of the decree, such incumbrances are payable out of the fund.⁷⁰

Where the mortgage is prior to an easement upon the property for light and air, the sale must be made free from the easement if its owner is made a party to the action, and such owner of the easement when brought into court as a defendant, and certain to be bound by the decree, should seek to modify the decree, and if he offers to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, the sale may be so made. The mortgagee cannot object, since his debt will be paid in full, and he has no greater right, and the mortgagor cannot assert an equity to have the sale so made as to free him from the easement. But when no limitation or condition is imposed by the decree, the statute determines the estate which passes by the foreclosure deed.⁷¹

§ 993. **Adjourning the sale.**—The determination of the question whether sale shall be adjourned is not a mechanical act, but one which involves the exercise of judgment, and it can be directed only by the officer conducting the sale.⁷²

If the sale be adjourned by the officer, notice should be given to those who attend at the time and place of sale, and notice should also be published. The proper method of adjourning the sale includes the naming of the adjourned day; but if this be prevented by the unwarranted act of the defendant in procuring a stay of proceedings, the sale will not be set aside as irregular if no adjourned day be mentioned, a day being inserted in the advertisement of the adjournment on which adjourned day the sale takes place.⁷³ If a fixed day is named, the sale must be had on that day, and if there be a variance between the notice announced on the adjournment and that published in the newspaper, the sale will be irregular.⁷⁴ An omission to publish a notice of postponement of a foreclosure sale until after one of the dates to which it was adjourned also constitutes an irregularity which, however, may be waived.⁷⁵

⁷⁰ *Steen v. Clayton*, 32 N. J. Eq. 121.

⁷¹ *Rector, etc., Christ P. E. Church v. Mack*, 93 N. Y. 488, rev'g 25 Hun, 418.

⁷² *Shepard v. Whaley*, 19 Civ. Pro. R. 381; 13 N. Y. Supp. 532.

⁷³ *La Farge v. Van Wagenen*, 14 How. Pr. 54.

⁷⁴ *Miller v. Hull*, 4 Den. 104.

⁷⁵ *Bechstein v. Schultz*, 120 N. Y. 168; 24 N. E. 388.

A verbal promise of a third person to pay a sum of money, in consideration of an adjournment of a sale in foreclosure, is void under the statute of frauds.⁷⁶

Section 1678 of the Code requires that notice of the postponement of the sale must be published in the paper or papers wherein the notice of sale was published. But the adjournment may be for a time so short as not to allow any publications to be made, in which case it is clear that none could be made. Prior to the Code of Civil Procedure there was no positive rule requiring the publication of adjournments, and the omission of publication did not entitle any person, as matter of strict right, to avoid the sale. An application for that purpose had to be addressed to the discretion of the court, to be exercised in furtherance of justice.⁷⁷

If, after a notice of sale has been duly published, the defendant serves an undertaking to stay proceedings on appeal, the plaintiff is not required to abandon the proceeding, but the sale may be adjourned until it can be determined whether or not the sureties will justify.⁷⁸

When the time for selling pursuant to notice has passed, and no valid sale has been made, or if valid the party elects to disregard it, he cannot again sell without the authority of the court unless he again advertises the sale.⁷⁹

§ 994. **Restraining sale by order of court.**—It is the duty of the officer intrusted with the sale of the property to put it up for sale at such a time and under such circumstances as to make it bring the best price, without injuring the party entitled to the proceeds of the sale by delaying the payment of his debt. And where the officer, in violation of his duty, is proceeding to sell property under a judgment or decree at an improper time, when such sale must necessarily sacrifice the property, as during the raging of a pestilence, or while there is a threatened invasion, which will destroy all chance of fair competition by deterring bidders from attending the sale, it will unquestionably be the duty as well as the right of the court to interfere. But a court of equity has no legal right to interfere for the relief of an individual by arbitrarily suspending the ordinary operation of the

⁷⁶ Ackley v. Parmenter, 98 N. Y. 425.

⁷⁸ Ward v. James, 8 Hun, 526.

⁷⁷ *Per curiam* in Stearns v. Welsh, 7 Hun, 676, aff'g 50 How. Pr. 186.

⁷⁹ Bicknell v. Byrnes, 23 How. Pr. 486.

laws for the collection of debts to meet his particular case, and the vain expectation that an extra session of Congress about to be held will settle the politics and finances of the country so effectually as to greatly increase the value of the property of the mortgagor, will not justify an adjournment of the sale.⁸⁰ Even the existence of a war, when there is no immediate danger of an invasion of the place where property is advertised to be sold, forms no sufficient ground for suspending the sale of mortgaged premises under a decree.⁸¹

A sale made on an election day is not for that reason void, but if made on that day in defiance of the protest of the defendant, it becomes at least very questionable, and although not of itself, perhaps, sufficient to warrant the court in setting aside the sale, yet, in connection with other facts, it cannot fail to produce an influence upon the court. Occupying the position of advantage, it behooves the plaintiff to pursue his remedy with scrupulous care, lest he should inflict an injury upon one who is comparatively powerless.⁸²

It is provided by Rule 67 that no order to stay a sale under a judgment in partition or for the foreclosure of a mortgage shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney. Where, after a referee has been appointed to sell real estate, in pursuance of a judgment of foreclosure, and a notice of sale has been duly published, the defendant serves an undertaking to stay proceedings upon appeal, the plaintiff is not required to abandon the proceedings instituted by him, but the sale may be adjourned, until it can be determined whether or not the sureties will justify.⁸³

§ 995. *Conveyance to state name of party.*—"A conveyance of property, sold by virtue of an execution, or sold pursuant to a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, must distinctly state, in the granting clause thereof, whose right, title or interest was sold, and is conveyed, without naming, in that clause, any of the other parties to the action; otherwise, the purchaser is not bound to accept the conveyance, and the officer executing it is liable for

⁸⁰ *McGown v. Sanford*, 9 Paige, 290.

⁸¹ *Astor v. Romaine*, 1 Johns. Ch. 310.

⁸² *King v. Platt*, 37 N. Y. 155.

⁸³ *Ward v. James*, 8 Hun, 526.

the damages, which the purchaser sustains by the omission, whether he accepts or refuses to accept it.”⁸⁴

Whenever a sheriff or referee sells mortgaged premises under a decree or order, or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such a mortgage and any assignment thereof in the office of the clerk, unless such mortgage and assignments have been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the filing of such mortgage and assignments, and the time of filing. But this rule shall not extend to any case where the mortgage or assignments appear, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.⁸⁵

§ 996. Fees of the officer making the sale.⁸⁶—By the judiciary act of 1847 it was enacted that sales of lands which had previously been made by masters in chancery might be made by the sheriffs of the respective counties.⁸⁷

By section 3307 of the Code of Civil Procedure, subdivision 11, it is provided that the sheriff shall receive for posting and publishing the notice of sale, selling and conveying real property, in pursuance of a direction contained in a judgment, the like fees as for the same services upon the sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed fifty dollars. The same section fixes these fees in detail. Section 3297 of the Code enacts that the fees of a referee appointed to sell real property pursuant to a judgment in an action, are the same as those allowed to the

⁸⁴ Code Civ. Pro. § 1244.

⁸⁵ Rule 63.

⁸⁶ See as to fees of referee for sale in partition, *Race v. Gilbert*, 102 N. Y. 298; 6 N. E. 592; 1 N. Y. St. Rep. 661, rev'g 32 Hun, 360;

Keppler v. Merkle, 23 W. Dig. 380; *Richards v. Richards*, 14 Hun, 25; 2 Abb. N. C. 93; *Daly v. Jacott*, 2 Abb. N. C. 97.

⁸⁷ Laws of 1847, c. 280, § 77.

sheriff; and he is also allowed the same disbursements as the sheriff.⁸⁸

Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum bidden by a party, and applied upon that party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of ten dollars. And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars, unless the property sold for ten thousand dollars or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other cause five hundred dollars.

Under this section where the property is bid in by the plaintiff and the amount of his bid is applied upon the judgment without being paid to the referee the commissions allowable to the latter are limited to ten dollars.⁸⁹ The fee provided for is recoverable by a referee who has been obliged to return the earnest money to a purchaser owing to the title being unmarketable because of a defect of parties to the record.⁹⁰ He is not, however, entitled to an additional compensation unless the amount which he actually receives and for which he is accountable equals or exceeds ten thousand dollars in cash.⁹¹ And then only when the court deems the fixed compensation inadequate because of the amount of labor required.⁹²

The referee should file a report showing his disbursements and is not excused from so doing by the fact that he has money ap-

⁸⁸ Lockwood v. Fox, (N. Y. C. P.) 3 W. Law Bulletin, 37.

⁸⁹ Kant v. Bergman, 97 App. Div. 118; 89 N. Y. Supp. 593.

⁹⁰ Hover v. Hover, 25 Misc. R. 95; 54 N. Y. Supp. 693, holding that his remedy is by an action against the plaintiff and not by a motion in the

foreclosure action to tax the fee against the latter.

⁹¹ Hosmer v. Gans, 14 Misc. R. 229; 35 N. Y. Supp. 471. See Maher v. O'Connor, 61 How. Pr. 103; 1 Civ. Pro. 158.

⁹² Dime Sav. Bank of Brooklyn v. Pettit; 5 N. Y. Supp. 794.

plicable to the payment of costs awarded to the plaintiff's attorney which the latter refuses to receive.⁹³

The fees of a referee on a sale are properly taxable, in the first instance, before the court at Special Term.⁹⁴ The referee may appeal from the order on such taxation.⁹⁵

§ 997. Local regulations.—Section 3308 of the Code provides that the special statutory provisions relating to the fees and expenses of the sheriff of the county of New York,⁹⁶ and of the sheriff of the county of Kings⁹⁷ shall not be affected by the provisions of section 3307. By these statutes the fee to which the sheriff is entitled for selling real property under a judgment is declared to be the same as for selling real property by virtue of an execution, but where the judgment was rendered in an action to foreclose a mortgage the total fee shall not exceed fifty dollars. It is the custom of the courts in both counties to make the sale through a referee.

§ 998. Fees of the auctioneer.—The only way in which auctioneers can be compensated upon foreclosure sales is by making their fees as a part of the terms of sale, to be paid by the purchasers; and if that course is not abused to the prejudice of defendants, there will be no reason for the court to interfere. No fee can be charged by an auctioneer upon an adjournment.⁹⁸

Where the terms of sale provided that the purchaser was to pay the auctioneer's fees, "\$25 for each parcel sold," it was held that the word "parcel" meant the piece or quantity of land put up and sold in a body, one piece and at one time, and pretended usage among auctioneers to construe the word "parcel" in such a case, so as to mean each of the lots into which the tract so sold had been divided, was declared not to control.⁹⁹

By Laws of 1879, chap. 519, it was enacted that "No auctioneer shall hereafter demand or receive for his services in selling at

93 *Carter v. Builders' Construction Co.*, 134 App. Div. 553; 119 N. Y. Supp. 670.

94 *Lynch v. Meyers*, 3 Daly, 261.

95 Code of Civ. Pro. § 1294; *Hobart v. Hobart*, 23 Hun, 484.

96 Laws 1890, ch. 523 as amended by Laws of 1891, chap. 315; Laws of 1892, chap. 418; Laws of 1894, chap.

477; Laws of 1897, chap. 636; Laws of 1911, chap. 761.

97 Laws of 1876, ch. 439; Laws of 1889, ch. 167; Laws of 1901, ch. 705; Laws of 1903, ch. 464.

98 *Ward v. James*, 8 Hun, 526; *Harrington v. Bayles*, 40 Misc. R. 388; 82 N. Y. Supp. 379.

99 *Miller v. Burke*, 68 N. Y. 615.

public auction, in the counties of New York or Kings, any real estate directed to be sold by any judgment or decree of any court of this State, a greater compensation or fee than fifteen dollars for each parcel separately sold; but where such sale is made at any public salesroom, said auctioneer may demand and receive such further amount not exceeding two dollars for each parcel separately sold, as he may have actually paid for the privilege or right of making said sale in such salesroom as aforesaid; but where one or more lots are sold at public auction with the privilege to the purchaser of taking one or more additional lots at the same rate or price, nothing herein contained shall be construed to prevent the auctioneer, making such sale, from demanding and receiving for his services the compensation or fee above allowed, for each additional lot taken by said purchaser under such option or privilege." The auctioneer is forbidden to divide his fee with the officer making the sale, or with any attorney in the action, and a violation of any of the provisions of the act is declared to be a misdemeanor.

CHAPTER XXVII

WHEN THE SALE SHOULD BE MADE IN SEPARATE PARCELS, AND ORDER OF THE SALE OF SUCH PARCELS.

SALE IN SEPARATE PARCELS.

- § 999. Only part of debt due.
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SALE IN SEPARATE PARCELS.

§ 999. **Only part of debt due.**—In cases where only a portion of the mortgage debt was due, it was the practice, prior to the Revised Statutes, to stay the sale when the mortgagor would come in before the sale and pay the amount due with costs, and to let the decree of foreclosure remain good to enforce payment of the future interest and instalments as they might respectively become due.¹ Where such an application was made before answer, it was sometimes required that a decree of foreclosure should be entered by way of security and to save the trouble and expense of a new suit.²

Where the mortgaged premises were so situated that they could be sold in parcels to advantage, the decree directed that sufficient be sold to satisfy the part then due with the cost, and a provision

¹ Campbell v. Macomb, 4 Johns. Ch. 534.

² Lansing v. Capron, 1 Johns Ch. 617.

was inserted that an order might be obtained from time to time, as the interest or principal became due, for a future sale on the foot of the decree.³

§ 1000. **Sale of entire property.**—If a part only of the mortgage debt were due, still the entire premises might be sold if they could not be divided without injury, and the proceeds might be applied, first in payment of that part of the debt already due, and next on that which had not yet matured. The object of the decree might not be to raise any part of the debt not due, yet the raising of the entire debt might be an unavoidable consequence of the sale, because the court, in order to raise what was due, might be obliged to sell the whole of the mortgaged premises if they consisted of one entire subject incapable of being conveniently or safely divided.⁴

So, too, payment of an instalment which was not due at the time of the entry of decree, but which would become due before a sale could be made, might be provided for in the order of sale.⁵

It was said by Chancellor WALWORTH that, in special cases, where the person in possession is not responsible for the debt, and the premises are not a sufficient security, the whole of the premises, or so much as is necessary to pay the whole debt and costs, should be sold, unless the defendant choose to pay the amount of the instalment which is due, before the sale, or will give security that the rest of the mortgage money will be paid when it is due.⁶ In this respect he differed somewhat from Chancellor KENT, who could not perceive that the circumstance that the premises were in a state of injury and decay from the action of storms, and had thereby become a precarious security, gave the complainant any right or title in equity to have the premises sold for a debt not due. “The security was taken with knowledge of the situation and character of the property and of the risks to which it was exposed. It does not belong to the court to give a party a better security than he elected to take,

3 Brinekerhoff v. Thalhimer, 2 Johns. Ch. 486; Lyman v. Sale, 2 Johns. Ch. 487; Campbell v. Macomb, 4 Johns. Ch. 534.

4 Campbell v. Macomb, 4 Johns. Ch. 534.

5 Lyman v. Sale, 2 Johns. Ch. 488.

6 Suffern v. Johnson, 1 Paige, 450; Hall v. Bamber, 10 Paige, 296.

where there has been no fraud or mistake, nor any abuse or waste of the subject.”⁷

In *Cox v. Wheeler* (7 Paige, 248), the complainant had held a mortgage upon real estate, only a portion of the money secured by which was due, and he advertised a sale of the property thereunder on a statute foreclosure. The premises were sold *subject to the future instalment*, and were bid in by the complainant. There was a surplus which the complainant sought to have applied on the last instalment. It was held that the mortgaged premises became the primary fund for the payment of the amount of the incumbrance; that the mortgagee, having become the purchaser, the incumbrance became merged in the legal estate in the equity of redemption, and the debt was, in equity, extinguished. The mortgagor was determined to be entitled to the surplus.

§ 1001. Provisions of Code, only a portion of debt being due.—

The Revised Statutes were mainly declaratory of the law as it existed before their passage, except that they favored the construction of Chancellor KENT, in cases where the only reason for selling the entire premises was found in the fact that the security was inadequate. It was, perhaps, for this reason that Chancellor WALWORTH thought that the power of the court in this respect had been somewhat restricted by the Revised Statutes.⁸

The provisions of the Revised Statutes on this subject⁹ are, in substance, now embodied in the Code of Civil Procedure, and stand as follows:

“§ 1634. Where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due, and the plaintiff's costs.

“§ 1635. In a case specified in the last section, if, after a final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal

⁷ *Campbell v. Macomb*, 4 Johns. Ch. 534. See also *Blazey v. Delius*, 74 Ill. 299.

⁸ *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38.

⁹ 2 R. S. 192, §§ 161 to 166 inclusive.

and interest, and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but, upon a subsequent default in the payment of principal or interest, the court may make an order, directing the enforcement of the judgment, for the purpose of collecting the sum then due.

“§ 1636. Where the mortgage debt is not all due, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct, that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order, directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order, as often as a default happens.

“§ 1637. If, in a case specified in the last three sections, it appears that the mortgaged property is so circumstanced, that a sale of the whole will be most beneficial to the parties, the final judgment must direct, that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action, and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest, for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.”

§ 1002. **Stay on paying amount due.**—After the judgment is entered, the plaintiff is not required to accept payment of the amount due from the hands of the defendant, but if the latter wishes a stay in the execution of the judgment, it is incumbent on him to move the court for leave to make the payment into court, and procure an order for a stay. The plaintiff will then be entitled to have a provision inserted in the judgment for its enforcement on future defaults. An observance of the statutes in these respects is highly important, for both parties are then made ac-

quainted with the terms of the decree, and have an opportunity to know and to protect their rights. Payment made by the mortgagor to the mortgagee without an order of the court making provision for future instalments, is likely to lead to confusion and trouble.¹⁰

§ 1003. **How much of premises should be sold.**—Under orders of reference in cases arising under this statute, the first duty of the referee is to ascertain whether the mortgaged premises are so situated that they can be sold in parcels, without injury to the interests of the parties. This provision of the statute relates entirely to the material condition of the mortgaged property. If the referee finds that the property cannot be sold in parcels, as he would be bound to do, in cases where it is indivisible for use or enjoyment, as in the case of a mill, a store, a dwelling-house, or a farm, or single piece of property whose value consisted in keeping it together in its unity or entirety, such finding will practically end his duties under the order. And so it will if he finds that the mortgaged premises consist of distinct parcels of land, whose relative value is entirely independent of each other. In such cases he will so report, and the land must be sold accordingly. The report of the referee is but part of the evidence before the court, and upon which it is called upon to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court will look to the pleadings, and will receive other evidence in its discretion, and will consider any stipulations offered, and admissions of the parties or of other persons presented to it on the hearing. All the plaintiff is entitled to is to receive his pay upon the mortgage, in cash, as the payments fall due. If parcels of the land can be sold for cash sufficient to pay the amount due to the plaintiff, without impairing his security for the balance of his debt, or the relative value of the residue of the land, it ought to be so sold, and the court cannot hold that it will be most beneficial to the parties to sell the whole land in one parcel.¹¹ The court may direct a sale of the whole mortgaged premises if such a sale is found to be most conducive

¹⁰ Long v. Lyons, 54 How. Pr. 129.

Kels v. West, 56 Misc. R. 126; 106

¹¹ Per E. D. SMITH, J., in Gregory v. Campbell, 16 How. Pr. 417. See

N. Y. Supp. 1108.

to the ends of justice in reference to the equitable rights of all the parties, although a part only of the mortgage debt has become due; but the fact that the premises are a meager and scant security, and are going to ruin and decay, does not of itself justify a sale to satisfy a debt not yet due.¹²

§ 1004. **Selling for benefit of junior liens.**—A foreclosure suit is not entertained for the benefit of the plaintiff alone. The rights of all of the parties are before the court, and where a junior mortgagee is made a party the court may make a decree directing a sale of so much of the mortgaged premises as will be sufficient to satisfy the amount due on such junior mortgage, and all intermediate liens and incumbrances, in addition to the amount of the plaintiff's mortgage and costs.¹³ But before such junior mortgage can be paid, the report of sale must be filed, and the surplus moneys brought into court, so that other persons, who have not been made parties to the suit, may have an opportunity to file claims to such surplus moneys.¹⁴

The same rule will prevail in favor of any other junior incumbrancer, as, for instance, a judgment creditor or the holder of a mechanic's lien. As these liens are cut off by the sale, they must be protected by the court which orders the sale, or they are lost. Hence arises the necessity of making all the holders of liens of a date later than that of the mortgage, parties to a foreclosure suit. The equities of all such parties are as much before the court, and as much the objects of its care, as those of the owner of the mortgage primarily to be foreclosed. The court cannot, of course, content itself with giving such directions as will certainly produce satisfaction of the plaintiff's lien, without regard to their effect upon those which are subsequent; but should make such order as, while it fully maintains the priority of the plaintiff, will best protect the rights and preserve the equities of all.¹⁵

§ 1005. **Supplemental order.**—If the judgment fails to protect the equitable rights of the parties before the court, the court has power to supply the defect by a supplemental order,¹⁶ and such

¹² *Blazey v. Delius*, 74 Ill. 299.

¹³ *Pancoast v. Duval*, 26 N. J. Eq. 445.

¹⁴ *Beekman v. Gibbs*, 8 Paige, 511.

¹⁵ Per *SELDEN*, J., in *Livingston*

v. Mildrum, 19 N. Y. 440; *De Forest v. Farley*, 62 N. Y. 628; *Barnes v. Stoughton*, 10 Hun, 14.

¹⁶ *Malcom v. Allen*, 49 N. Y. 448.

order may be made after enough of the property has been sold to satisfy the plaintiff's claims.¹⁷

While it is in the power of the court to order a sale of more of the mortgaged property than is required to satisfy the demand of the plaintiff, the ordinary form of judgments in foreclosure does not justify the referee to make any sale further than is required to pay the amount decreed to be due to the plaintiff, with costs and expenses. In *McBride v. Lewisohn* (17 Hun, 524), an excessive amount of property was sold and the surplus was paid into court. The purchaser of the parcel last sold objected that the decree furnished no authority for selling such parcel. In this point the court agreed with him, but, it further appearing that proceedings had been taken to distribute the surplus on notice to all parties, and that the owner of the equity of redemption had made no objection, this was held to establish the validity of the sale. The owner of the equity of redemption was said to be the only person having any right whatever to question it, and by omitting to take any action with regard to the alleged improper sale, and by permitting the proceedings to go on in reference to the surplus occasioned by the sale, he was held to have waived all right to any consideration on that subject and to be estopped.

And where a defendant neither answered nor appeared in opposition to a motion that his parcel be sold first, it was decided that an appeal from the order granting the motion could not be taken by him and the plaintiff also was held to be precluded from so doing as he was not a party aggrieved within the meaning of the Code.¹⁸

§ 1006. When the sale should be made in separate parcels.—Section 1678 of the Code of Civil Procedure¹⁹ provides that “if the property consists of two or more distinct buildings, farms, or lots, they shall be sold separately, unless otherwise ordered by the court; and provided, further, that where two or more buildings are situated on the same city lot they be sold together.”

The word “shall” in this section is directory merely,²⁰ and if a sale is, without direction of the court, made in one parcel, it

¹⁷ *Livingston v. Mildrum*, 19 N. Y. 440.

¹⁸ *Stern v. Marcuse*, 128 App. Div. 169; 112 N. Y. Supp. 653.

¹⁹ Substitute for 3 R. S., 5th ed. 1860, § 6.

²⁰ *Wallace v. Feely*, 61 How. Pr. 225; *Cunningham v. Cassidy*, 17 N. Y. 276.

would constitute an irregularity merely that the court might disregard if such a method of sale was determined to have been proper.

The provision of the statute directing a sale in separate parcels, except in unusual cases, is simply a declaration of the law as administered before the passage of any positive enactment. The object of the sale is to make the property produce the largest sum, and a sale in parcels is generally best for the interests of all concerned. Such a sale will produce the most, because it will accommodate the greatest number of bidders, and it tends to prevent odious speculations upon the distresses of the debtor.²¹

§ 1007. Parcels described together.—The rule holds good whether the parcels be described together or separately in the mortgage. The mortgagor may by his mortgage subject the whole property to the lien of the mortgage, leaving in himself only an equity or right to redeem, but neither the sale nor the manner of conducting it is regulated by the contract. The mortgagee has a right to nothing more than the application of so much of the property as may be necessary to the satisfaction of his debt and costs,²² and the sale will be made in such a way as to pay his just demands without inflicting unnecessary loss upon his debtor.²³

§ 1008. Best results must be sought.—The question must, therefore, always be as to what method of sale will produce the best results, and while the presumption is, in cases where the parcels are capable of distinct and separate enjoyment, that they will bring a larger sum if sold separately than if sold together, the court may direct the officer making the sale to sell the entire mortgaged property together, if in the special case it is thought wise so to do. This provision was intended to apply to cases where from the peculiar situation of the parcels with respect to each other, it is evident that, if owned by one person and kept together, they will be more valuable than the aggregate values of the several parcels could be to several individuals if owned by them in severalty; or where, in consequence of some prior incumbrance upon the

²¹ Woods v. Morrell, 1 Johns. Ch. 502. See also Corley v. Lashley, 15 N. J. Eq. 116.

²² Ellsworth v. Lockwood, 42 N. Y. 89; Jencks v. Alexander, 11 Paige, 619; Tiernan v. Wilson, 6 Johns. Ch.

411; Hewson v. Deygert, 8 Johns. 333; Mohawk Bank v. Atwater, 2 Paige, 61, 62.

²³ Wolcott v. Schenck, 23 How. Pr. 385.

whole of the premises, purchasers would be unwilling to purchase only a portion of the property, subject to such incumbrance.²⁴

§ 1009. **Sale in one parcel.**—If the mortgaged premises consist of separate parcels whose relative values are entirely independent of each other and which may be sold separately, the sale should be so made; but if, for any reason, the values of the parcels depend upon each other, and upon being held and enjoyed by the same owner, they should be sold together.²⁵ The fact that the defendants, or some of them, are infants can make no difference in the rule.²⁶

§ 1010. **Protecting rights of plaintiff.**—Much depends upon the circumstances of each individual case. The plaintiff has a right to be protected to the extent of his lien, and if he acts in good faith, and no other party in interest will furnish him security, he will in doubtful cases be allowed to designate the manner of sale.²⁷ *Griswold v. Fowler* (24 Barb. 135) was a case of this kind. The property was situated on Staten Island and was originally mortgaged in one parcel, but it was afterward laid out into city lots facing on streets. The plaintiff showed his willingness to accept any method of sale which would be suggested, provided security were furnished him, but in the absence of security he objected to a sale in parcels, because the spaces marked out for streets could not thus be sold. A sale made in one parcel was therefore held to be proper.

If, on the other hand, the security is ample, the judgment or preference of the mortgagee is not entitled to consideration by the referee.²⁸ In *Ellsworth v. Lockwood* (42 N. Y. 89), the plaintiff refused a proposition made by a junior incumbrancer to bid the entire amount due for a single parcel of the mortgaged premises and sold the whole together, and, in setting aside the sale as irregular, much stress was laid upon this fact.

§ 1011. **Examples of sales in one parcel.**—In *Lane v. Conger* (10 Hun, 1), the mortgagor, subsequent to the execution of the

²⁴ *American Ins. Co. v. Oakley*, 9 Paige, 259; *Cunningham v. Cassidy*, 17 N. Y. 276.

²⁵ *Gregory v. Campbell*, 16 How. Pr. 417; *Suffern v. Johnson*, 1 Paige, 450.

²⁶ *Mills v. Dennis*, 3 Johns. Ch. 367; *Brevoort v. Jackson*, 1 Edw. Ch. 447.

²⁷ *Brown v. Frost*, Hoff. 41.

²⁸ *Walworth v. Farmers' Loan & Trust Co.*, 4 Sandf. Ch. 51.

mortgage, laid the land out in lots fronting on certain streets and lanes which were shown on a map, but which were not dedicated to the public. A sale of the whole mortgaged premises in one parcel was sustained.

No dedication of streets to public use after the giving of a mortgage can divest the lien of the mortgagor, and he is entitled to a method of sale that will dispose of the entire security if required to pay his debt.²⁹

Where property is mortgaged in one parcel and is by the same description decreed to be sold, the officer making the sale is under no obligation to divide it into lots. If such a division is thought desirable, the persons wishing for it should, before the sale, ask the direction of the court, and a survey and division may, if deemed expedient, then be ordered at the expense of the fund.³⁰

If the premises, though consisting of several lots, are so built upon as really to constitute one establishment, they may properly be sold in one parcel.³¹

Where, subsequent to the execution of a deed of trust, another deed of trust was made by the same grantor to another grantee on adjoining lands, and buildings extended over the line and stood upon both parcels, it was held that the facts that the same grantor had owned both parcels, and that to sever the lots would be destructive of the value of both, would justify the court in directing that both lots should be sold together, reserving to the second grantee his proportional part of the proceeds.³²

The sale need not be made in separate parcels where the parcel which the defendant desires to be sold first or separately has no fixed, known or definite boundaries. It must be a distinct tract or parcel which can be conveniently sold, described, and conveyed.³³

If property is put up for sale in separate parcels and no bidders can be found willing to purchase in that way, the officer conducting the sale may properly offer it *en masse*.³⁴

29 Griswold v. Fowler, 24 Barb. 135; People *ex rel.* Weber v. Herbel, 96 Ill. 384; Hague v. Inhabitants of West Hoboken, 23 N. J. Eq. 354.

30 Woodhull v. Osborne, 2 Edw. Ch. 615.

31 McLaughlin v. Teasdale, 9 Daly, 23.

32 Pepper v. Shepherd, 4 Mackey (D. C.) 269.

33 Ellsworth v. Lockwood, 9 Hun, 548.

34 Van Valkenburg v. Trustees of Schools, 66 Ill. 103.

§ 1012. **Discretion of referee.**—The discretion of the referee, if honestly and fairly exercised, in the absence of any special circumstances tending to show a clear mistake of judgment or of a desire to do injustice, will in most cases control, and after the sale has been made, it will not on slight grounds be set aside.³⁵ The presumption is that where the separate parcels are distinctly marked for separate use and enjoyment, they should be sold separately;³⁶ but where they adjoin each other, and have previously been used, enjoyed, and conveyed together,³⁷ the manner in which the sale should be made rested, prior to the present Code, in the sound discretion of the referee.

The fact that the sale is intended to be made in separate parcels need not be specified in the notice of sale.³⁸

ORDER OF SALE.

§ 1013. **In what order separate parcels should be sold.**—If the mortgaged premises are to be sold in parcels to different persons, the several parcels should be sold in the order of their equitable liability to pay the mortgage debt. This, in the absence of special circumstances, is in the inverse order of their alienation by the debtor. When one parcel is aliened by the debtor, the parcels remaining in his hands are the primary fund for the payment of the debt, and so on as each is sold. If anything remains in his hands when the lien comes to be enforced, that is to be first subjected to it, and his most recent grantees or mortgagees must contribute toward the payment of the debt in the first instance before those whose rights vested earlier. This rule has its foundation in the equitable principle, that where a creditor has two funds for the security of his debt, and another party has an interest in one only of said funds, without any right to resort to the other, equity will compel the creditor to take his satisfaction out of the fund in which he alone has an interest, so that both parties may, if possible, escape without injury.³⁹

³⁵ *Whitbeck v. Rowe*, 25 How. Pr. 403.

³⁶ *Wolcott v. Schenck*, 23 How. Pr. 385.

³⁷ *Anderson v. Austin*, 34 Barb. 319.

³⁸ *Hoffman v. Burke*, 21 Hun, 580.

³⁹ *Libby v. Tufts*, 121 N. Y. 172; 24 N. Y. Supp. 12; *Ingalls v. Morgan*, 10 N. Y. (6 Seld.) 178, and cases cited; *Kels v. West*, 56 Misc. R. 126; 106 N. Y. Supp. 1108. See *Roosevelt v. Schile*, 95 App. Div. 524; 88 N. Y. Supp. 595.

§ 1014. **Inverse order of alienation.**—When, therefore, the debtor has conveyed or mortgaged one parcel of the mortgaged premises, retaining the rest, it is the right of his grantee or mortgagee to demand that the land still remaining in the hands of his grantor or mortgagor shall be first sold. The mortgage creditor may sell all the parcels if their sale is necessary to satisfy his lien, but he must first take the property in which the junior grantee or mortgagee of one parcel has no interest. The right of the junior grantee to insist upon this order of sale becomes vested when his title is perfected, and his equitable claim against the parcels which remained in the hands of his grantor at the time of the grant to him, follow those parcels into the hands of subsequent grantees. The right of each purchaser or incumbrancer to have the parcels remaining in the hands of the debtor at the time he makes his purchase or acquires his lien applied to the payment of the debt, cannot be disturbed by anything which takes place after his title or lien is perfected, and each new claimant must take subject to prior equities.⁴⁰

§ 1015. **In measuring equities** between different junior grantees or mortgagees, the dates of the vesting of their rights become important. When parcels are sold under various judgments, the portions should stand as of the dates when the respective judgments became liens, and not as of the dates of actual sales, for the sales, whenever they take place, are of the respective interest upon which the several judgments were liens.⁴¹

Where a mortgagor sells parcels of the mortgaged property to different purchasers without the knowledge of the mortgagee, he

⁴⁰ Gill v. Lyon, 1 Johns. Ch. 447; Clowes v. Dickenson, 5 Johns. Ch. 235; James v. Hubbard, 1 Paige, 228; Gouveneur v. Lynch, 2 Paige, 300; Jenkins v. Freyer, 4 Paige, 47; Guion v. Knapp, 6 Paige, 35; Skeel v. Spraker, 8 Paige, 182; Patty v. Pease, 8 Paige, 277; Schryver v. Teller, 9 Paige, 173; Kellogg v. Rand, 11 Paige, 59; The New York Life Ins. & Trust Co. v. Cutler, 3 Sandf. Ch. 176; Stuyvesant v. Hall, 2 Barb. Ch. 151; Ferguson v. Kimball, 3 Barb. Ch. 616; Lafarge Co. v. Bell, 22 Barb. 54; Barnes v. Mott, 64 N. Y. 397, 402; Coles v. Appleby,

87 N. Y. 114; Mahagan v. Mead, 63 N. H. 570; Brown v. Simons, 44 N. H. 475; Morrison v. Beckwith, 47 B. Mon. (Ky.) 73; 16 Am. Dec. 138; McCullom v. Turpie, Adm'r, 32 Ind. 146; Williams v. Perry, 20 Ind. 437; Niles v. Harmon, 80 Ill. 396; Hosmer v. Campbell, 98 Ill. 572; Orvis v. Powell, 98 U. S. 176. By the State Finance Law, § 29, provision is made for the sale of premises mortgaged to the State, on the foreclosure of such mortgages, in parcels in the inverse order of alienation.

⁴¹ Woods v. Spaulding, 45 Barb. 602.

who first receives his deed, and not he whose deed was first recorded, is protected, and the land of the latter must first be sold.⁴²

§ 1016. Controlling principle.—The great principle underlying all the cases is that each owner shall pay his own debts. If the mortgagor should convey one parcel and receive the full price for it, or if he should mortgage it and receive the consideration for the mortgage, it would be plainly unjust for him to cast upon his grantee or upon his mortgagee the necessity of either paying twice for the land or of having it sold to discharge the mortgage debt. His own land should go to pay his own debts, and there would be no equity in compelling his subsequent grantee or mortgagee to discharge an obligation, the consideration for which was never received by him. Cases may arise, however, where the payment of the mortgage debt or a part of it is assumed by the junior grantee,⁴³ or where other circumstances intervene which will render a different rule proper. So, too, there may be cases where equity requires that each portion of the mortgaged premises shall bear its proportion of the mortgage debt, as where tenants in common mortgage lands for a joint debt, and afterward make partition.⁴⁴

An agreement may be made between parties fixing the order of priority of sale of the different parcels of the mortgaged premises owned by them respectively, and will be enforced if found not to be inequitable.⁴⁵

§ 1017. Equities between mortgages and conveyances.—As between mortgages of different dates, the rule of selling inversely in the order of their priority in point of time prevails, but as between a mortgage of an earlier date and a conveyance of a later, the mortgaged parcel must be sold first. A subsequent mortgage upon a part of the equity of redemption by the owner of the whole of the mortgaged premises is only an alienation of that part to the extent of the money due on such junior mortgage, and for which the owner of such junior mortgage has no other security which should in equity be first resorted to. If a part of the mortgaged premises

⁴² *Ellison v. Pecare*, 29 Barb. 333.

⁴⁴ *Rathbone v. Clark*, 9 Paige, 648.

⁴³ *Bowne v. Lynde*, 91 N. Y. 92;

⁴⁵ *Cowdrey v. Carpenter*, 1 Abb.

Halsey v. Reed, 9 Paige, 446; *Torrey v. Bank of Orleans*, 9 Paige, 649;

Ct. of App. Dec. 445.

Warren v. Boynton, 2 Barb. 13.

has been mortgaged a second time and the residue thereof has been sold absolutely subsequent to the second mortgage, the part mortgaged should be sold first and the surplus proceeds of that sale beyond the amount of principal and interest due on the second mortgage should be applied in payment of the first mortgage, before resorting to a residue of the premises for that purpose which was conveyed absolutely.⁴⁶

In a case where successive conveyances are to the same person, all subject to the original mortgage, the title to all remaining in the grantee at the time of the foreclosure, who is also personally liable for any deficiency arising after the sale of the whole, such grantee can have no equity to have the property sold in parcels in the inverse order of the conveyances to him.⁴⁷

§ 1018. **Undivided interests.**—There is no principle upon which an undivided interest in property can be sold, if the whole is jointly pledged for the mortgage debt, and the legal presumption is, that a piece of property will not sell as well in individual moieties as the whole will together. If two tenants in common join in mortgaging their property for their joint debt, the court will not compel the mortgagee to adopt a disadvantageous method of sale in order to enable them the more easily to adjust their equities as between themselves.⁴⁸

The rule as to making the sale in parcels in the inverse order of alienation will not be applied where the court can see that its enforcement may prejudice the mortgagee in the collection of the debt due him,⁴⁹ and it has no application to mere undivided interests in the property.⁵⁰ If an undivided interest in a piece of real estate is primarily chargeable with the mortgage debt, the whole parcel must be sold, and the equities between the respective owners must be worked out in the application of the proceeds of the sale.⁵¹

There may be cases where only an undivided interest should be

⁴⁶ Kellogg v. Rand, 11 Paige, 59.

⁴⁷ Steere v. Childs, 15 Hun, 511.

⁴⁸ Frost v. Bevins, 3 Sandf. Ch. 188; Van Slyke v. Van Loan, 26 Hun, 344; Cashman v. Martin, 50 How. Pr. 337.

⁴⁹ Smart v. Bement, 4 Abb. Ct. of

App. Dec. 253; 4 Keyes, 241; Cashman v. Martin, 50 How. Pr. 337.

⁵⁰ Van Slyke v. Van Loan, 26 Hun, 344, 347; Cashman v. Martin, 50 How. Pr. 337.

⁵¹ Van Slyke v. Van Loan, 26 Hun, 344.

sold,—as, if a bid is offered to an amount exceeding the claims of the plaintiff, for such undivided interest.⁵²

§ 1019. Direction in judgment as to order of sale.—It is a matter of course at the time of making a decree of foreclosure and sale, upon a mere suggestion that separate portions of the mortgaged premises are held by different persons under conveyances or mortgages subsequent to the mortgage of the plaintiff, to insert a provision in the judgment which will enable the referee or sheriff to sell in such a manner as to protect the rights of the defendants respectively. The provision usually inserted in the decree in such cases is, that if it shall appear to the officer who is to make the sale that separate parcels of the mortgaged premises have been conveyed or incumbered by the mortgagor, or by those claiming under him subsequent to the plaintiff's mortgage, such officer shall sell the same in the inverse order of alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to him.⁵³ This qualification of the discretion to sell in the inverse order of alienation, that it shall be according to the equitable rights of the subsequent grantees or incumbrancers is necessary to meet special cases. It should always be inserted in the judgment when such judgment directs the sale of the premises in parcels in the inverse order of alienation.⁵⁴ Under a decree thus drawn, if the grantee of a portion of the premises was, by virtue of his conveyance, entitled to a right of way or other easement, in the residue of the premises which belonged to the grantor subsequent to such conveyance, it would be a matter of course for the officer to sell such residue subject to such right of way, or other easement, in favor of the owner or purchaser and his heirs and assigns.⁵⁵

Where a difference of opinion exists as to the proper order of sale, this should be submitted to the court upon a proper application before the sale is had.⁵⁶

§ 1020. Adjusting equities after sale.—When the entire mort-

⁵² *Quaw v. Lameraux*, 36 Wis. 626.

⁵³ *Knickerbacker v. Eggleston*, 3 How. Pr. 130.

⁵⁴ *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 353; *Rathbone v. Clark*, 9 Paige, 648.

⁵⁵ *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 353.

⁵⁶ *St. Joseph Manuf'g Co. v. Daggett*, 84 Ill. 556.

gaged premises are to be sold it can make but little difference as to which parcel is sold first. The proceeds of the sale will go into court together as a common fund, and the court will see that equity is done as between the owners of the various parcels. If the officer making the sale pays more than a proper proportion of the proceeds of any parcel toward the satisfaction of the plaintiff's debt and costs, the court would of course direct it to be refunded, out of the proceeds of the other parcels in settling the rights of the junior claimants and incumbrancers as between themselves.⁵⁷

The order of the sale of separate parcels is mainly of interest to owners of such parcels, who desire that their possession shall not be disturbed, but the manner of sale, as to whether it should be in parcels or not, and if in parcels, in what parcels, is frequently of much greater importance to junior incumbrancers and claimants than the mere order of sale would be. This should be in such a way that the equities of the various parties can be easily adjusted by the court upon the reference as to the surplus proceeds of the premises. If there are conflicting claims to the surplus which require any special form of sale, application should be made to the court before the sale, so that the manner of sale may be fixed and determined.⁵⁸ It has been said that one defendant in a foreclosure suit may set up an equity by answer so as to have the order of sale determined before judgment,⁵⁹ but this may admit of doubt,⁶⁰ and the better way is to raise the question by mere motion.

§ 1021. Method of sale cannot control equities.—The rules which regulate both the manner of sale, whether in parcels or otherwise, and the order of sale when in parcels, are mere rules of practice and of convenience, and, while the observance of them frequently preserves substantial rights, the neglect of them does not work the forfeiture of equities which the court finds itself

57 *Snyder v. Stafford*, 11 Paige, 71; *Van Slyke v. Van Loan*, 26 Hun, 344, 347.

58 *Vandercook v. The Cohoes Savings Institution*, 5 Hun, 641; *Snyder v. Stafford*, 11 Paige, 71; *Bard v. Steele*, 3 How. Pr. 110; *Collier v. Whipple*, 13 Wend. 229; *King v. Platt*, 37 N. Y. 161.

59 *N. Y. Life Ins. & Trust Co. v. Cutler*, 3 Sandf. Ch. 176.

60 *Smart v. Bement*, 3 Keyes, 241; 4 Abb. Ct. of App. Dec. 253; *Farmers' Loan & Trust Co. v. Seymour*, 9 Paige, 539; *Miller v. Case, Clarke*, 395.

able to recognize and enforce.⁶¹ If land, not equitably bound as between it and other property for the payment of a mortgage, be sold, the owner of the property relieved from its burden may be compelled to make good the loss,⁶² even when the person injured has been negligent in asserting his rights;⁶³ and where several parcels are sold together under a prior mortgage, the court will inquire into the proportion of the purchase price which each parcel contributed toward the entire price, in order to determine the equities as between the claimants to the surplus.⁶⁴

There may be cases where a sale in parcels upon any plan that may be suggested would operate inequitably, while complete justice can be done if the sale is made in a single parcel, and in such cases the court is not embarrassed by any technical rule. Thus, where there was a first mortgage upon a parcel of land in a city, one hundred feet in width, and there were also two junior mortgages, one being upon sixty feet in width and the other upon forty feet in width; and the entire property was insufficient for the payment of all of the mortgages, and a sale in parcels would have resulted in leaving a surplus for the devisee of the mortgagor, it was held that all of the land should be sold in one parcel.⁶⁵

61 Snyder v. Stafford, 11 Paige, 71.

62 James v. Hubbard, 1 Paige, 228.

63 Clowes v. Dickenson, 5 Johns. Ch. 235, *aff'd* 9 Cow. 405.

64 Oppenheimer v. Walker, 3 Hun, 30; 5 N. Y. Sup. (T. & C.) 325; Savings Bank of Utica v. Wood, 17 Hun, 133.

65 Bernhardt v. Lymburner, 85 N. Y. 172.

CHAPTER XXVIII.

SETTING ASIDE THE SALE IN FORECLOSURE AND ORDERING A RESALE.

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| § 1022. Proper remedy is by motion. | § 1033. Adjournments. |
| 1023. Effect of setting aside sale. | 1034. Fraud as ground for resale. |
| 1024. Effect of order denying a resale. | 1035. Oppressive and fraudulent conduct. |
| 1025. Who may apply for a resale. | 1036. Discretionary power. |
| 1026. Notice of application. | 1037. Excusable mistake as ground for resale. |
| 1027. Application should be made promptly. | 1038. Mistake held sufficiently excused. |
| 1028. Rule where plaintiff becomes the purchaser. | 1039. Diligence required of defendant. |
| 1029. Inadequacy of price as a ground for granting a resale. | 1040. Ordering resale for benefit of infants. |
| 1030. Inadequacy of price may be evidence of irregularity. | 1041. When a resale will be denied. |
| 1031. Irregularity in conducting the sale. | 1042. Terms imposed in ordering a resale. |
| 1032. Sale in parcels. | 1043. Appeal. |

§ 1022. Proper remedy is by motion.—An original action cannot be sustained by a party in a foreclosure suit to impeach or set aside the proceedings upon the sale under the judgment, where there was nothing which could have prevented an application to the court in that suit, for a resale, by those who were interested in the premises, and where the title was not acquired by the purchaser by means of a fraud. If the sale is made at an improper time, or in such a manner as to prevent a fair competition, or if for any other cause it would be inequitable to permit the sale to stand, the proper remedy is by a summary application to the court in the suit in which the judgment was made, for a resale upon such terms and conditions as may be just; so as to protect the rights of the purchaser as well as the rights of the parties interested in the sale.¹ It would seriously affect the

¹ Crocker v. Gollner, 135 N. Y. Paige, 339; Nicholl v. Nicholl, 8 662; 32 N. E. 114; Requa v. Rea, 2 Paige, 349; American Ins. Co. v.

interests of those whose property is sold under the judgments and orders of the court, if it was understood that questions of this kind were to be litigated and determined in a collateral suit; for no man of ordinary prudence would bid what he believed to be the fair cash value of the property at a judicial sale, if he might be subjected to the expense and delay of a protracted equity suit to determine whether the proceedings on the sale had been strictly regular.²

The only case where a new action to set aside a sale would be permissible would be where a sale had been fraudulently conducted to the prejudice of a party interested in the property, and a person who had been a party to such a fraud had acquired the title under it. In such a case an action would lie, although there might also be a concurrent remedy by motion.³

§ 1023. **Effect of setting aside sale.**—Where a person becomes a purchaser under a decree of the court, he submits himself to the jurisdiction of the court in that suit as to all matters connected with the sale, or relating to him in the character of purchaser.⁴ All acquiring title from and under him take subject to the same jurisdiction. A conveyance to a *bona fide* purchaser may be a circumstance which will influence the court in the exercise of its discretion, when a motion is made for a resale, but it does not take away jurisdiction. A grantee takes the place of his grantor, and consents to the same jurisdiction, under and subject to which the title is held. He has notice of the source of his grantor's title, and knowledge of the power of the courts over titles thus acquired, and takes no better or more perfect title, as against the interference of the court, than his grantor had.⁵

Where a judgment of foreclosure is opened, and the sale is vacated, this destroys the title of the purchaser acquired at the sale and that of his grantees.⁶

Oakley, 9 Paige, 259; Brown v. Frost, 10 Paige, 243; Collier v. Whipple, 13 Wend. 224; McCotter v. Jay, 30 N. Y. 80; Gould v. Mortimer, 26 How. Pr. 167; 16 Abb. 448.

² Brown v. Frost, 10 Paige, 243.

³ Platt v. Platt, 2 N. Y. Supp. (T. & C.) 25; Vandercook v. The Cohoes Savings Institution, 5 Hun, 641; McCotter v. Jay, 30 N. Y. 80; Gould

v. Mortimer, 26 How. Pr. 167; Smith v. The American Life Insurance Co., Clarke, 307; McMurray v. McMurray, 66 N. Y. 175.

⁴ Cazet v. Hubbell, 36 N. Y. 680; May v. May, 11 Paige, 201; Requa v. Rea, 2 Paige, 339.

⁵ Hale v. Clausen, 60 N. Y. 339.

⁶ Freeman v. Munns, 15 Abb. 468.

§ 1024. **Effect of order denying a resale.**—A refusal to grant relief upon a summary application is not, except under very special circumstances, a final determination of the merits of the controversy and a bar to an action for relief. It will bar another summary application unless leave is given to renew. The court may properly, in a doubtful case, remit the moving party to his action, but it cannot assume to limit his right to bring such action, either by prescribing terms or by limiting the time within which the action may be brought.⁷

§ 1025. **Who may apply for a resale.**—The motion to set aside the sale may be made by any person whose rights are injuriously affected by it, though he is not a party to the suit.⁸ A judgment creditor whose lien is destroyed,⁹ or a junior incumbrancer whose rights accrued subsequent to the commencement of the action, and who was therefore not made a party, can make such a motion;¹⁰ as also can a person who is not a party, but is personally liable for the payment of the mortgage debt. But a guarantor who has no interest in the mortgaged premises has no right to ask for a resale, if he is discharged from liability to an amount equal to the full value of the property,¹¹ or if the sale produces enough to relieve him from personal liability.¹²

It is not necessary that the person moving to set aside a sale and for a resale shall have a lien upon the property sold. The owner of a judgment against the executrix of the will of the mortgagor, such executrix having purchased the property, can make such a motion.¹³

An owner of the equity of redemption retains an interest in the property after a general assignment by him for the benefit of creditors, which would make him a proper person to apply for a resale.¹⁴

§ 1026. **Notice of application.**—Every defendant who has ap-

⁷ Howell v. Mills, 53 N. Y. 322, 334.

⁸ Gould v. Mortimer, 26 How. Pr. 167; 16 Abb. 448; Kellogg v. Howell, 62 Barb. 280; Goodell v. Harrington, 76 N. Y. 547.

⁹ May v. May, 11 Paige, 201; Matter of Fuller v. Brown, 35 Hun, 165.

¹⁰ American Ins. Co. v. Oakley,

9 Paige, 259; Brown v. Frost, 10 Paige, 243.

¹¹ Chancery, 1843, Bodine v. Edwards, 2 N. Y. Leg. Obs. 231; 3 Ch. Sent. 46.

¹² Shuler v. Maxwell, 38 Hun, 240.

¹³ Goodell v. Harrington, 76 N. Y. 547, 549.

¹⁴ D. L. & W. R. R. Co. v. Scranton, 34 N. J. Eq. 429.

peared in the suit, and who has any interest in the property sold, or in the proceeds of the sale, is entitled to notice of an application to discharge the purchaser or for a resale,¹⁵ and where the application for a resale is made by a party interested in the fund, the purchaser should have an opportunity to attend the hearing and to be heard in opposition.

§ 1027. Application should be made promptly.—An objection to the sale should be made promptly, and will not be listened to after a great lapse of time, unless a sufficient excuse is given for the delay,¹⁶ especially where rights of innocent parties have intervened.¹⁷ The mover will not obtain any relief if he has been guilty of laches, and if the period prescribed by statute within which an action in equity to redeem a mortgage might have been brought has expired, the court has no power to set the sale aside.¹⁸ On the same principle, the court will not give the purchaser the benefit of his purchase where he has neglected to comply with the terms of sale within a reasonable time, if a resale of the property is deemed more beneficial to the parties interested in the proceeds of the sale.¹⁹

The statute limitation of one year has no application to a motion to set aside a sale and for a resale. The question of laches and its effect are dependent upon the circumstances of each particular case involving the consideration of them. It would be more strictly applied as against a purchase in good faith by a stranger to the proceedings than to a party privy to it and not a *bona fide* purchaser. Also, when rights of third parties had intervened which would be affected by giving the relief. In cases where there has been no substantial change in situation which will make the relief result to the prejudice of the purchasers, the question of laches has less importance.²⁰

¹⁵ Robinson v. Meigs, 10 Paige, 41.

¹⁶ Nicholl v. Nicholl, 8 Paige, 349; Lockwood v. McGuire, 57 How. Pr. 266; Francis v. Church, Clark, 475. See Atlantic Trust Co. v. New York City Suburban Water Co., 75 App. Div. 354; 78 N. Y. Supp. 120; Farrell v. Noel, 17 App. Div. 319; 45 N. Y. Supp. 207.

¹⁷ Atlantic Trust Co. v. New York City Suburban Water Co., 75 App. Div. 354; 78 N. Y. Supp. 120.

¹⁸ Depew v. Dewey, 46 How. Pr. 441; 2 N. Y. Supp. (T. & C.) 515.

¹⁹ Jackson v. Edwards, 7 Paige, 386.

²⁰ Per BRADLEY, J., in Matter of Fuller v. Brown, 35 Hun, 162, 166; McMurray v. McMurray, 66 N. Y. 176, 181; Lockwood v. McGuire, 57 How. Pr. 266; Viele v. Judson, 15 Hun, 328; In re Woolsey, 95 N. Y. 135, 144.

The owner of an equity of redemption who applied to set aside a foreclosure sale of land for mere irregularities four years after the sale, who knew of the sale shortly after it was made, was held to have been guilty of such gross laches as not to be entitled to relief.²¹

§ 1028. Rule where plaintiff becomes the purchaser.—Where everything is fair and every bidder unshackled, there is nothing in the circumstance of the mortgagee becoming the buyer, even though the purchase is made at a low price. He has equal rights in this respect with any third person; but circumstances may occur which would authorize a motion to reopen such a sale, where it would not be reopened if a stranger had become the purchaser. Where the mortgagee or plaintiff himself becomes the purchaser, the court has not always held the sale so conclusive as where the property has been purchased by one who was an entire stranger to the suit, and who has bid for the purpose of investment merely.²²

In a case where a sale was made of lands under a power of sale contained in a mortgage, the attorney for the mortgagee was the only person present and bid off the property to his client. It was held that this was not a sale of the premises at public auction, and that there can be no legal auction if no one is present but the auctioneer.²³

§ 1029. Inadequacy of price as a ground for granting a resale.—By the practice of the English Court of Chancery, it is almost a matter of course to open the biddings on a master's sale, before the confirmation of his report, upon the offer of a reasonable advance on the amount bid and the payment of the costs and expenses of the purchaser. As a general rule an advance of ten per cent. is sufficient to authorize a resale, but the biddings will not be opened where the amount of the advance is less than £40. The English practice has not been adopted in this State, and mere inadequacy of price is not a sufficient ground for setting aside a sale. It is thought to be essential to the interests of those whose

²¹ Hoyt v. Savings Institution, 110 Ill. 390; Hamilton v. Lubukee, 51 Ill. 415; Bush v. Sherman, 80 Ill. 160; McHany v. Schenk, 88 Ill. 357.

²² Mott v. Walkley, 3 Edw. 590; Tripp v. Cook, 26 Wend. 146, 158. See also Brown v. Frost, Hoff. 41;

Woodhull v. Osborne, 2 Edw. 614; Kellogg v. Howell, 62 Barb. 280; Gould v. Libby, 24 How. Pr. 440. See also Littell v. Zoutz, 2 Ala. 256; 36 Am. Dec. 415.

²³ Campbell v. Swan, 48 Barb. 109.

property is thus sold, that purchasers should continue to retain full confidence in the safety of such purchases, and that they will not, as a matter of course, be disturbed merely because a good bargain has been obtained.²⁴ To justify setting aside a sale on this ground it is said that the inadequacy must be so great as to shock the conscience of the court, and raise an inference of unfairness or fraud, or there must be circumstances showing mistake or surprise.²⁵ This rule has peculiar force in cases where the purchase has been made by a stranger to the litigation for the mere purpose of investment.²⁶ But even in such a case it has been held proper to order a resale where the property was sold below its assessed valuation and without notice to a subsequent mortgagee other than by advertisement, there being no objection by the plaintiff and such mortgagee having legally bound himself to bid more at the resale than the assessed valuation.²⁷ Where the plaintiff in the action has become the purchaser at the sale, the court has not always enforced the rule in its strictness.²⁸

§ 1030. Inadequacy of price may be evidence of irregularity.—

While inadequacy of consideration standing alone affords no conclusive reason for setting aside a sale, it is always a material element when joined with other circumstances. The object of the sale is to create a fund, and if as large a price is obtained as can be expected upon a resale, no advantage can be gained by releasing one purchaser in order to seek for another, even though the proceedings on the first sale are shown not to have been altogether regular. On the other hand, a striking difference between the real value of the property and the amount for which it is sold, may furnish evidence of irregularity and may emphasize the importance of circumstances by which the inadequacy of price was produced.

²⁴ *Houseman v. Wright*, 50 App. Div. 606; 64 N. Y. Supp. 71; *Duncan v. Dodd*, 2 Paige, 99; *Brown v. Frost*, 10 Paige, 243; *Howell v. Mills*, 53 N. Y. 322; *Woodhull v. Osborne*, 2 Edw. 614; *Mott v. Walkley*, 3 Edw. 590; *March v. Ludlum*, 3 Sandf. Ch. 35; *Lefevre v. Laraway*, 22 Barb. 167; *Kellogg v. Howell*, 62 Barb. 280; *Story's Eq. Jur.* § 245; *Matter of Rider*, 23 Hun, 91; *Cortland Sav-*

ings Bank v. Lighthall, 53 Misc. R. 423.

²⁵ *State Realty & Mortgage Co. v. Villaume*, 121 App. Div. 793; 106 N. Y. Supp. 698.

²⁶ *Littell v. Zoutz*, 2 Ala. 256; 36 Am. Dec. 415.

²⁷ *Kennedy v. Bridgeman*, 27 Misc. R. 585; 58 N. Y. Supp. 253.

²⁸ *Mott v. Walkley*, 3 Edw. 590; *Tripp v. Cook*, 26 Wend. 146, 158.

Where inadequacy of price is considered, the true market value of the property, and not a speculative value, should be taken as a guide.²⁹

Where a co-defendant of the mortgagor took advantage of the illness of the latter, which prevented him from attending the sale under the decree, in interfering to prevent a postponement of the sale, and himself became a purchaser of the mortgaged premises at less than one-third of their real value, the court ordered a resale. The purchaser was said to have taken an unconscientious advantage of the situation in which the mortgagor was placed by a dispensation of Providence.³⁰

Where land brought \$4,200 and the purchaser's check for ten per cent. thereof was refused at the bank through a mistake, and the referee ordered a resale for the afternoon of the same day without notifying other bidders at the morning sale, of whom one had offered \$4,100, the second sale, which realized only \$3,000, was set aside.³¹

§ 1031. Irregularity in conducting the sale.—When the plaintiff, or the officer making the sale, frames terms and conditions of sale which are harsh and unreasonable and out of the usual course of such sales, as where he demands the payment in specie of the whole amount of the purchase money within an hour of the sale, the court will not countenance such proceedings, but will set the sale aside.³²

Where the referee sells the premises upon terms other than those upon which the judgment directs him to sell them, the sale will be set aside on motion of any person who is aggrieved thereby.³³

§ 1032. Sale in parcels.—If the mortgaged premises consist of several parcels, which under the rule ought to be sold separately, and they are sold together, the sale may be set aside.³⁴ The sale is, in such a case, said to be irregular and voidable at the instance

²⁹ *Barnes v. Stoughton*, 2 N. Y. Sup. (T. & C.) 675; *White v. Coulter*, 3 N. Y. Sup. (T. & C.) 608; 1 Hun, 357.

³⁰ *Billington v. Forbes*, 10 Paige, 487.

³¹ *Barr v. Benzinger*, 27 App. Div. 590; 50 N. Y. Supp. 499.

³² *Goldsmith v. Osborne*, 1 Edw. 560.

³³ *Hotchkiss v. The Clifton Air Cure*, 4 Keyes, 170.

³⁴ *Wolcott v. Schenck*, 23 How. Pr. 385; *Griffith v. Hadley*, 10 Bosw. 587; *The American Ins. Co. v. Oakley*, 9 Paige, 259.

of the party aggrieved, but it is not void.³⁵ In a case where eleven dwelling-houses worth \$24,000 were sold in one parcel for \$10,000, the sale was set aside.³⁶

Where the officer sold a lot not equitably liable to pay the debt, in defiance of the protest of the owner of that lot, and with notice of the equities which were not denied, the sale was set aside.³⁷

Where a mortgage had been given of the undivided half of a tract of land, and the mortgagor and his co-tenants made partition, he taking the south half of the tract, the sheriff, at the foreclosure sale, refused a bid of the whole amount due for the undivided half of the south half, and sold the whole. The sale was afterward set aside.³⁸

A sale will not be set aside for irregularity in the description or a failure to apportion a prior mortgage between the several parcels, if upon a resale, the same irregularities must exist by reason of the terms of the judgment of foreclosure.³⁹

§ 1033. **Adjournments.**—If there be a variance between the notice announced upon the adjournment and that published in the newspaper, the sale is irregular.⁴⁰ If, however, by the act of the defendant in procuring a stay of proceedings, a sale is adjourned generally, without specifying any day, and a notice is afterward published stating such adjourned day, the defendant cannot set aside the sale on that ground. It would be taking advantage of his own wrong.⁴¹

So, where a stay was procured, and was vacated on the day of sale as having been improperly granted, it was held that the fact that the party procuring the stay made no preparation to attend the sale, was no ground for setting the sale aside.⁴²

§ 1034. **Fraud as ground for resale.**—A sale will be set aside where there is any fraud or misconduct in the purchaser or other person connected with and directing the sale, or where there has

³⁵ *Cunningham v. Cassidy*, 17 N. Y. 276; *Vingret v. Ketcham*, 102 App. Div. 403; 92 N. Y. Supp. 605.

³⁶ *The Merchants' Ins. Co. of New York v. Hinman*, 3 Abb. 455.

³⁷ *Breese v. Busby*, 13 How. Pr. 485.

³⁸ *Quaw v. Lameraux*, 36 Wis. 626.

³⁹ *State Realty & Mortgage Co. v. Villaume*, 121 App. Div. 793; 106 N. Y. Supp. 698.

⁴⁰ *Miller v. Hull*, 4 Den. 104.

⁴¹ *La Farge v. Van Wagenen*, 14 How. Pr. 54.

⁴² *Peck v. New Jersey & N. Y. R. Co.*, 22 Hun, 129.

been a surprise upon any party in interest, created by the purchaser or other person directing the sale, so that the party in interest has been misled.⁴³

While the law secures to the creditor his just demand and sequesters the property of the debtor to satisfy it, it still sedulously guards his interests in all the various steps taken leading to a sale of the property. It will not tolerate the slightest undue advantage over him, even by pursuing the strict forms of law or positive rules.⁴⁴ Occupying the position of advantage, it behooves the plaintiff to pursue his remedy with scrupulous care, lest he should inflict an injury on one who is comparatively powerless. A court of equity closely scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection, and stands ready to afford relief on very slight evidences of unfair dealing, whether it is made necessary by moral turpitude, or only by a mistaken estimate of another's rights.⁴⁵

A sale conducted according to the literal provisions of law may nevertheless be set aside if the proceedings on the part of the plaintiff show an effort to injure the mortgagor; as where the notice was published in a newspaper which had no circulation in the town where the land was situated, and the sale was had at the shortest legal limit as to time, and the result was a sale for a grossly inadequate price.⁴⁶

§ 1035. Oppressive and fraudulent conduct.—The appointing of a sale on an election day, in defiance of the protest of the owner of the equity; the discouragement of the bidders at the sale by the agent of the plaintiff; the adoption of an order of sale contrary to the wishes of the defendant and in spite of his reasonable request, ending by a purchase of the entire property by the plaintiff for an inadequate price, presents a proper case for the interposition of the court and for the setting aside of the sale.⁴⁷

Where the plaintiff or his agent, by verbal promises which he afterward refuses to keep, induces the defendant not to bid, and thereby becomes the purchaser for a price less than the value of

43 Schwaman v. Truax, 179 N. Y. 35; 71 N. E. 464; Gardiner v. Schermerhorn, Clarke, 102.

44 Story's Eq. Jur. § 239.

45 King. v. Platt, 37 N. Y. 155.

46 Briggs v. Briggs, 135 Mass. 306.

47 King v. Platt, 37 N. Y. 155.

the property, the sale will be set aside.⁴⁸ So, too, where the purchaser misled the owner by assuming to act for him and to obtain an adjournment of the sale, so that all parties remained away, and he became the purchaser for a nominal price, the sale was set aside and a new sale was ordered at the expense of the purchaser.⁴⁹

Where a person who had been the agent of the owner, acting in the interest of a person who afterward became the purchaser, made statements to the junior mortgagees which induced them to remain away from the sale, by means of which the property was sold for a less sum than its value, the sale was set aside on terms.⁵⁰

Where the complainant misled the defendants by false statements and by promising to adjourn the sale, and afterward purchased the property at a small price, the sale was set aside and the costs of the sale were refused to him.⁵¹

Where a parcel of land was bid off by the plaintiff, who afterward refused to abide by his bid, and the same parcel was again put up by the sheriff with other lands, and again bid off by the plaintiff, the sale was set aside.⁵²

Where an agreement is made to purchase for the benefit of the mortgagor, and the purchaser claims for himself, the sale should be set aside;⁵³ and if the mortgagor be guilty of laches, this only affects the terms on which he should be relieved.⁵⁴

In a case where premises were sold for one-tenth of their value, bidders having been discouraged by some one, though there was no proof that the purchaser had been privy to the fraud, the sale was, nevertheless, set aside at the instance of a judgment creditor whose lien was destroyed, and the purchaser was refused costs of opposing the application, his opposition being inequitable.⁵⁵

§ 1036. Discretionary power.—Courts of equity exercise a supervision of sales made under their decrees, which is not in all cases controlled by legal rules, but may be guided by considerations resting in discretion. They may set aside their own judicial sales,

⁴⁸ *Banta v. Maxwell*, 12 How. Pr. 479.

⁴⁹ *Slocum v. Glass*, 3 How. Pr. 178.

⁵⁰ *Murdock v. Empie*, 19 How. Pr. 79; 9 Abb. 283.

⁵¹ *Francis v. Church, Clarke*, 475. See also *Angel v. Clark*, 21 App.

Div. 339; 47 N. Y. Supp. 731; *Demaray v. Little*, 19 Mich. 244.

⁵² *Woodruff v. Bush*, 8 How. Pr. 117.

⁵³ *Frost v. Myrick*, 1 Barb. 370.

⁵⁴ *Crane v. Stiger*, 2 N. Y. Sup. (T. & C.) 577.

⁵⁵ *May v. May*, 11 Paige, 201.

upon grounds insufficient to confer upon the objecting party an absolute legal right to a resale. They may relieve against real mistakes, accidents, or hardships, or oppressive or unfair conduct of others, though such conduct may not amount to a violation of law; and where a fraud is alleged they may order a resale upon facts casting such a degree of suspicion upon the fairness of the sale as to render it, in their judgment, expedient, under all the circumstances, to vacate it, though the alleged fraud may not be clearly established.⁵⁶ When a bid is accepted a contract is created, and the bid cannot be withdrawn except under circumstances that would justify the rescission or reformation of an ordinary contract for the sale of land, and in the absence of such circumstances, an order reducing the amount of the bid should not be granted.⁵⁷

Where the officer making the sale becomes the real purchaser, though in the name of another, the sale will be set aside as of course, without proof of actual fraud.⁵⁸

Where a second mortgagee agreed with the first mortgagee that if he was allowed to buy without competition, he would pay the first mortgage, and, pursuant to this arrangement, bought a mill worth \$10,000 for \$5,000, thereby throwing upon the mortgagor a liability for a deficiency, it was held that the sale should be set aside.⁵⁹ It is also within the power of the court to punish as a contempt a refusal of the purchaser to obey an order to complete his purchase⁶⁰ though the order adjudging him in contempt may be revised on appeal where the specific amount due has not been determined.⁶¹

§ 1037. Excusable mistake as ground for resale.—The excusable mistake of a party in interest is a ground for a resale. As, where the property was knocked down to a purchaser, whereupon the bidders went away, believing the sale to be over; the purchaser failed to pay the deposit of ten per cent. required by the terms of

⁵⁶ Per RAPALLO, J., in *Fisher v. Hersey*, 78 N. Y. 387. See also *Holly v. Hirsch*, 135 N. Y. 590; 32 N. E. 709; *Burton v. Linn*, 21 App. Div. 609; 47 N. Y. Supp. 835.

⁵⁷ *Continental Ins. Co. v. Reeve*, 135 App. Div. 737; 119 N. Y. Supp. 901.

⁵⁸ *Howery v. Helms*, 20 Gratt. (Va.) 1.

⁵⁹ *Morris v. Woodward*, 25 N. J. Eq. 32.

⁶⁰ *Burton v. Linn*, 21 App. Div. 609; 47 N. Y. Supp. 835. See *Burton v. Linn*, 21 Misc. R. 266; 47 N. Y. Supp. 693, where it was held that the ends of justice did not require such punishment.

⁶¹ *Rowley v. Feldman*, 66 App. Div. 463; 73 N. Y. Supp. 385.

sale, and the property was sold for a small price.⁶² So, where the owner of the equity of redemption had appealed in good faith from the judgment of foreclosure, but, owing to imperfect justification of the sureties the sale was not stayed, and the plaintiff, without notice to the owner and without returning the undertaking, proceeded and sold the premises, bidding off the same by himself, or his agents, for much less than their real value, and taking judgment for the deficiency, the sale was set aside.⁶³ A misunderstanding as to the adjournment of the sale may also be a ground for ordering a resale.⁶⁴

§ 1038. **Mistakes held sufficiently excused.**—Where the executors of a mortgagor were innocently misled by the statements of their agent, of conversations had with the complainant and his solicitor as to the time of sale, and were induced thereby to stay away, by means of which the property was sold for much less than its value, the sale was set aside on the ground of surprise. Chancellor KENT in deciding the case, said: "I may add further, that the surprise is not of the most striking kind, and the case for relief on that ground is pushed to the utmost verge of an admissible interference."⁶⁵

A public sale was set aside where—owing to a misunderstanding between the counsel of the mortgagor and the counsel of a person who would have been a bidder at the sale, and who would have bid \$1,800—lands worth \$2,500 were sold for \$1,400.⁶⁶

In a case where the owner was wholly ignorant of the institution of the foreclosure suit until after the sale, and the agent to whom he had confided the care of the property, had, by the visitation of God, been so far deprived of his reason as to be rendered incapable of attending to the business of his principal, or even of communicating with him, the sale was set aside on the ground of mistake.⁶⁷ So, too, in a case not reported, the court set aside a sale where the property had been struck off at a price much below its value, owing to the misfortune of the defendant in having his

⁶² King v. Morris, 2 Abb. 296.

⁶³ Gould v. Libby, 24 How. Pr. 440; *sub nom.* Gould v. Gager, 18 Abb. 32; Parfitt v. Warner, 13 Abb. 471; Smith v. Heermance, 18 How. Pr. 261.

⁶⁴ Burrill v. Flitner, 109 App. Div. 60; 95 N. Y. Supp. 1078.

⁶⁵ Williamson v. Dale, 3 Johns. Ch. 290.

⁶⁶ Banta v. Brown, 32 N. J. Eq. 41.

⁶⁷ Thompson v. Mount, 1 Barb. Ch. 607.

horse drop down dead while he was on his way to attend the sale; in consequence of which he did not arrive until a short time after the premises had been put up and sold by the master.⁶⁸

§ 1039. **Diligence required of defendant.**—The defendant cannot be held to exercise more than ordinary prudence and diligence in providing for his interests at the sale. If he uses as much diligence as is reasonably practicable in the condition in which he is placed, and is prevented by accidental causes from being represented at the sale, by means of which the property is sold for much below its value, the sale will be set aside. When the defendant is led to believe, by the statements of the complainant or his solicitor, that the property will not be sold for less than the debt and costs, he is sufficiently diligent if he writes by mail to an agent of sufficient ability, requesting him to attend to the matter; and in case the letter miscarries, and for that reason neither the agent nor his principal is present at the sale, the sale will be set aside upon the motion of the defendant.⁶⁹

Where the mistake of the defendant is caused in whole or in part by misinformation, received from the mortgagee or his representatives, or from the officer making the sale, or from a co-defendant, or from the person who afterward becomes the purchaser, and the sale is greatly below value, the sale will be set aside.⁷⁰ So, if the notice of sale be too indefinite, as when a sale was advertised to take place at a certain hotel without mentioning the room, by means of which parties wishing to bid were misled.⁷¹

Where surprise or misapprehension is created among the bidders at the sale, by the acts of the officer whose duty it is to conduct the sale,⁷² or by the acts of the person who afterward becomes the purchaser,⁷³ or where the officer makes an announcement which was calculated to impair the price which would be offered, and where a less price is obtained than the value of the land, a resale will be ordered.⁷⁴

In *Requa v. Rea* (2 Paige, 339) the master was instructed by

⁶⁸ Cited in *Thompson v. Mount*, 1 Barb. Ch. 609.

⁶⁹ *Hoppock v. Conklin*, 4 Sandf. Ch. 582.

⁷⁰ *Collier v. Whipple*, 13 Wend. 226; *Tripp v. Cook*, 26 Wend. 143;

Hoppock v. Conklin, 4 Sandf. Ch. 582.

⁷¹ *Kellogg v. Howell*, 62 Barb. 280.

⁷² *Stahl v. Charles*, 5 Abb. 348.

⁷³ *Mott v. Walkley*, 3 Edw. 590.

⁷⁴ *Marsh v. Ridgway*, 18 Abb. 262.

the complainant's solicitor not to sell for less than \$2,600; through ignorance of his duty he sold the property for \$1,000 less, to a person having knowledge of the facts, and the sale was set aside upon motion.

It has also been said that a sale will be set aside where a guarantor has misunderstood his liability.⁷⁵

§ 1040. **Ordering resale for benefit of infants.**—A sale will commonly be set aside on slight grounds where the interest of infants are concerned. Where it is apparent that a resale will benefit infant owners, it has even been said that the court will order it of its own motion.⁷⁶ A sale may be set aside where infants who were necessary parties defendant were not made parties.⁷⁷

Where the only estate belonging to two infant children was sold for half its value, to pay a debt a little less than the amount of the purchase money, the sale was set aside. The property was sacrificed either through the misapprehension or negligence of their mother and stepfather. Immediately after they heard of the sale, they made application to the purchaser to let them redeem the property for the benefit of the infants, and they offered to bid a considerable advance.⁷⁸

Where a judicial sale was purposely arranged to prevent competition, in order to cut off the title of infants for the purpose of mortgaging the property, it was held that the infants were entitled as a matter of right to an order setting aside the sale. A mortgagee who had notice of the contrivance, and who loaned money on the title, was not protected.⁷⁹

A sale will not be set aside because a guardian of infant defendants interested in such sale refused to attend, unless it appears that such non-attendance was the cause of the property being sold at a less price than it would otherwise have been sold for.⁸⁰

§ 1041. **When a resale will be denied.**—When a purchase is fair, and free from fraud, suspicion, or surprise, a resale will not be ordered where the equities of the whole case preponderate in favor

⁷⁵ *Gardiner v. Schermerhorn*, Clarke, 102; *Lansing v. McPherson*, 3 Johns. Ch. 424.

⁷⁶ *Lefevre v. Laraway*, 22 Barb. 167.

⁷⁷ *Gruner v. Ruffner*, 134 App. Div. 837; 119 N. Y. Supp. 142.

⁷⁸ *Duncan v. Dodd*, 2 Paige, 99.

⁷⁹ *Howell v. Mills*, 53 N. Y. 322.

⁸⁰ *Stryker v. Storm*, 1 Abb. (N. S.) 424.

of the purchaser.⁸¹ It has been said in this connection, that upon an application for a resale, the whole equities between the parties will be taken into consideration, and the court in its final order will be governed by such equities.⁸² This proposition has been controverted,⁸³ and it may perhaps be stated more correctly in a different form. Where there is no reason given for setting aside the sale which gives to the applicant a legal right to such relief, and where the mere discretion of the court is invoked, the court will exercise that discretion or not according as substantial justice will be served upon all the facts in the case. A court of equity will not willingly allow itself to be used to promote injustice, and, on this principle, in a case where the defendant, instead of moving for a resale, made an equitable agreement with the purchaser for a reconveyance, and then violated his part of the agreement, his subsequent application for a resale was denied.⁸⁴

The rule is distinctly and clearly laid down in numerous cases, that the court will not interfere except in very special cases, and never where the mortgagor is an adult, and has an opportunity of attending the sale and taking care of his interests, and the sale was fairly conducted.⁸⁵

Want of knowledge of the time of sale, where the party is an adult and a party to the suit, is no ground for relief.⁸⁶

§ 1042. **Terms imposed in ordering a resale.**—The proper terms to be imposed in ordering a resale depend upon the circumstances of each case.⁸⁷ Where the court is obliged to order a resale of property purchased in good faith, the former purchaser must be fully and liberally indemnified for all damages, costs, and expenses to which he has been subjected.⁸⁸ These include the deposit or percentage paid by him on the sale, the expenses of investigating the title, and the costs of a motion, if he is put to a motion.⁸⁹ If the defect or irregularity is caused by the plaintiff or his attorney,

⁸¹ *Frazier v. Swimm*, 79 App. Div. 53; 79 N. Y. Supp. 787; *Moller v. Watts*, 56 App. Div. 562; 67 N. Y. Supp. 488; *Gardiner v. Schermerhorn*, Clarke, 102.

⁸² *Wiley v. Angel*, Clarke, 222.

⁸³ *Tripp v. Cook*, 26 Wend. 143.

⁸⁴ *Toll v. Hiller*, 11 Paige, 228.

⁸⁵ *Haines v. Taylor*, 3 How. Pr.

200; *Livingston v. Byrne*, 11 Johns. 555; *The American Ins. Co. v. Oakley*, 9 Paige, 259; *White v. Coulter*, 1 Hun, 357.

⁸⁶ *McCotter v. Jay*, 30 N. Y. 80.

⁸⁷ *Francis v. Church*, Clarke, 475.

⁸⁸ *Duncan v. Dodd*, 2 Paige, 99.

⁸⁹ *Raynor v. Selmes*, 52 N. Y. 579.

he and not the owner of the equity must bear the expenses of the resale, and the damages of the purchaser at the first sale.⁹⁰

§ 1043. **Appeal.**—An order granting or denying a motion for a resale, though it may rest entirely in the discretion of the judge who heard the motion, is still appealable. It is an order made upon a summary application after judgment, and affects a substantial right.⁹¹ The Code makes the granting or refusal of certain orders discretionary; but it is not to be implied from this that it is the discretion alone of a single judge who makes the order, nor that it affects the jurisdiction of the several branches of the Supreme Court. A party dissatisfied with the exercise of the discretion of a judge at Special Term, has a right also to the exercise of the discretion of the Appellate Court. Where an order relates to a mere matter of form, it may be that the court on appeal has no authority to review the discretion of the Special Term in granting or denying the order. But in other cases it has the right to review a discretionary order.⁹² The Appellate Division may however refuse to disturb the exercise of such discretion except upon condition that the moving party pay the costs and expenses of the sale and execute an agreement to make a substantially higher bid.⁹³

The decisions establish that orders for a resale, made upon grounds that are discretionary, that is, where there is no irregularity, will not be reviewed by the Court of Appeals; ⁹⁴ but that orders where they refuse resales and involve matters of legal right based upon fixed legal principles, are appealable to that court.⁹⁵

⁹⁰ Raynor v. Selmes, 52 N. Y. 579.

⁹¹ Code of Civ. Pro. § 349.

⁹² People v. New York Central Railroad Co., 29 N. Y. 418; Matter of Duff, 41 How. Pr. 350; 10 Abb. (N. S.) 416; Dollard v. Taylor, 1 J. & S. 496; Central National Bank of N. Y. v. Clark, 2 J. & S. 487.

⁹³ German-American Bank v. Dorthy, 39 App. Div. 166; 57 N. Y. Supp. 172.

⁹⁴ Crocker v. Gollner, 135 N. Y. 662; 32 N. E. 114; Young v. Bloomer, 22 How. Pr. 383; Hazleton v. Wakeman, 3 How. Pr. 357; Dows v. Cong-

don, 28 N. Y. 122; McReynolds v. Munns, 2 Keyes, 214; Wakeman v. Price, 3 N. Y. (3 Comst.) 334; The Buffalo Savings Bank v. Newton, 23 N. Y. 160; Hale v. Clauson, 60 N. Y. 339; Goodell v. Harrington, 76 N. Y. 547; Fisher v. Hersey, 78 N. Y. 387; Peck v. N. Y. & N. J. R. R. Co., 85 N. Y. 246. See Knickerbocker Trust Co. v. Oneonta, C. & R. S. Railway Co., 197 N. Y. 391; 90 N. E. 1111.

⁹⁵ Howell v. Mills, 53 N. Y. 322; King v. Platt, 2 Abb. Ct. App. Dec. 527; Fisher v. Hersey, 78 N. Y. 387.

CHAPTER XXIX.

RIGHTS AND OBLIGATIONS OF THE PURCHASER AT THE SALE UNDER THE JUDGMENT OF FORECLOSURE.

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WHO MAY PURCHASE.

§ 1044. **Parties to the action.**—By the 61st Court Rule it is provided that, unless otherwise specially ordered by the court, every judgment for the sale of mortgaged premises shall direct that the plaintiff or any other party may become a purchaser on such sale. This has always been the practice in this State, and where everything is fair and every bidder unshackled, the mortgagee may purchase and is entitled to protection the same as third persons.¹

§ 1045. **Officer making the sale.**—It is also enacted in section 1679 of the Code that a commissioner or other officer making a sale under a judgment or a guardian of an infant party to the

¹ Brown v. Frost, 10 Paige, 243; Mott v. Walkley, 3 Edw. 590.

action, shall not, nor shall any person for his benefit, directly or indirectly, purchase or be interested in the purchase of any of the property sold; except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit of his ward. The violation of this section is a misdemeanor, and a purchase made contrary to this section is void. This provision of the Code is held to apply only to guardians *ad litem* and not to guardians in socage.² The principle that will prevent an agent to sell from becoming a purchaser, would render a purchase by the officer making the sale, void, even though made in the name of a third person,³ and a sale to a guardian *ad litem*, though he bought for a third person, would be void,⁴ although a sale to either a guardian *ad litem* or in socage is generally spoken of as voidable only,⁵ and as inuring to the benefit of the minors at their election.⁶

§ 1046. **Purchases by trustees.**—A general guardian of a minor heir to mortgaged premises will acquire no title by purchasing them at a foreclosure sale, except such as would be necessary to protect him for his advances.⁷ And a cashier of a bank, bound to pay off a mortgage, cannot purchase for himself, and thus render the bank liable to indemnify such person for the loss of his property.⁸

In *Fulton v. Whitney* (66 N. Y. 548, aff'g s. c. 5 Hun, 16), a mortgage was bequeathed to two persons in trust to pay the testator's debts, and to apply the surplus to the payment of certain legacies. Included in the debts was a liability for deficiency upon another mortgage, the security for which ought to have been nearly sufficient, if the property had been sold at a fair price. The trustees and their partner purchased at the foreclosure sale for a price so low that the whole of the mortgage in their hands was consumed in paying the judgment for deficiency, and one of the legatees, who was an infant, thereupon brought an action against them to open the sale. It was held by the Court of Appeals, that neither the trustees nor their partner were entitled to purchase at

² *Boyer v. East*, 161 N. Y. 580; 56 N. E. 114.

³ *Howesey v. Helms*, 20 Gratt. (Va.) 1.

⁴ *Lefevre v. Laraway*, 22 Barb. 167.

⁵ *Dugan v. Sharkey*, 89 App. Div. 161; 85 N. Y. Supp. 778; *Cahill v.*

Seitz, 93 App. Div. 105; 86 N. Y. Supp. 1009.

⁶ *Synod of the Reformed Church v. O'Brien*, 13 Misc. R. 729; 35 N. Y. Supp. 209.

⁷ *Low v. Purdy*, 2 Lans. 422.

⁸ See also note on this case in *Albany Law Journal*, vol. 14, p. 271.

the sale, and that the trustees were not protected by a provision in the judgment allowing any of the parties to the action to become purchasers, nor by an order of the court confirming the sale, nor by a decree of the surrogate settling their accounts as executors.⁹

In a later case, however, it is decided that the court may either authorize or confirm a purchase made by a trustee for his own use and benefit. Though it seems that in the absence of such authorization or confirmation, the purchase by the trustee will be held to be for the benefit of the *cestui quie trust*.¹⁰ A similar question arose in *Van Epps v. Van Epps* (9 Paige, 237), where a person who held a junior mortgage as a trustee for others, was held to be incapacitated from purchasing the mortgaged premises under a foreclosure of the prior incumbrance for his own benefit, to the prejudice of the *cestuis que trust*. The same principle was also asserted in *Bennett v. Austin* (81 N. Y. 308). But in a rather recent case decided by the Appellate Division it is held that where a person holds a mortgage in his name for the benefit of himself and co-mortgagees, he may purchase the property to protect his own interest on the foreclosure of a prior mortgage, and that in the absence of an agreement or conduct misleading the other mortgagees to their prejudice he will not be regarded as holding the property in trust for them.¹¹ A wife of such a trustee may purchase the premises at a foreclosure of the prior mortgage to acquire a good title thereto.¹²

Where an agent having control of the property of his principal, with power to rent and sell, becomes the purchaser at a sale under a mortgage, his purchase is not void, but voidable merely at the option of his principal seasonably expressed; and when the principal seeks to set aside the sale, he will be required to do equity.¹³ And a purchase by a trustee is also voidable and not absolutely void, and may be confirmed not only by the express act of the *cestui que trust* but also by acquiescence and lapse of time.^{13a}

⁹ *Torrey v. Bank of Orleans*, 9 Paige, 650.

¹⁰ *Corbin v. Baker*, 167 N. Y. 128; 60 N. E. 332.

¹¹ *Rodger v. Bowie*, 134 App. Div. 596.

¹² *Potter v. Sachs*, 45 App. Div. 454; 61 N. Y. Supp. 426.

¹³ *Adams v. Sayre*, 76 Ala. 509; *Dozier v. Mitchell*, 65 Ala. 511; *Downs v. Hopkins*, 65 Ala. 508; *Corner v. Sheehan*, 74 Ala. 452.

^{13a} *Kahn v. Chapin*, 152 N. Y. 305; 46 N. E. 489. See *Smith v. Howlett*, 29 App. Div. 182; 51 N. Y. Supp. 910.

Similarly a purchase by an assignee for creditors is voidable only.¹⁴

A person purchasing jointly with a trustee stands in the same position as the trustee.¹⁵

A purchaser who becomes such under an agreement with the mortgagor, and who derives any advantage under such an agreement, either by restraining the mortgagor or his friends from bidding or in any other way, becomes a trustee for the mortgagor.¹⁶

A person named as trustee in a mortgage or deed of trust for the persons whose claims are intended to be secured, cannot purchase the property for his own benefit for less than the amount due to his *cestuis que trust* and thereby cast the loss upon them. If he does so purchase, he holds the title as he held the mortgage, for the benefit of his *cestuis que trust*.¹⁷ He is not however protected by the provision in the decree of foreclosure that any party to the action may become a purchaser at the sale;¹⁸ nor will an order of confirmation entered in the foreclosure suit bar the rights of the *cestuis que trust*.¹⁹ A person acting for such trustee at the sale, or procuring the position of purchaser through him, will be chargeable with notice of his trust duties, and will acquire no higher rights than the trustee would.²⁰ Such trustee may convey the land to a *bona fide* purchaser, holding himself liable for the proceeds; but he cannot retain the land for his own use and remit to the beneficiaries the proceeds of the sale in foreclosure.

It is both the right and the duty of an administrator who forecloses a bond and mortgage belonging to the estate to bid in the premises on the sale in order to save the estate from loss. Whether he takes the title in his own name or in his representative capacity, he holds it for the benefit of the fund, and deeds executed by him

¹⁴ *Smith v. Hamilton*, 43 App. Div. 17; 59 N. Y. Supp. 521. See *Preston v. Fitch*, 137 N. Y. 41; 33 N. E. 77 where the assignee who purchased the property was held to take it with a burden impressed upon it in favor of the estate of the deceased partner of the assignor.

¹⁵ *Cumberland Co. v. Sherman*, 30 Barb. 553; *Fulton v. Whitney*, 66 N. Y. 548; *Cumberland Coal Co. v. Hoffman*, 16 Md. 456.

¹⁶ *Ryan v. Dox*, 34 N. Y. 307.

Compare *Mackall v. Olcott*, 93 App. Div. 282; 87 N. Y. Supp. 757, *aff'd* 183 N. Y. 580; 76 N. E. 1100.

¹⁷ *People v. Merchants' Bank*, 35 Hun, 97; *Van Epps v. Van Epps*, 9 Paige, 241.

¹⁸ *Fulton v. Whitney*, 66 N. Y. 556.

¹⁹ *Terwilliger v. Brown*, 44 N. Y. 237; *Colburn v. Morton*, 3 Keyes, 305; *Conger v. Ring*, 11 Barb. 356.

²⁰ *People v. Merchants' Bank*, 35 Hun, 97.

in both capacities are sufficient to vest the title in a purchaser from him.²¹ The fact, however, that a person is an administrator does not prevent him from foreclosing a mortgage on real estate of his intestate, held by him at the time of the latter's death. He may also purchase the property at the sale and hold it in his own right.²²

§ 1047. Purchases by foreign corporations.—It is enacted that, "Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or, upon any judgment or decree for debts due it, or, upon any settlement to secure debts, any real property within this State covered by or subject to such mortgage, judgment, decree or settlement, and may take by devise any real property situated within this State and hold the same for not exceeding five years from the date of such purchase, or from the time when the right to the possession thereof vests in such devisee, and convey it by deed or otherwise in the same manner as a domestic corporation."²³

§ 1048. Employment of puffers.—The principle upon which the employment of puffers by the person for whom a sale at auction is made, is disallowed, as a fraud upon fair purchasers, is that the persons who thus bid are not in fact real bidders, but are the mere instruments of the vendor to deceive the other bidders. But this principle does not apply to a master's sale under a decree, where the persons bidding, either for themselves, or as the agents of another, are bound to take the property either for themselves or their principal. Any person who is a real bidder at a judicial sale has a right to bid in person or by his agent duly authorized. And there is no principle which renders it necessary that a person bidding at an auction as the agent of another, should disclose to other bidders the name of the person for whom he is bidding, unless the

²¹ *Valentine v. Belden*, 20 Hun, 537.

Where the personal representative buys in the premises, they take on the character of the mortgage indebtedness and are as personalty in his hands, which he may dispose of and for which he is liable to account as such. *Haberman v. Baker*, 128 N. Y. 253; 28 N. E. 370.

²² *Matter of Monroe*, 142 N. Y. 484; 37 N. E. 517. See *matter of Gilbert*, 104 N. Y. 200; 10 N. E. 148; 5 St. Rep. 673.

²³ *General Corp. Law*, § 21. For purchases by moneyed corporations, see *ante*, §§ 132-138. Same rule declared in *Indiana* independent of any statute. *Elston v. Piggott*, 94 Ind. 14.

person for whom he acts is the vendor who is professedly selling the property instead of buying it.²⁴

§ 1049. **Agreements not to bid.**—The general rule is that agreements which, in their necessary operation upon the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void.²⁵ But there are cases holding that the fact that an agreement has the effect to prevent competition at a public sale, does not necessarily render the agreement void; it depends on the intent. Thus in *Phippin v. Stickney* (3 Metc. 384) it was held that an agreement by two or more persons that one of them only will bid at an auction of property and will become the purchaser for the benefit of them all, is illegal if it be made for the purpose of preventing competition at the bidding, and depreciating the price of the property below the fair market value, but that it is valid if the purpose of the agreement be to enable each of the parties to become a purchaser, when he desires a part of the property offered for sale, or if the agreement be for any other honest and reasonable purpose. That case has been approved and followed in this State;²⁶ and it has been held that the rule forbidding a combination between persons having no prior interest in the property to suppress bidding at a judicial sale for speculative purposes, will not apply to an arrangement between the parties interested in the property by which one is to bid in the interest of all. The mere fact that an arrangement fairly entered into, with honest motives, for the preservation of existing rights and property, may incidentally restrict competition at a public or judicial sale, does not render the arrangement illegal. The question of intent, at all events, is one for the jury, upon the whole facts as they shall appear on the trial.²⁷ An agreement by which one party agrees not to attend the sale or bid and the other agrees to

²⁴ Per Chancellor WALWORTH, in *The National Fire Ins. Co. v. Loomis*, 11 Paige, 431.

²⁵ *Atcheson v. Mallon*, 43 N. Y. 147; *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Meech v. Bennett, Hill and Denio*,

191; *Brackett v. Wyman*, 48 N. Y. 667.

²⁶ *Marsh v. Russell*, 66 N. Y. 288; *Marie v. Garrison*, 83 N. Y. 14.

²⁷ *Hopkins v. Ensign*, 122 N. Y. 144; 25 N. E. 306; *Marie v. Garrison*, 84 N. Y. 14, 28; *Myers v. Doran*, 34 Hun, 115; *Delisi v. Ficarrota*, 76 Misc. R. 488.

purchase the premises and to convey to the former will be enforced.²⁸

The violation of an implied agreement not to bid may also, though no trust relation is established, create a liability for the breach.²⁹

CONTRACT OF THE PURCHASER AND ENFORCING ITS PERFORMANCE

§ 1050. The memorandum signed by the purchaser is only a *quasi* contract; it is in reality a submission to the jurisdiction of the court in a foreclosure suit as a purchaser under the judgment. It is easy to see that it lacks the most essential elements of a contract, not only parties, but mutuality and consideration. It contains, or is intended to contain, an express consent to the exercise of the powers which courts of equity assert over purchasers, and it is doubtful if it adds anything to the jurisdiction or authority of the court in this particular. There can certainly be no suit maintained upon it as an express stipulation with any person whatever. The rights and liabilities of the purchaser do not grow out of a contract, but arise from the proceeding and submission; and as the referee makes no contract, the provisions of the statute of frauds, requiring contracts for the sale of lands to be in writing and subscribed by the party by whom the sale is to be made, is not applicable.³⁰ It certainly is sufficient for the referee to sign the memorandum of the sale, and it is not necessary that the purchaser should sign it.³¹ But where a purchaser signs the terms of sale with his initial and gives his check for the preliminary payment to bind the bid, he may be compelled to complete the purchase as by such act he adopts the bid as his own, even though he made the bid for another whose name had the same initial.³²

§ 1051. Remedy against purchaser.—It is a familiar principle that any one who interferes *pendente lite* with the subject-matter of a suit in equity, submits himself to the jurisdiction of the

²⁸ Congregation Kehal Adath v. Universal V. & C. Co., 134 App. Div. 368; 119 N. Y. Supp. 72. See Schmaltz v. Weed, 27 App. Div. 309; 50 N. Y. Supp. 168.

²⁹ Patterson v. Meyerhofer, 204 N. Y. 96; 97 N. E. 472.

³⁰ Willets v. Van Alst, 26 How. Pr. 325.

³¹ Bicknell v. Byrnes, 23 How. Pr. 486.

³² State Bank v. Wilchinsky, 128 App. Div. 485; 112 N. Y. Supp. 1002.

court, to be exercised by petition or motion in the original suit, and that he acquires no right in that manner which may not be modified, controlled, or directed, without any new proceeding directly against him; and this doctrine applies with full force to the case of a purchaser under a decree, and to all who claim interests under him.³³ The remedy against the purchaser must be had in the action under which the sale was made.³⁴ If the purchaser is responsible and able to complete his purchase, he may be compelled to do so by attachment, on motion in the action in which the sale was made; and this is the proper course where he is shown to be in collusion with the mortgagor for the purpose of frustrating the sale, for, as it has been said, he will not be permitted to baffle the court, and sport with its decrees.³⁵

But the court is not restricted to an order compelling him to complete his purchase upon receiving a deed when for any reason the delivery of such deed is inequitable or impossible.³⁶ The court may order that the property be resold and the purchaser charged with the loss.^{36a}

Where a purchaser improperly fails to take title and complete his purchase, and taxes are imposed subsequent to the first sale, and before the second sale, he will be liable for the amount of such taxes, under the clause in the terms of sale to the effect that

33 *Stokes v. Hoffman House of New York*, 167 N. Y. 554; 60 N. E. 667; *Proctor v. Farnham*, 5 Paige, 614; *Requa v. Rea*, 2 Paige, 341.

34 *State Bank v. Wilchinsky*, 128 App. Div. 485; 112 N. Y. Supp. 1002.

35 *Brasher v. Cortlandt*, 2 Johns. Ch. 505; *Requa v. Rea*, 2 Paige, 339; *Graham v. Bleakie*, 2 Daly, 55; *Cazet v. Hubbell*, 36 N. Y. 677; *Goodwin v. Simonson*, 74 N. Y. 133-136; *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Paine v. Smith*, 2 Duer, 293; *Miller v. Collyer*, 36 Barb. 250; *Proctor v. Farnham*, 5 Paige, 614; *Knight v. Moloney*, 4 Hun, 33, modified 2 N. Y. W. Dig. 40. See also *Anderson v. Foulke*, 2 Har. and Gill (Md.) 346; *Richardson v. Jones*, 3 Gill and Johns. (Md.) 163; *Gordon v. Saunders*, 2 McCord (S. C.) Ch. 151; *Clarkson v. Reed*, 15 Gratt.

(Va.) 288; *Wood v. Mann*, 3 Sumner, 318-326; *Lansdown v. Ederton*, 14 Vesey, 512; *Saville v. Saville*, 1 Peere, Wm., 745.

The court may allow affidavits by either party and may determine the question without order of reference. *Wanser v. De Nyse*, 188 N. Y. 378; 80 N. E. 1088.

36 *State Bank v. Wilchinsky*, 128 App. Div. 485; 112 N. Y. Supp. 1002.

36a *Nesbit v. Knowlton Hall Co.*, 45 Misc. R. 510; 92 N. Y. Supp. 761.

An order charging the purchaser with the difference between his bid and the price secured at the resale should be entered as a judgment in the same manner as an order for a deficiency and should thereafter be enforced by execution. *Leslie v. Saratoga Brewing Co.*, 33 Misc. R. 118; 67 N. Y. Supp. 222.

the purchaser will be "liable for any deficiency there may be between the sum for which said premises may be struck down upon the sale, and that for which they may be purchased on the resale, and also for any costs or expenses occurring on such resale."³⁷ Interest may also be charged against a purchaser where the agreement to extend the time for closing so provides.³⁸ The terms of the sale may be such as to permit, in case of a default by the purchaser, of a sale without application to the court and for a liability on the part of the defaulting purchaser for any deficiency on such resale. And such liability arises although the second sale was made after readvertising the property and in pursuance of an *ex parte* order of which fact the purchaser had actual though no former notice.^{38a}

An announcement by the referee, after the property has been struck off, that if the purchaser does not comply with the terms of the sale, the property will be resold at his expense, does not discharge the purchaser from his bid;³⁹ and he may either be compelled to complete by an attachment, or a resale may be ordered, in which case he will be liable for the deficiency.⁴⁰

§ 1052. **Rights of purchaser.**—If the sale be made by the referee in a manner not authorized by the judgment, the purchaser will not on that account be compelled to pay any greater sum than the amount of his bid.⁴¹ So, too, if the purchaser contracted for a sale on time, he will not be compelled to pay cash.⁴² In such a case the proper remedy for the party who is aggrieved by the conduct of the referee in making the sale, is to move for an order vacating the sale and ordering a resale.⁴³

The purchaser may assign his bid, and the court, upon the application of the assignee, will direct the execution of a conveyance immediately to him. If there is more than one assignee, the court will, upon motion in the action in which the sale is made, decide between them.⁴⁴ In one case, in which it is said "there were peculiar circumstances," the court refused to

³⁷ *Ruhe v. Law*, 8 Hun, 251.

³⁸ *Grabfelder v. Tallman*, 36 Misc. R. 247; 73 N. Y. Supp. 282.

^{38a} *Egan v. Buellesbach*, 116 App. Div. 306; 101 N. Y. Supp. 476.

³⁹ *The National Fire Ins. Co. v. Loomis*, 11 Paige, 431.

⁴⁰ *Graham v. Bleakie*, 2 Daly, 55.

⁴¹ *Hotchkiss v. Clifton Air Cure*,

⁴ *Keyes*, 170.

⁴² *Rhodes v. Dutcher*, 6 Hun, 453.

⁴³ *Hotchkiss v. Clifton Air Cure*,
⁴ *Keyes*, 170.

⁴⁴ *Proctor v. Farnham*, 5 Paige, 614.

sanction a conveyance to the complainant as assignee of a purchaser who failed to complete.⁴⁵

An appeal from an order refusing a resale will not of itself prevent the purchaser from completing his purchase, and the appellant is not entitled to an order staying the purchaser from completing his purchase and taking possession of the property, without giving security for the payment of the rents and profits of the premises in the meantime, and that no waste shall be committed.⁴⁶

The court in its discretion may relieve a purchaser from his bid where it subsequently appears that a person not made a party to the suit claims to be the owner of the equity of redemption and has moved for an order to show cause why the sale should not be vacated and set aside. This is true although the affidavits do not show a positive defect in title, as the purchaser should not be burdened with a threatened lawsuit.⁴⁷

Where the court has granted a purchaser's motions and relieved him from his bid, such action enures to the benefit of the junior mortgagees, and if it is to their interest to have a resale, as where the property has increased in value, neither the purchaser nor his assignee is entitled to an order vacating the prior order and directing a conveyance.⁴⁸

Where the title to lands situated in another state is held by a party to a foreclosure action in this State, the court of New York, though the foreclosure action and sale will not pass title to such lands, may require such party to convey them.⁴⁹

WHAT KIND OF A TITLE THE PURCHASER MUST TAKE.

§ 1053. Right to possession.—For the purpose of obtaining a fair price for the premises on judicial sales, it is important that purchasers should know that if they pay a fair price for the property, and it is sold without reserve, they will be protected by the court, and will not be required to take an incumbered or worthless title. If there is any cloud upon the title, or incum-

⁴⁵ *Thompson v. Dimond*, 3 Edw. 298.

⁴⁶ *American Ins. Co. v. Oakley*, 9 Paige, 496.

⁴⁷ *Koechl v. Gale Development*, 149 App. Div. 239.

⁴⁸ *Ely v. Mathews*, 128 App. Div. 513; 112 N. Y. Supp. 788.

⁴⁹ *Harrison v. Union Trust Co.*, 144 N. Y. 326; 39 N. E. 353.

brance upon the land, or difficulty in obtaining possession, the property should be sold at the risk of the purchaser in that respect; and in the amount bid there would then be a reasonable allowance for such risk. Even though a valid legal title should pass by the sale, the court will not compel the purchaser to take if the person in possession is not a party, and claims adversely to the parties to the suit;⁵⁰ or if he is a tenant of a party to the suit and is not willing to surrender possession.⁵¹ The tenants in such a case, could not be forcibly dispossessed by any process which could be issued to enforce the judgment.⁵² What the purchaser has a right to suppose he is to receive by means of the purchase, is not merely a title to the premises sold, but beyond that, the power of securing immediate possession. If the latter does not exist, even though he could obtain the former, he will be justified in refusing to complete the purchase.⁵³

§ 1054. **Interests not bound by judgment.**—Where a sale is made under a decree or order of the court, and the purchaser is not informed at the time of sale that he is to take the risk of any defect in the title, the court will not compel him to complete his purchase unless it can assure him that he will have not only a legal title, such as will avail him in a court of law to defend the possession if necessary, but also a title that will not be liable to be set aside, or even seriously litigated in a court of equity. The rule appears to be not to compel the acceptance of a title against which doubts or suspicions exist of such a character as that the court cannot conscientiously warrant the estate to him. It cannot do this where there is a lien upon the premises held by a person not a party to the action,⁵⁴ or where a publication against an absent defendant is defective,⁵⁵ even where the interest not bound by the judgment is of small value.⁵⁶

50 *McGown v. Wilkins*, 1 Paige, 120; *Rogers v. McLean*, 31 Barb. 304.

51 *Hirsch v. Livingston*, 3 Hun, 9; 5 N. Y. Sup. (T. & C.) 263.

52 *Fuller v. Van Geesen*, 4 Hill, 171.

53 *Hirsch v. Livingston*, 3 Hun, 9; *Morris v. Mowatt*, 2 Paige, 586, 590; *Veeder v. Fonda*, 3 Paige, 94; *Seaman v. Hicks*, 8 Paige, 655.

54 *Per McCoun*, V. C., in *Coster v. Clarke*, 3 Edw. 428; *Dodd v. Neil-*

son, 90 N. Y. 243; 1 Sugd. Vend. 339; *Morris v. Mowatt*, 2 Paige, 590; *Jackson v. Edwards*, 22 Wend. 509, 510; *Blakely v. Calder*, 13 How. Pr. 476; *Althause v. Radde*, 3 Bosw. 410.

55 *Bixby v. Smith*, 5 N. Y. Sup. (T. & C.) 279; 3 Hun, 60; *Piser v. Lockwood*, 30 Hun, 6.

56 *Weeks v. Tomes*, 16 Hun, 349, aff'd 76 N. Y. 601; *Smith v. Wells*, 69 N. Y. 600; *Verdin v. Slocum*, 71 N. Y. 345.

A purchaser was relieved in a case where an infant defendant was not personally served with process, though a guardian *ad litem* had been appointed for him.⁵⁷

The title to funds paid into court prior to the foreclosure as an award in condemnation proceedings of a part of the mortgaged premises does not pass to the purchaser at the foreclosure sale; though the right of the mortgagees may be regarded as in the nature of an equitable lien thereon in case of any deficiency.⁵⁸

The party who holds the title at the time the land is actually appropriated is generally regarded as entitled to the award.⁵⁹

§ 1055. Failure of title to part of property.—A purchaser cannot be obliged to accept property to an important part of which he can obtain no title whatsoever. A purchaser was relieved from his bid in a case where the terms of sale stated that it would be made "subject to a lease of the present upland of said property to expire May 1, 1884." At the time of the sale a brick building, worth about \$5,000, was standing upon the upland, which, by the terms of his lease, the tenant was entitled to remove, and no notice of this right was given at the time of sale.⁶⁰

§ 1056. Record title.—A defect in the record title may, under certain circumstances, furnish a defense to the purchaser. But there is no inflexible rule that the purchaser must be furnished with a perfect record or paper title.⁶¹ Before he can successfully resist performance of his contract on the ground of defective

⁵⁷ *Ingersoll v. Mangam*, 24 Hun, 202. Compare *Sproule v. Davies*, 69 App. Div. 502; 75 N. Y. Supp. 229, *aff'd* 171 N. Y. 277; 63 N. E. 1106.

⁵⁸ *Matter of City of Rochester*, 136 N. Y. 83; 32 N. E. 702. See also *Magee v. City of Brooklyn*, 144 N. Y. 265; 39 N. E. 87; *Matter of Mayor of City of New York (Morris ave.)*, 118 App. Div. 117; 103 N. Y. Supp. 180. Compare *Burkard v. City of Brooklyn*, 6 Misc. R. 431; 26 N. Y. Supp. 1112.

See § 160.

⁵⁹ *Magee v. City of Brooklyn*, 144 N. Y. 265; 39 N. E. 87. See *Gates v. De La Mare*, 142 N. Y. 307; 37 N. E. 121; *Matter of Grade Crossing Commissioners*, 64 App. Div. 71; 71

N. Y. Supp. 674, *aff'd* 169 N. Y. 605; 62 N. E. 1096.

⁶⁰ *Beckenbaugh v. Nally*, 32 Hun, 160.

⁶¹ *Fleming v. Burnham*, 100 N. Y. 1; 2 N. E. 905, *rev'g* 36 Hun, 456; *Hellreigel v. Manning*, 97 N. Y. 56.

A vendee of lands contracting to assume existing mortgages is chargeable with notice of their terms as shown by the record. But as to mortgages to be executed by him as a part of the consideration, the contract is controlling, and the vendee should not be compelled to execute a mortgage containing harsh or unusual terms. *Feist v. Block*, 115 App. Div. 211; 100 N. Y. Supp. 211.

title, there must be at least a reasonable doubt as to the title; such as affects its value and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence.⁶²

§ 1057. **What is a marketable title.**—The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title.⁶³ The court cannot make it such by passing upon an objection depending upon a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences. There must, doubtless, be a real question and a real doubt; but this situation existing, the purchaser should be discharged.⁶⁴

A court of equity will not compel a purchaser to accept a title which is so doubtful that it may expose him to litigation, though the court may believe it to be good. If, therefore, there be a reasonable chance that some third person may raise a question

62 *Hellreigel v. Manning*, 97 N. Y. 56, 60; *Seymour v. De Lancey*, Hopk. 426; *Miller v. Macomb*, 26 Wend. 239; *Fagen v. Davison*, 2 Duer, 153; *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234; *Murray v. Harway*, 56 N. Y. 337; *Shriver v. Shriver*, 86 N. Y. 575.

63 *Rice v. Barrett*, 102 N. Y. 161; 6 N. E. 898; *People v. Board of Stock Brokers*, 92 N. Y. 98; *Jordan v. Poillon*, 77 N. Y. 518.

A vendee of land under a contract for the purchase thereof cannot be compelled to complete his purchase where the land is subject to a mortgage containing: 1. A clause assigning the rents on the breach of

any covenant in the bond. 2. A clause making the mortgage due on the actual or threatened demolition of any building on the premises. 3. A clause requiring the owner to certify to the mortgagee the amount due on the mortgage within a specified time after notice, either personally or by mail. These clauses, particularly No. 3, are so unusual and severe that the vendor is not in a position to give a good and marketable title to the premises. *Elterman v. Hyman*, 192 N. Y. 113; 84 N. E. 937.

64 Per ANDREWS, J., in *Fleming v. Burnham*, 100 N. Y. 1, 10; 2 N. E. 905.

against the owner of the estate after the completion of the contract, the court will not compel him to accept it.⁶⁵

A mere possibility that the purchaser may be disturbed on account of some alleged defect of title, is not sufficient to justify him in refusing to accept and receive the title.⁶⁶

To subject the case to the operation of this principle, there must be some rational doubt concerning the validity of the title; and where a court of justice upon the evidence would be warranted in directing a verdict in favor of the title, then no such doubt can be entertained.⁶⁷ The fact that a mortgage on land is payable in gold is not an objection to the title.⁶⁸

§ 1058. Illustrations.—In *Jordan v. Poillon* (77 N. Y. 518), land had been sold under a judgment in partition and the purchaser objected to taking title, alleging that the land was subject to the lien of certain legacies, and the legatees were not parties to the action. The court declined to express an opinion in regard to the validity of these legacies, and sustained the purchaser in his refusal. Judge MILLER remarked as follows: “A purchaser on a partition or a foreclosure sale has a right to expect that he will receive a good title, and the law presumes that he bids with that object in view. He should not be left, upon receiving a deed, to the uncertainty of a doubtful title, or the hazard of a contest with other parties, which may seriously affect the value

65 *Wanser v. De Hyse*, 188 N. Y. 378; 80 N. E. 1088; *Heller v. Cohen*, 154 N. Y. 299; 48 N. E. 527; *Cambrelling v. Purton*, 125 N. Y. 610; 26 N. E. 907; *Toole v. Toole*, 112 N. Y. 333; 19 N. E. 682; *Shriver v. Shriver*, 86 N. Y. 575; *Builders' Mortgage Co. v. Barkowitz*, 134 App. Div. 136; 118 N. Y. Supp. 804; *Post v. Bernheimer*, 31 Hun, 247; *Scheu v. Lehning*, 31 Hun, 183; *Lockman v. Reilly*, 29 Hun, 434; *Stephens v. Flammer*, 40 Misc. R. 278; 81 N. Y. Supp. 1064. See also *Richmond v. Gray*, 3 Allen (Mass.) 25-27; *Christian v. Cabelt*, 22 Grat. (Va.) 82, 103.

66 *Cambrelling v. Purton*, 125 N. Y. 610; 26 N. E. 907; *Shriver v. Shriver*, 86 N. Y. 575, 584; *Carroll*

v. McKaharay, 55 App. Div. 582; 55 N. Y. Supp. 113. See also *Ferry v. Sampson*, 112 N. Y. 415; 20 N. E. 387; *Kahn v. Chapin*, 152 N. Y. 305; 46 N. E. 489.

67 *Union Trust Co. v. Driggs*, 62 App. Div. 213; 70 N. Y. Supp. 947; *Post v. Bernheimer*, 31 Hun, 247, 253. See also *Roarty v. McDermott*, 146 N. Y. 296; 41 N. E. 30; *Murphy v. Smith*, 61 App. Div. 574; 70 N. Y. Supp. 786, case of a claim for fixtures; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400.

68 *Blanck v. Sadlier*, 153 N. Y. 551; 47 N. E. 920, aff'g 5 App. Div. 81; 38 N. Y. Supp. 817, aff'g 16 Misc. R. 164; 38 N. Y. Supp. 834; *Hartigan v. Smith*, 19 App. Div. 173; 45 N. Y. Supp. 1012.

of the property if he desires to sell the same. It is easy to see how a claim of this kind might impair the value of the real estate sold, by casting a cloud over the title, or by subjecting the purchaser to the risks of a contest at law. From such a result he is entitled to protection, and the case should be very plain which would authorize a court to decide a question arising on a motion to compel a party to take a conveyance; and then it should be determined only with the consent of such purchaser."

Where, in the chain of title to real estate sold upon the foreclosure of a mortgage, there was a conveyance by one Martin as special guardian for certain infants to one Mather for \$8,000, and a simultaneous reconveyance from the latter to the former for \$100, and the infants were not parties to the foreclosure suit, it was held that the record of title showed upon its face that it was a doubtful one and open to litigation, and that the transaction between Martin and Mather, as shown by the conveyances, was presumptively fraudulent, and that the purchaser was entitled to be relieved from his bid. The court refused to compel the purchaser to assume the responsibility of being able himself to show in a possible action by the infants that, notwithstanding appearances, the special guardian acted in good faith, and paid an actual consideration for the land.⁶⁹

A defect in title rendering it unmarketable so as to relieve a purchaser may result where there has been a failure to implead necessary parties in the action; ⁷⁰ or where there are irregularities or defects in the proceedings upon which the title rests that require further or other action to cure them and so prevent a performance of the contract of sale by the vendors at the time fixed; ⁷¹ or where there is an encroachment upon the premises; ⁷²

69 *The People v. Globe Mutual Ins. Co.*, 20 W. Dig. 14. See *Smith v. Warringer*, 41 Misc. R. 94; 83 N. Y. Supp. 655, as to infants' rights not cut off by failure to comply with rule 60 of Rules of Practice of the Supreme Court. See in this connection *Franklin v. Diclemente*, 123 App. Div. 664; 108 N. Y. Supp. 123.

70 *Moir v. Flood*, 66 App. Div. 544; 73 N. Y. Supp. 364; *Reydel v. Reydel*, 10 Misc. R. 273; 31 N. Y. Supp. 1.

Contingent remaindermen not made parties. *New York Security & T. Co. v. Schoenberg*, 87 App. Div. 262; 84 N. Y. Supp. 359.

71 *Heller v. Cohen*, 154 N. Y. 299; 48 N. E. 527; *Toole v. Toole*, 112 N. Y. 333; 19 N. E. 682. As to delay in completing sale see § 1066, post; as to irregularities prior to judgment see § 1061 herein.

72 *Ely v. Mathews*, 58 Misc. R. 365; 110 N. Y. Supp. 1102.

or where there is a contingent remainder in unborn children.⁷³

§ 1059. **Title by adverse possession.**—A clear adverse possession for more than twenty years makes a title which a purchaser at a judicial sale may not refuse.⁷⁴ But when there are circumstances in the case which may prevent the possession from becoming adverse, as if there is a possibility of the title having escheated to the State, or having vested in infants, by reason of which the full period necessary to perfect the title in the persons claiming possession has not expired, or if any other facts exist which as to questions of fact open to diverse conclusions, the court will not compel him to accept and pay for the title.⁷⁵

Where a doubt arises as to the acquiring of a title by adverse possession which is of such a character as to justify an ordinarily prudent man in hesitating to accept title to the property or loan money thereon, an order to complete the purchase should be reversed and the case remitted to the Special Term to take further proofs and for a rehearing thereon.⁷⁶

If it appears that any person is making an adverse claim, or that there is any reason to suppose that such a claim may thereafter be made, the court may direct the testimony of the witnesses to be perpetuated.⁷⁷

§ 1060. **Defects which do not excuse purchaser.**—The court does not guarantee that none but good titles shall be sold under its decrees. At most, it excuses a purchaser from taking a title when he points out a defect.⁷⁸ A purchaser is bound to complete the purchase when the vendor shows a *prima facie* title, against which there are no reasonable grounds of suspicion;⁷⁹ but the court will not compel him to complete when there is a defect in the title which cannot be remedied, or there is a well-founded doubt as to its validity.⁸⁰

⁷³ Huber v. Case, 93 App. Div. 479; 87 N. Y. Supp. 663.

⁷⁴ Wanser v. De Nyse, 188 N. Y. 378; 80 N. E. 1088; Messinger v. Foster, 115 App. Div. 689; 101 N. Y. Supp. 387; Timmerman v. Cohn, 70 Misc. R. 327; 128 N. Y. Supp. 770; Seymour v. De Lancey, Hopk. Ch. 436; Grady v. Ward, 20 Barb. 543; FOLGER, Ch. J., in Shriver v. Shriver, 86 N. Y. 575, 581. See Katz

v. Kaiser, 154 N. Y. 294; 48 N. E. 532.

⁷⁵ Shriver v. Shriver, 86 N. Y. 575; Mott v. Mott, 68 N. Y. 246.

⁷⁶ Wanser v. De Nyse, 188 N. Y. 378; 80 N. E. 1088.

⁷⁷ In re Browning, 2 Paige, 64.

⁷⁸ Williamson v. Field, 2 Sandf. Ch. 533.

⁷⁹ In re Browning, 2 Paige, 64.

⁸⁰ Mason v. Scott, 50 App. Div.

The court, in giving a title to a purchaser, does not undertake to give a title which can, by no possibility, be defeated. It only assumes to give such a title as a purchaser at a private sale could not legally object to receive.⁸¹ The court neither gives nor requires a vendor to give to a purchaser a title against which there can be no possibility of a valid claim. The purchaser is permitted to object to the title only when there is some probability that some other person has a valid claim or subsisting lien upon the premises; and a mortgage which has not been recognized by the mortgagor, and upon which no claim has been made by the mortgagee for more than twenty years, is not a valid objection to a title.⁸²

If the defect pointed out by the purchaser is one which may equitably be cured by a discharge of a lien out of the purchase money, as in the case of taxes or assessments, this will be done,⁸³ and if the title can be made good by the execution of conveyance or releases, by parties who are willing to execute them, the purchaser cannot refuse to accept the title after the objections to it have been removed.⁸⁴ Neither can he be excused from taking title where the defect is not injurious to him, as where his own wife was not properly made a party to the action, he having been owner of the equity of redemption.⁸⁵

Nor is the title necessarily unmarketable on account of the existence of a *lis pendens*; ⁸⁶ nor by the fact that a quitclaim deed executed by two grantors was defective as to one of them without showing that such grantor had some title to the property; ⁸⁷ nor by a record of violations of the Tenement House Act in New York City, an unpaid judgment therefor in favor of

463; 64 N. Y. Supp. 68; Matter of Brennan, 21 App. Div. 236; 47 N. Y. Supp. 661; Graham v. Bleakie, 2 Daly, 55.

⁸¹ Spring v. Sandford, 7 Paige, 550; Fryer v. Rockefeller, 63 N. Y. 268.

⁸² Dunham v. Minard, 4 Paige, 441; Belmont v. O'Brien, 12 N. Y. (2 Kern.) 394; Paget v. Milcher, 42 App. Div. 76; 58 N. Y. Supp. 913.

⁸³ Ebert v. Hanneman, 69 Misc. R. 223; 125 N. Y. Supp. 237, aff'd 142 App. Div. 898; 126 N. Y. Supp.

1127; Lawrence v. Cornell, 4 Johns. Ch. 542.

⁸⁴ Grady v. Ward, 20 Barb. 543; Graham v. Bleakie, 2 Daly, 55.

⁸⁵ Knight v. Moloney, 4 Hun, 33.

⁸⁶ Baecht v. Hevesy, 115 App. Div. 509; 101 N. Y. Supp. 413, holding that the question whether title is marketable depends on the validity of the claim represented by the *lis pendens*, which matter will be considered by the court when the vendee refuses to complete his purchase.

⁸⁷ Platt v. Finck, 60 App. Div. 312; 70 N. Y. Supp. 74.

the city and the *lis pendens* filed in the action where a judgment of foreclosure extinguishes liens of the city for such violations.⁸⁸

§ 1061. **Irregularities prior to judgment.**—If all persons having any claim upon the property are made parties to the action, and if the court has jurisdiction, the purchaser will have to take the title, even though the court decided wrongly upon the merits. As no one but the parties to the action can, in such a case, call the purchaser's title in question, and as they are bound by the judgment, there can be no reason why he should not complete his bargain.⁸⁹

Nor does an error in the name of the owner in the summons and complaint where the defect was subsequently cured by amendment excuse a purchaser,⁹⁰ nor a mere clerical error in the *lis pendens*.⁹¹

If the purchaser was himself a party to the suit, he cannot raise a question as to the regularity of the decree on a proceeding to compel him to take title. If the decree be irregular, he should apply to the court to have it set aside on that ground.⁹²

Mental incapacity or incompetency of parties presents no interference with the enforcement of legal liabilities. Actions may be maintained against lunatics, and whether their insanity will constitute a defense depends on the circumstances of the case.⁹³ A judgment of foreclosure rendered upon the personal service of the summons and complaint on persons alleged to be insane, but against whom no proceedings have been instituted to inquire into their mental condition, is not erroneous or irregular,⁹⁴ and a purchaser will not be excused from taking title under such a judgment.⁹⁵

⁸⁸ People *ex rel.* Gordon v. Butler, 135 App. Div. 222; 120 N. Y. Supp. 302.

⁸⁹ Graham v. Bleakie, 2 Daly, 55; Blakely v. Calder, 15 N. Y. (1 Smith) 617; Gaskin v. Anderson, 7 Abb. N. S. 1; 55 Barb. 259; De Forest v. Farley, 62 N. Y. 628. See O'Connor v. Felix, 147 N. Y. 614; 42 N. E. 269; Lauder v. Meserole, 148 App. Div. 739; Lowenfelt v. Ditchett, 114 App. Div. 56.

⁹⁰ Stuyvesant v. Weil, 167 N. Y. 421; 60 N. E. 738.

⁹¹ Freedman v. Safran, 131 App. Div. 675; 116 N. Y. Supp. 113.

⁹² Concklin v. Hall, 2 Barb. Ch. 136. But see Hidden v. Godfrey, 92 App. Div. 373; 87 N. Y. Supp. 14.

⁹³ Sanford v. Sanford, 62 N. Y. 553; Mutual Life Ins. Co. v. Hunt, 14 Hun, 169; 79 N. Y. 541.

⁹⁴ Crippen v. Culver, 13 Barb. 428; Sternbergh v. Schoolcraft, 2 Barb. 153.

⁹⁵ Prentiss v. Cornell, 31 Hun, 167, *aff'd* 96 N. Y. 665.

§ 1062. **Defects mentioned at time of sale.**—A purchaser cannot be relieved because of defects of which he had full notice at the time he made his bid. The ground of the decisions is that it is for the interest of all concerned, that bidders may bid freely and to the full value of the premises, and that to do this they must feel assured that they may exact a good title. But if notice of defects is given at or before the sale, this reason does not operate, and those at the sale bid in fact, and in legal contemplation, for the lands with such title as can be given for them; and the successful bidder must then pay for just the title he had in his mind when he bought.⁹⁶

If the sale is made subject to a prior mortgage and to a pending action to foreclose it the purchaser is obliged to take the conveyance subject to such prior mortgage and pending action.⁹⁷

This is also true where a restriction upon the use of the mortgaged land is enforced by an instrument of record which is distinctly referred to in the notice of sale.⁹⁸

Where the terms of sale provide that all incumbrances will be allowed to the purchaser out of the purchase money on his producing vouchers therefor, the existence of incumbrances which he might thus pay off, is no reason for refusing to complete his purchase.⁹⁹

Where leasehold property is sold and the lease is referred to in the notice of sale, the purchaser is chargeable with knowledge of the contents thereof. He is supposed to have examined the lease and made his bid in view of its provisions; and he is also chargeable with knowledge of what was apparent and obvious upon the premises.¹

⁹⁶ *Fryer v. Rockefeller*, 63 N. Y. 268, aff'g 4 Hun, 800, but not sustaining the opinion of the court below; *Riggs v. Pursell*, 66 N. Y. 193.

⁹⁷ *State Bank v. Wilchinsky*, 128 App. Div. 485; 112 N. Y. Supp. 1002. See *Welche v. Schoenberg*, 45 Misc. R. 126; 91 N. Y. Supp. 880, as to purchaser being estopped from asserting the invalidity of the prior mortgage.

See § 992 as to terms of sale where title is encumbered by prior rights or liens.

⁹⁸ *Kingsland v. Fuller*, 157 N. Y. 507; 52 N. E. 562.

⁹⁹ *Lenihan v. Hamann*, 14 Abb. N. S. 274.

¹ *Riggs v. Pursell*, 66 N. Y. 193; *King v. Bardeau*, 6 Johns. Ch. 38; *Winne v. Reynolds*, 6 Paige, 407; *White v. Seaver*, 25 Barb. 235; *Tompkins v. Hyatt*, 28 N. Y. 347. See also *Craddock v. Thurley*, 3 A. K. Marsh (Ky.) 288; *Taylor v. Stibbert*, 2 Ves. 437; *Hall v. Smith*, 14 Ves. 426.

So a purchaser at a sale in an action to foreclose a mortgage on a lease is not to be relieved because of the pendency of an action to set aside the lease, if he knew of such pendency at the time of the sale.²

But where a purchaser had notice or knowledge of facts sufficient to put him on inquiry as to the invalidity of a mortgage it was held that he would not be compelled to complete his purchase even though all parties interested in the property had been made parties.^{2a}

§ 1063. **No allowance can be made for defects.**—Under contracts between parties for the sale and purchase of land where material deficiencies are discovered to exist, the purchaser may have, at his election, specific performance as to so much as there may be of the land with compensation by way of damages for the deficiency; and in some cases he may be compelled to take the title with such compensation.³ But these cases rest altogether upon the rights and obligations of contract between vendor and vendee of the lands and the liability that grows out of the breach of contract on the part of the seller to make the purchaser good in damages for any injury sustained by reason of such deficiencies. In judicial sales upon the foreclosure of mortgages, there is no such contract between vendor and purchaser to which the court may apply or enforce the equitable principles growing out of the breach of contract, and the consequent claims for damages to be adjusted between the parties. The court that has rendered the judgment and directed the sale of the mortgaged lands, enters into no contract with the purchaser at the sale for the breach of which damages may be enforced against the court. And the court will not compel the purchaser to take anything less than what was contemplated by his bid, and it will not speculate as to what deduction, if any, should be made in the price because of a defect in the title or of a deficiency in the amount of the property which the purchaser believed that he would obtain.⁴

² *Dunlop v. Mulry*, 85 App. Div. 498.

^{2a} *Boskowitz v. Held*, 18 Misc. R. 674; 43 N. Y. Supp. 818.

³ *King v. Knapp*, 59 N. Y. 466; *Paine v. Upton*, 87 N. Y. 327.

⁴ *Thompson v. Schmieder*, 38 Hun, 504. But see *King v. Bardeau*, 6 Johns. Ch. 38, where an allowance was made and purchaser was required to complete.

WHEN A PURCHASER WILL BE EXCUSED.

§ 1064. **Misled by terms of sale.**—As property to a vast extent is sold under the decrees and orders of the courts of equity, much of which property belongs to infants and others who are unable to protect their own rights, it has always been an object with those courts to encourage a fair competition at such sales. For this purpose it is necessary that purchasers should understand that no deception whatever will be permitted to be practiced upon them; that in a contract between them and the court, they will not be compelled to carry that contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of a contract against the purchaser, if the sale had been made by such individual or his agent. It is therefore a principle that the officer who sells the property shall not, in the description of the same, add any particular which may enhance the value of the property, or mislead the purchaser. If the statement of the supposed quantity of land is incorrect, and the land falls short of the quantity, the purchaser, having been actually deceived, will not be compelled to complete the purchase, especially if the person interested in the fund to be raised by the sale have knowledge of the mistake and fails to correct it.⁵ So, where purchasers were misled by a statement in the terms of sale, that all assessments which were liens would be paid out of the purchase money, and by the fact that a certain public improvement had been finished for three years, into the belief that such improvement would be paid for out of the purchase money, they were excused and released from their bids.⁶

And a failure to give notice in the terms of sale of restrictive covenants running with the land is held to be a sufficient ground for relieving the purchaser.⁷

§ 1065. **Description.**—As a general rule, an irregularity which does not render void the judgment under which the sale was had does not affect the marketability of the title under the sale. Under such circumstances the defect can be challenged only by

⁵ *Veeder v. Fonda*, 3 Paige, 94.

⁶ *Post v. Leet*, 8 Paige, 337.

⁷ *Conlen v. Rizer*, 109 App. Div. 537; 96 N. Y. Supp. 566; *Ray v.*

Adams, 28 Misc. R. 664; 59 N. Y. Supp. 1047, aff'd 44 App. Div. 173; 60 N. Y. Supp. 663.

the parties to the action. The purchaser will receive an indefeasible title, and the remedy of the party aggrieved will be confined to a disposition of the proceeds of sale. Yet, if such defect will render the judgment voidable at the election of the party aggrieved, a purchaser at a sale held under the judgment should not be forced to take title. Even if the defect be curable in the action itself, the plaintiff cannot cast upon the purchaser the burden of taking the necessary steps to make the cure.

So the court will not compel the purchaser to complete his purchase unless he can obtain, under the deed of the referee, such an interest, both in the land and in the buildings thereon, as he was authorized to suppose he was buying when the property was struck down to him on his bid. If the municipal corporation of the city in which the mortgaged premises are situated has a legal right to take any part of the property without compensating the owner for the buildings, this would be a defect which would excuse the purchaser.⁸

If the sale be fair and the title good, and the quantity of land exist, and the substance of the description be true, it is as much as ought to be exacted or required. Where two lots were sold together as one parcel, the master announced that there was a house upon one of the lots. The fact was that the house projected somewhat on to the other lot, thus making it inconvenient for the purchaser to make use of the vacant lot, but the court ordered him to complete his purchase, and directed that any diminution from the value caused by the projection, should be deducted from the price.⁹

In *Smyth v. McCool* (22 Hun, 595), a house, No. 679 Madison Avenue, New York City, was sold by a description by metes and bounds; the initial point was five inches wrong, and this was held sufficient to excuse the purchaser, although the northern and southern lines were through the center of party walls.¹⁰

But where by mistake of a newspaper employee the advertisement, though it correctly stated the boundary lines, contained a diagram which represented the lots as larger than they actually

⁸ *Seaman v. Hicks*, 8 Paige, 655.

⁹ *King v. Bardeau*, 6 Johns. Ch.

38. But see *Thompson v. Schmieder*, 38 Hun, 504, where it was held that no allowance could be made.

¹⁰ Citing *Higinbotham v. Stoddard*, 72 N. Y. 94. See also *German American Real Estate Co. v. Meyers*, 32 App. Div. 41; 52 N. Y. Supp. 449.

were it was held that the purchaser was not entitled to relief, it appearing that the property was correctly described in the notice of sale and that the diagram furnished to the newspaper by the plaintiff's attorney was correct.¹¹

§ 1066. **Delay in completing title.**—As the court will not give a purchaser at a judicial sale the benefit of his purchase, where he has neglected to comply with the terms of sale within a reasonable time, if a resale of the property is deemed more beneficial to the parties interested in the proceeds of sale; so neither will it compel him to take the title, where, by the fault of the parties thus interested, and without any captious objections to the title on his part, the completion of the sale has been delayed so long that he cannot have the benefit of his purchase, substantially, as if the sale had been completed and the title given at the time contemplated by the terms of sale.¹² A delay of three months in perfecting a title has been held to be a sufficient excuse to the purchaser for refusing to comply with the terms of the sale after the expiration of that time. The delay was said to be for too great a period to authorize the application of the principle that time is not always of the essence of a contract for the sale of lands.¹³

If any fraudulent practice has been used to deceive an intending purchaser and thereby induce him to bid more for the property than it is fairly worth, this will require a setting aside of the sale on the application of such purchaser. In *Fisher v. Hersey* (17 Hun, 370), a person employed by one of the parties interested in the result of a piece of property about to be sold under a judgment in partition, visited the plaintiffs and falsely represented that he desired to purchase the property for \$35,000, which was \$5,000 in excess of its real value. He afterward attended the sale with his employer, and by bidding, though without intending to purchase, induced the plaintiffs to bid \$32,500, at which sum it was knocked down to them. It was held that this was a fraud upon the plaintiffs, and that they were entitled to be released from their purchase and to have the property resold, and it was remarked by the court that the employment of a

¹¹ *Francis v. Watkins*, 72 App. Div. 15; 76 N. Y. Supp. 106, aff'd 171 N. Y. 682; 64 N. E. 1120.

¹² *Jackson v. Edwards*, 7 Paige, 386, aff'd 22 Wend. 498.

¹³ *Rice v. Barrett*, 99 N. Y. 403, rev'g 35 Hun, 366.

puffer for the purpose of taking advantage of the eagerness of an intending purchaser, and not merely as a defensive precaution against an undue sacrifice of the property, is a transaction that cannot be justified by a court of equity.¹⁴

§ 1067. Allowance of costs to the purchaser.—If the purchaser takes possession with notice of the facts for which a resale is ordered, and of a proposed application for a resale, he will not be allowed for improvements,¹⁵ and if he opposes an application to set aside an inequitable sale, no costs will be allowed him.¹⁶

If he is discharged from his purchase for a reason beyond his control, and if he has acted fairly and innocently, he is entitled to have his deposit returned to him with interest,¹⁷ and to the costs to which he has been subjected, to be charged on the plaintiff personally, even if he has acted in good faith, unless there be a fund in court, or one in prospect.¹⁸ The proper expenses of the purchaser, which must be repaid to him, include the expenses of investigating the title, and the costs of the motion for repayment, if he is put to a motion.¹⁹

§ 1068. Who chargeable with costs of resale.—The practice of the court is to charge the expenses of opening the sale upon those parties whose conduct or negligence makes such action necessary. If the plaintiff is without fault, although he may be compelled to pay the expenses in the first instance, he will ordinarily be indemnified out of the proceeds of the property, since, as a general rule, an error in the proceedings in the cause, or other error or defect rendering necessary or proper a reopening of the sale, may perhaps, as a general proposition, be laid to the charge of one party to the suit as much as to another. But the owner of the equity of redemption, when not made a party to the suit, and in nowise having notice of its pendency or of the proceedings in it, cannot be made to bear the loss arising from a resale, made neces-

¹⁴ *Smith v. Clarke*, 12 Ves. 477; *Veazie v. Williams*, 8 How. (U. S.) 148; 2 Kent's Com. 537.

¹⁵ *Requa v. Rea*, 2 Paige, 339.

¹⁶ *May v. May*, 11 Paige, 201.

¹⁷ *Builders' Mortgage Co. v. Berkowitz*, 142 App. Div. 57; 126 N. Y. Supp. 464, aff'd 201 N. Y. 596; 95 N. E. 1124; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Ray v. Adams*,

28 Misc. R. 664; 59 N. Y. Supp. 1047, aff'd 44 App. Div. 173; 60 N. Y. Supp. 663.

¹⁸ *Morris v. Mowatt*, 2 Paige, 586; *Douglass v. Woodworth*, 51 Barb. 79; *Kohler v. Kohler*, 2 Edw. 69; *Veeder v. Fonda*, 3 Paige, 94.

¹⁹ *Raynor v. Selmes*, 52 N. Y. 579; 7 Lans. 440.

sary by negligence in the conduct of the action, more especially when the vitiating defect is the omission to bring him in as a party, and thus subject him to the jurisdiction of the court in the action, and hold him bound by its decree.²⁰

20 Raynor v. Selmes, 52 N. Y. 579; 7 Lans. 440.

CHAPTER XXX.

ESTATE OF THE PURCHASER AT THE SALE UNDER THE JUDGMENT, AND HOW POSSESSION MAY BE OBTAINED.

TITLE OF THE PURCHASER.

- § 1069. Nature of the title acquired by the purchaser.
- 1070. Purchaser takes title of mortgagor.
- 1071. The referee cannot exceed the authority granted to him.
- 1072. Mistake in description.
- 1073. Title not affected by error in judgment.
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- § 1083. If the proceedings are irregular.
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OBTAINING POSSESSION.

- 1088. Jurisdiction of the court.
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- 1093. Where tenants in possession are not made parties.
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- 1095. Summary proceedings to obtain possession.

TITLE OF PURCHASER.

§ 1069. Nature of the title acquired by the purchaser.—A purchaser of mortgaged lands under a foreclosure sale acquires, if the proceeding be regular, the same estate and no other or greater than would have vested in the mortgagee if the equity of redemption had been foreclosed. The sheriff's or referee's conveyance to him is as valid, as if it was executed by the mortgagor

and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action.¹

Where legal title is concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land. The interest remaining in the mortgagor is an equity which is cut off by the foreclosure, leaving the title conveyed by the mortgage absolute. Such is precisely the effect of a strict foreclosure of the equity of redemption, and the consequences of a strict foreclosure, and no other or greater, are by statute made to follow a sale under a judgment in a suit in equity to satisfy or foreclose a mortgage.² It is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage in a sense which would subject him to the mortgagor's acts intermediate to the mortgage and the foreclosure. The master's deed may probably be considered, as against the mortgagor as a release of the equity of redemption,³ as of the date of the mortgage.⁴

And the entire estate both of the mortgagor and of the mortgagee as of the date of the mortgage is acquired by such a purchaser.⁵

§ 1070. Purchaser takes title of mortgagor.—The purchaser may take the mortgagor's position as to a vendee in possession under an executory contract for the purchase of the premises, and, upon default of payment of the moneys due upon the contract, may turn him out of possession.⁶

¹ Code Civ. Pro. § 1632; Lawrence v. Delano, 3 Sandf. 333.

² McFadden v. Allen, 134 N. Y. 489; Wells v. Garbutt, 132 N. Y. 430; National Bank of West Troy v. Levy, 127 N. Y. 549; Continental Insurance Co. v. Reeve, 149 App. Div. 835; East New York Refrigerator and Woodworking Co. v. Halpern, 140 App. Div. 201; 125 N. Y. Supp. 111; Caccia v. Brooklyn Union El. R. R. Co., 98 App. Div. 294.

³ Per DENIO, J., in Packer v. The Rochester and Syracuse R. R. Co.,

17 N. Y. 283. See also Taylor v. Kearn, 68 Ill. 339.

⁴ Rector, etc., Christ P. E. Church v. Mack, 93 N. Y. 488, 492.

⁵ Wells v. Garbutt, 132 N. Y. 430; 30 N. E. 978.

⁶ Dwight v. Phillips, 48 Barb. 116. The foreclosure was by advertisement. See also Korn v. Campbell, 119 App. Div. 401; 104 N. Y. Supp. 462, aff'd 192 N. Y. 40; 85 N. E. 687; Gottlieb v. City of New York, 128 App. Div. 448; 112 N. Y. Supp. 545.

This is also held to be true in the case of the foreclosure of a purchase-money mortgage.⁷

A purchaser at a sale under the foreclosure of a mortgage which was made by a party in possession of the lands, but who was afterward disseized, can assert the same rights as the disseizee, and recover upon his possession without proving that he himself had ever been in possession.⁸

Where the mortgage is upon a lease and the mortgagee is a party defendant, the purchaser becomes the assignee of the lease.⁹

The purchaser takes the title of the mortgagor at the date of the mortgage, subject to all of its qualifications, and if his title is a mere equity or right to own the property upon payment of the purchase price, that is all that is transferred by the master's deed.¹⁰

So, where a husband executed a mortgage upon lands deeded to him and his wife, thereby making them tenants by the entirety, the mortgage was effectual to cover his interest, which was a right to the use of an undivided half of the estate during their joint lives, and to the fee in case he survived her; and the purchaser on sale under a foreclosure of the mortgage acquired this interest, and became a tenant in common with the wife subject to her right of survivorship.¹¹

And the purchaser under a foreclosure sale of a mortgage executed by one of several residuary devisees acquires the interest of such devisee.^{11a}

Such a purchaser also acquires the right of the mortgagor to sue upon a covenant of warranty in the deed to the latter.¹²

§ 1071. The referee cannot exceed the authority granted to him by the judgment, and the purchaser can only claim what the referee has actually sold to him. A referee's deed will not convey land which has been released, and is included in the decree

⁷ *De Garmo v. Phelps*, 176 N. Y. 455; 68 N. E. 873.

⁸ *Clute v. Voris*, 31 Barb. 511.

⁹ *Kearney v. Post*, 1 Sandf. 105.

¹⁰ *Wells v. Garbutt*, 132 N. Y. 430; 30 N. E. 978; *Stewart v. Hutchinson*, 29 How. Pr. 181.

¹¹ *Hiles v. Fisher*, 144 N. Y. 306; 39 N. E. 337.

^{11a} *Drake v. Paige*, 127 N. Y. 562; 28 N. E. 407.

¹² *Wygatt v. Coe*, 142 N. Y. 78; 36 N. E. 870.

by a mere clerical error, neither will it convey property included in the decree but not embraced in the sale.¹³

§ 1072. **Mistake in description.**—If there be a mistake in the description of the property as contained in the mortgage, that mistake must be corrected before judgment. The authority of the sheriff or other officer making the sale is limited by the judgment, and he can only sell the property described in the decree. A purchaser cannot sustain an action to reform, even though the sheriff pointed out the property to him before the sale.¹⁴

In *Wood v. Martin* (66 Barb. 241), a clerical error in the description was made in the judgment, by which error the initial point was alleged to be 193 feet from a certain street, instead of 123 feet. Following the words of description was a reference to a deed in which the correct description was given. The mortgage, notice of *lis pendens*, notice of sale, and all other papers in the suit contained the correct description. An order was made, upon consent of all the parties who had appeared in the action, amending the judgment *nunc pro tunc* in the respect alluded to. On a motion to compel the purchaser to complete his purchase and take the title, it was held that the court had ample power to allow such an amendment.

The right of the purchaser cannot be enlarged to cover lands not described in the mortgage, and not owned by any defendant in the action to foreclose, by including those lands in the description contained in the complaint and judgment.¹⁵

§ 1073. **Title not affected by error in judgment.**—If the court had jurisdiction of the parties and of the subject-matter, the title of the purchaser will not be affected by error in the judgment, or by its subsequent reversal,¹⁶ even though such purchaser was a party to the action.¹⁷ Neither will the rights of the pur-

¹³ *Laverty v. Moore*, 33 N. Y. 658.

¹⁴ *Miller v. Kolb*, 47 Ind. 220.

¹⁵ *Clapp v. McCabe*, 155 N. Y. 525; 50 N. E. 274; *Hoopes v. Auburn Water Works Co.*, 37 Hun, 568, 574.

¹⁶ *De Forest v. Farley*, 62 N. Y. 628; *South Fork Canal Co. v. Gordon*, 2 Abb. (N. S.) 479; *Smith v. Joyce*, 25 W. Dig. 106; *Holden v.*

Sackett, 12 Abb. Pr. 475; *Breese v. Bange*, 2 E. D. Smith, 474; *Wood v. Jackson*, 8 Wend. 9; *Galpin v. Page*, 1 Sandf. 309. See also *Gray v. Brignardello*, 1 Wall. (U. S.) 627; *Garrett v. Lynch*, 45 Ala. 204; *Storm v. Smith*, 43 Misc. 497; *McAusland v. Pundt*, 1 Neb. 211; *Sinnett v. Cralle*, 4 W. Va. 600.

¹⁷ *Hening v. Punnett*, 4 Daly, 543.

chaser be affected by a payment after judgment of which he had not notice.¹⁸ The right of the purchaser to fixtures¹⁹ and to emblements²⁰ have been treated in former parts of this work.

§ 1074. Defendants claiming adversely to the mortgage.—A mortgagee cannot make one claiming title adversely to that of the mortgagor, and prior to the mortgage, a defendant to the action for the purpose of contesting such adverse claim of title;²¹ and even if he does so, the statute which declares the referee's deed to vest only that title in the purchaser that would have vested if the equity of redemption had been foreclosed, would prevent him from gaining any advantage from such a course.²²

A wife has a claim prior to a mortgage made by her husband alone for a debt other than for purchase money during her coverture, and her claim cannot be divested by making her a party defendant to a foreclosure. Her rights will be the same whether she has or has not been made a party, and even if she has interposed this defense, and has suffered judgment to be taken against her.²³ It is not within the province of a court of equity to try a mere question of legal title which is not coupled with some equity against the party claiming the title, and, for this reason, an adverse claim of this kind cannot be tried in an equity suit.²⁴

§ 1075. Waiver of rights by prior lienor.—Where a person owning a mechanic's lien prior to the mortgage foreclosed, was made a party to the foreclosure, and appeared in the action and served a waiver of "service of a copy of all papers except notice of sale and application for surplus funds," it was urged that this amounted to a consent to come in subsequently to plaintiff's mortgage, and operated as an estoppel against any lien upon the premises by virtue of the lien. The court was disposed to take this view, but in the absence of any allegation or proof that the prop-

¹⁸ Splahn v. Gillespie, 48 Ind. 397.

¹⁹ *Ante*, § 178 *et seq.*

²⁰ *Ante*, § 172 *et seq.*

²¹ Eagle Fire Ins. Co. v. Lent, 6 Paige, 637; Banks v. Walker, 3 Barb. Ch. 438; Frelinghuysen v. Colden, 4 Paige, 204; Holcomb v. Holcomb, 2 Barb. 22; Corning v. Smith, 6 N. Y. (2 Seld.) 82; Lee v. Parker, 43 Barb. 611.

²² Frost v. Koon, 30 N. Y. 428; Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127.

²³ Lewis v. Smith, 11 Barb. 152, *aff'd* 9 N. Y. 502; Merchants' Bank v. Thomson, 55 N. Y. 7.

²⁴ Jones v. St. John, 4 Sandf. Ch. 208; Frelinghuysen v. Colden, 4 Paige, 204.

erty was sold clear of the lien with the knowledge and acquiescence of the lienor, and it appearing that the lienor had done acts inconsistent with such an understanding on his part, it was held that the judgment and sale did not cut him off.²⁵

§ 1076. When the rights of the purchaser vest.—Intermediate the time of the sale and the delivery of the deed, the mortgagor retains the right of possession, and the consequent right to collect and receive the rents of the mortgaged premises,²⁶ and until the deed is delivered, the rights between the mortgagor and those claiming under him as tenants are not changed.²⁷

But the sale terminates the right of the owner of the equity of redemption to pay the debt and retain the estate. The time allowed by the terms of sale is for the convenience of the purchaser, and to enable the officer who makes the sale to get the best price for the property, and not for the purpose of giving the mortgagor the right of redemption in the meantime.²⁸

§ 1077. Confirmation of report of sale.—If the proceedings in the action have been regular, the title of the property passes to the purchaser upon the delivery of the deed of the referee or of the other officer making the sale, the confirmation of the sale by the court relating back to that time.²⁹ By the early practice in this State, the decree provided that the purchaser should have possession on production of the master's deed and a certified copy of the order to confirm the sale. Under such a decree the deed alone was sufficient to maintain ejectment against a wrong-doer, the confirmation relating back as against him, but as against a person lawfully in possession an order of confirmation was neces-

²⁵ *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

²⁶ *Strong v. Dollner*, 2 Sandf. 444; *Clason v. Corley*, 5 Sandf. 447; *Mitchell v. Bartlett*, 51 N. Y. 447; *Astor v. Turner*, 11 Paige, 436; *Cheney v. Woodruff*, 45 N. Y. 98. See also *Whitney v. Allen*, 21 Cal. 233. But a tenant of the mortgagor who is a party may be turned out of possession even if he had paid rent in advance to the mortgagor. *Devitt v. Sullivan*, 8 Cal. 592.

²⁷ *Mitchell v. Bartlett*, 51 N. Y. 447, aff'd 52 Barb. 319; *Whalin v.*

White, 25 N. Y. 462. A tenant of the mortgagor is not evicted until the referee's deed is produced. *Peck v. Knickerbocker Ice Co.*, 18 Hun, 183.

²⁸ *Brown v. Frost*, 10 Paige, 243, 247, rev'g Hoff. 41; *Tenbrook v. Lansing*, 4 Johns. Ch. 601.

²⁹ *Continental Insurance Co. v. Reeve*, 148 App. Div. 835; *Fuller v. Van Geesen*, 4 Hill, 171, aff'd 1 How. App. Cas. 240; *Fort v. Burch*, 6 Barb. 60; *Stimson v. Arnold*, 5 Abb. N. C. 377; *Mitchell v. Bartlett*, 51 N. Y. 447.

sary.³⁰ The present practice is to provide in the judgment, that the purchaser be let into possession on production of the referee's deed.³¹ No formal confirmation of the report of sale is necessary, the rule of court providing that the report be absolute, and stand in all things confirmed, unless exceptions be filed and served within eight days after the service of notice of filing the same.³²

§ 1078. **Questions not disposed of by judgment and sale.**—The sale of the mortgaged premises, forecloses the rights of the defendants in the equity of redemption, but it does not determine the right to the moneys which are realized by the sale. In *Slee v. Manhattan Co.* (1 Paige, 48), the plaintiff being the holder of a bond and mortgage, assigned them to the defendant as security for a debt owing by the former to the latter, which mortgage was foreclosed by the assignee, by advertisement, and the mortgaged premises were bid in by him for a sum less than the amount secured by the mortgage, and less than the debt which the assignment was meant to secure; and the assignee was required, on receiving the amount of his debt and interest, to convey the mortgaged premises to the assignor. In *Hoyt v. Martense* (16 N. Y. [2 Smith] 231), the assignor and assignee both joined as plaintiffs in an action to foreclose the mortgage, and it was held that the foreclosure and sale settled no questions as between the plaintiffs, and that on the assignee of the mortgage purchasing the mortgaged premises at the sale, he held them as he had held the mortgage, as security only and subject to the right of the assignor to redeem.³³

§ 1079. **Act of 1837, allowing redemption after sale.**—By Laws of 1837, c. 410, it was enacted, that within one year from the time when any sale of real or leasehold estate, under any mortgage theretofore executed, or any decree thereon, should thereafter be made, the real or leasehold estate so sold, or any distinct lot, tract, or portion that may have been separately sold, might be redeemed by the mortgagor, his personal representatives or assigns,

³⁰ *Giles v. Comstock*, 4 N. Y. (4 Comst.) 270.

³¹ Rule 61.

³² Rule 30. *Mitchell v. Bartlett*, 51 N. Y. 447. See also *Brown v. Marzyck*, 19 Fla. 840; *Petty v. Mays*, 19 Fla. 652. *Contra*, in Wisconsin—

Allen v. Elderkin, 62 Wis. 627; 22 N. W. 842.

³³ See *Bloomer v. Sturges*, 58 N. Y. 168, in which *Slee v. The Manhattan Co.*, 1 Paige, 48, and *Hoyt v. Martense*, 16 N. Y. 231, are distinguished and limited.

on paying to the purchaser, his personal representatives or assigns, or to the officer who made such sale for the use of such purchaser, the sum of money which was bid on the sale of such lot or tract, together with the interest on that sum from the time of sale, at the rate of ten per cent. a year; and on making such payment a certificate was required to be signed by him to whom the payment was made, stating the same to be in full redemption of the said mortgaged premises and of the sale thereupon made.

This statute was enacted at a time of great business depression, and was intended to prevent the forfeiture of valuable estates by foreclosure of the mortgages upon them. It was repealed by Laws of 1838, c. 266.

CONTRACTS MADE BY MORTGAGOR BEFORE FORECLOSURE.

§ 1080. **Discussion.**—It is obvious that the purchaser cannot gain any advantage from contracts made by the mortgagor subsequent to the mortgage with any of the defendants in the action to foreclose, for such contracts were made with relation to an equity which the sale has destroyed, but it has been questioned as to whether he may claim the benefits of bargains made with persons who, by not having been made parties to the suit, are allowed to retain any advantage which they acquired under such bargains. In *Packer v. The Rochester and Syracuse R. R. Co.* (17 N. Y. [3 Smith] 283), an easement to construct a mill-race across the mortgaged land had been granted by the owners of the equity of redemption to certain mill owners for which they undertook to construct the walls of said race in a specified manner. The mortgage was afterward foreclosed without making the mill owners parties, and the question arose in an action for damages for obstructing the race, brought by the mill owners against the purchasers at the foreclosure, as to the admissibility of the original contract under which the race had been built, and of a decree in chancery between the parties to such contract decreeing its specific performance. The opinions of DENIO, and PRATT, JJ., are interesting as showing the diverse views held by those learned judges with regard to the rights of the purchaser under the foreclosure sale, though they arrived at the same conclusion with regard to the case when under consideration. DENIO, J., held that by the foreclosure the equity of redemption was extinguished;

that the purchaser did not claim under the mortgagors by title subsequent to the contract offered in evidence, but by paramount title, and that he could, therefore, neither be bound by it nor could he avail himself of its advantages. PRATT, J., on the other hand, maintained with great force the proposition that the purchaser's title, so far as an incumbrancer who was not made a party to the action was concerned, was that of a grantee from the mortgagor as of the date of the foreclosure,³⁴ and that not only could such incumbrancer insist upon the benefits which contracts subsequent to the mortgage had assured to him, but also that the purchaser could enforce the reciprocal obligations which had induced the mortgagor to grant such benefits.³⁵

If all persons having interest in or liens upon the equity of redemption are made parties to the suit, the purchaser will take the same title as if the original mortgage had been an absolute conveyance to him, and, in all cases, his title will be the same as if all of the parties to the action had conveyed their rights in the land to him. The judgment will "bar" them from denying that to the extent of their interests the purchaser has acquired a perfect title, and those interests may be enforced by the purchaser against strangers to the action. So, as we have already seen, the purchaser acquires the interests of the plaintiff with respect to the land,³⁶ and he also acquires a right to redeem from lienors not made parties, if such right had been possessed by any of the parties to the action.³⁷ It would also seem to follow that he acquires the right of any party to the action to enforce the performance of a covenant, upon consideration for which a stranger to the action held an interest in the property.³⁸

§ 1081. Rule as settled.—In *Rector, etc., of Christ P. E. Church v. Mack* (93 N. Y. 488, rev'g 25 Hun, 418), the defendant's husband had purchased the property from the mortgagor subject to the mortgage and to a servitude subsequently created restricting the use of the property so as to allow the adjoining property to have the use of windows opening upon it. The title was there-

³⁴ Approved in *Rector, etc., Christ P. E. Church v. Mack*, 93 N. Y. 488, 492.

³⁵ See Code of Civ. Pro. § 1632.

³⁶ *Hart v. Wandle*, 50 N. Y. 381; *ante*, § 1070.

³⁷ *Vanderkemp v. Shelton*, 11 Paige, 28.

³⁸ *Pardee v. Steward*, 37 Hun, 259, 264.

after granted to the defendant. The mortgage was subsequently foreclosed, and the defendant having become the owner thereunder, she commenced the erection of buildings which would have closed the windows of the adjacent property. The action was brought to restrain the continuance of such erection, and an injunction was granted and sustained by the General Term. It was conceded that a purchase under the foreclosure would have given a stranger to the title an ownership discharged of plaintiff's easement, and the Court of Appeals decided that the same result attended the purchase by the defendant, notwithstanding her relation to the property. The rule was declared to be that "the effect of the foreclosure deed, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent incumbrances and conveyances of the mortgagor."

§ 1082. A tenant in possession of mortgaged lands is by statute authorized to attorn to the mortgagee after the mortgage has become forfeited;³⁹ and a payment of rent by a tenant to a purchaser at foreclosure would constitute a perfect defense to an action brought by the mortgagor upon the covenant.⁴⁰

Until such tenant attorns the purchaser cannot maintain an action for rent under the lease,⁴¹ nor an action of ejectment.⁴² If the tenant were made a party to the action, it would doubtless rest with him either to remain under a new contract with the purchaser or to quit the premises and refuse to pay rent either to his lessor or to the purchaser.⁴³ It is hard to perceive how, upon any just principle, a tenant not made a party to the action, and whose rights were therefore unaffected by the judgment, could either evade the payment of rent, while he continued to occupy the premises, or repudiate his contract of letting, or justify a payment to his lessor after the rights of such lessor had been acquired by the purchaser.⁴⁴

³⁹ Real Prop. Law, § 224.

⁴⁰ Jones v. Clark, 20 Johns. 51.

⁴¹ Wacht v. Erskine, 61 Misc. R. 96; 113 N. Y. Supp. 130.

⁴² Davidson v. Weed, 21 App. Div. 578; 48 N. Y. Supp. 368.

⁴³ Simers v. Saltus, 3 Den. 214.

⁴⁴ Packer v. The Rochester and Syracuse R. R. Co., 17 N. Y. (3 Smith) 283, 298; Lovett v. The German Reformed Church, 9 How. Pr. 220; Pardee v. Steward, 37 Hun, 259, 264.

PURCHASER'S TITLE AFTER DEFECTIVE FORECLOSURE.

§ 1083. If the proceedings are irregular, the purchaser acquires, so far as junior incumbrancers not made parties to the action are concerned, a prior lien upon the premises to the extent of the money due and unpaid upon the older mortgage, in the same manner as if the plaintiff had assigned that mortgage to him without foreclosure irrespective of the amount bid at the sale.⁴⁵ Where he has lawfully taken possession, he is, as to them, in the position of a mortgagee in possession,⁴⁶ and he may again foreclose the mortgage as to such parties.⁴⁷ As against the owners of the equity of redemption and persons having liens thereon who were made parties to the suit, he acquires their interests.⁴⁸

45 *Hart v. Wandle*, 50 N. Y. 381; *Robinson v. Ryan*, 25 N. Y. 320; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. 33; *Benedict v. Gilman*, 4 Paige, 59; *Smith v. Gardner*, 42 Barb. 356; *Dunning v. Fisher*, 20 Hun, 178; *Winslow v. Clark*, 47 N. Y. 261; *Gage v. Brewster*, 31 N. Y. 218; *Raynor v. Selmes*, 52 N. Y. 579. See also *United States v. Powell*, 14 Wall. (U. S.) 493; *Probst v. Brock*, 10 Wall. (U. S.) 519; *Carpenter v. Brennan*, 40 Cal. 221; *Bradley v. Snyder*, 14 Ill. 267; *Bodkin v. Merritt*, 102 Ind. 293; 1 N. E. 625; *Curtis v. Gooding*, 99 Ind. 45; *Johnson v. Harmon*, 19 Iowa, 56; *Baker v. Pierson*, 6 Mich. 522; *Martin v. Fridley*, 23 Minn. 13; *Foster v. Union Bank*, 34 N. J. Eq. 48; *Childs v. Childs*, 10 Ohio St. 339; *Whitehead v. Fisher*, 64 Tex. 638; *Raymond v. Holborn*, 25 Wis. 57.

The interests acquired are interests in the land and the purchaser cannot retain the land and enforce a claim against the mortgagor for a portion of the debt not cancelled by the sale. *Wells v. Lincoln Co.*, 80 Mo. 424.

46 *Croner v. Cowdrey*, 139 N. Y. 471; 34 N. E. 1061; *Townsend v. Thomson*, 139 N. Y. 152; 34 N. E.

891; *Moulton v. Cornish*, 138 N. Y. 133; 33 N. E. 842; *Lunny v. McClellan*, 116 App. Div. 473; 101 N. Y. Supp. 812.

See *Townsend v. Thomson*, 139 N. Y. 152; 34 N. E. 891, where owner of the equity of redemption had not been unpleaded. See also *Chard v. Holt*, 136 N. Y. 30; 32 N. E. 740.

47 *Vought v. Levin*, 142 App. Div. 623; 127 N. Y. Supp. 479. See *Green v. Mussey*, 76 App. Div. 174; 78 N. Y. Supp. 434, where owner of the equity of redemption had not been impleaded.

48 *Goebel v. Iffla*, 111 N. Y. 170; 16 N. E. 619; *People's Trust Co. v. Tonkonogy*, 144 App. Div. 333; 128 N. Y. Supp. 1055; *Vanderkemp v. Shelton*, 11 Paige, 28; *Seward v. Huntington*, 94 N. Y. 104, 114; *Vroom v. Ditmas*, 4 Paige, 531. See also *Young v. Brand*, 15 Neb. 601; 19 N. W. 494. The purchaser may be substituted as plaintiff in an ejectment suit brought by one of the defendants and pending at the time of the sale. *Conger v. Duryee*, 23 W. Dig. 193. But his possessory right does not accrue until the delivery of the referee's deed, and before that time though after the sale, he cannot defend an ejectment suit brought by a

§ 1084. The effect of the foreclosure and sale is to transfer to the purchaser the rights of the mortgagee in the land, and so much of the equity of redemption as is owned by parties to the action.⁴⁹ It has therefore been said that a judgment creditor, in order to redeem, must pay the amount of all incumbrances prior to his, to pay which the property was sold.⁵⁰

The purchaser, as against a junior lienor not made a party to the foreclosure, is the transferee of the mortgage foreclosed and of the equity of redemption and of all liens upon the property held by defendants who were duly served.⁵¹ As against such junior incumbrancer he may either foreclose the prior lien under which he purchased or he may redeem by virtue of the title of the owner of the equity of redemption who was a party to the action.⁵²

§ 1085. Rights of persons not bound by judgment.—As against all of the parties to the suit, the effect of the master's deed is to bar their right to redeem from the mortgage, and to extinguish their liens upon or their rights in the premises, and it binds no one not a party.⁵³ The difference, therefore, between those made parties to the suit and those who are not, is, that the former lose their right of redemption, which remains in the latter.⁵⁴ The rights and interests of all of the parties defendant in the equity of redemption are barred and destroyed, and the purchaser takes the same title he would have had if the mortgage foreclosed had been an absolute conveyance to him—that is, he takes the title of the mortgagor as of the date of the mortgage,⁵⁵ subject to the

stranger to the action. *Sanders v. McDonald*, 63 Md. 503.

⁴⁹ *Watson v. Dundee M. & Tr. Invest. Co.*, 12 Oreg. 474; 8 Pac. R. 548; *Sellwood v. Gray*, 11 Oreg. 535; 5 Pac. 196.

⁵⁰ *Van Dayne v. Shann*, 39 N. J. Eq. 6; *McCormick v. Knef*, 105 U. S. 122; *Parker v. Child*, 10 C. E. Green (N. J.) 41.

⁵¹ *Vanderkemp v. Shelton*, 11 Paige, 28; *Seward v. Huntington*, 94 N. Y. 104, 114, rev'g 26 Hun, 217; *Holden v. Sackett*, 12 Abb. 474; *Parker v. Child*, 25 N. J. Eq. 41.

⁵² *Renard v. Brown*, 7 Neb. 449; *Kraft v. James*, 64 Iowa, 159; 19 N.

W. 894; *Smith v. Shay*, 62 Iowa, 119; 17 N. W. 444. If the purchaser goes into possession under his deed his rights are those of a mortgagee in possession, and he cannot be removed by an action of ejectment. *Russell v. Whitely*, 59 Mo. 196; *Jones v. Mack*, 53 Mo. 147.

⁵³ *Brainard v. Cooper*, 10 N. Y. 356; *Peabody v. Roberts*, 47 Barb. 91; *Ward v. Dewey*, 7 How. Pr. 17.

⁵⁴ *Watson v. Spence*, 20 Wend. 262. See also *Hasselmann v. McKernan*, 50 Ind. 441; *De Lashmitt v. Sellwood*, 10 Oreg. 319.

⁵⁵ *White v. Evans*, 47 Barb. 186; *Butler v. Viele*, 44 Barb. 166.

claims of those persons who, not having been made parties, are not bound by the judgment; and these claims hold the same relation to the title after the sale as they did before.

A person not made a party to the foreclosure is not affected by the judgment or sale, either favorably or unfavorably. If he was the owner of the equity of redemption before the sale, he remains such afterwards; and if he held a lien, that lien is preserved to him in all its force and with all of its just claims to priority over other liens.⁵⁶ But he cannot ask that liens or titles bound by the sale for the benefit of the purchaser be held bound for him on any ground of the amount of price bid at a sale which he repudiates and treats as a nullity. His rights are the same after the sale as they were before, but the rights which were superior to his and which, before the sale, belonged to parties to the action, are, by force of the sale, vested in the purchaser.

In *Salmon v. Allen* (11 Hun, 29), a second mortgage was assigned as security for a smaller sum than was due upon it, and the assignee was omitted from the foreclosure of the first mortgage. An action to redeem was brought by such assignee, and it was held that the plaintiff could claim only the amount due to him under the agreement upon which the mortgage was assigned to him; that a sale of the premises subject to the prior mortgage was improper, the prior mortgage being merged in the title under the sale, and that the proper judgment was to give the junior mortgagee a right to redeem from the prior claim unless the prior claimant redeemed from him.

§ 1086. Costs of defective foreclosure.—While the prior mortgage is deemed to be assigned to the purchaser, and the debt and lien are kept alive for his benefit as against the junior incumbrancer who is not foreclosed, he has no right to collect as against such junior incumbrancer the costs of the defective foreclosure.⁵⁷

§ 1087. Remedies of purchaser under defective foreclosure.—The proper remedies of a purchaser under a defective foreclosure are as follows:

1. He may foreclose the mortgage under which the sale was

⁵⁶ *Catterlin v. Armstrong*, 101 Ind. 258; *Taylor v. Adams*, 115 Ill. 570; 4 N. E. 837.

⁵⁷ *Gage v. Brewster*, 31 N. Y. 218; *Mutual Life Insurance Co. v. Dake*, 1 Abb. N. C. 381.

made as the assignee thereof in the usual method.⁵⁸ If he does this, and a sale is had, he will be entitled to any surplus that may remain after satisfying the junior lien, because he stands as the assignee of the owner of the equity of redemption who was bound by the first foreclosure; or

2. He may redeem from the junior incumbrancer who was omitted from the first foreclosure; or

3. He may bring an action for a strict foreclosure⁵⁹ in which the junior incumbrancer will be called upon to redeem the first mortgage and all liens prior to his own, to the whole of which the purchaser is subrogated.⁶⁰

OBTAINING POSSESSION.

§ 1088. **Jurisdiction of the court.**—A judgment of foreclosure and sale commonly provides that the purchaser be let into possession on production of the sheriff's or of the referee's deed; but whether this provision is inserted in the judgment or not, the purchaser is entitled to be put into possession upon complying with the terms of the sale. The sale would be useless and without meaning to the purchaser if it were not to be accompanied with actual possession; possession is part of the title, and is equally within the meaning of the suit and the spirit of the decree.⁶¹

Independent of the statute, the court has jurisdiction to enforce its decree of sale against the parties to the suit, and persons coming into possession under them since the commencement of the litigation and filing of the notice of *lis pendens*, since it is a principle of a court of equity to do complete justice where that it practicable, not merely by declaring the right, but also by affording a remedy for its enjoyment. The power is also explicitly declared by statute.⁶²

The court has no power, either under the statute or independent of it, to deprive any person of possession who is not a party

⁵⁸ *Franklyn v. Hayward*, 61 How. Pr. 43. See also *Shirk v. Andrews*, 92 Ind. 509; *Georgia R. R. Co. v. Walker*, 61 Miss. 481.

⁵⁹ But as to this under the code, query. See "STRICT FORECLOSURE," Chap. XXXII.; *Benedict v. Gilman*, 4 Paige, 58; *Ross v. Boardman*, 22

Hun, 527; *Bolles v. Duff*, 43 N. Y. 469.

⁶⁰ *Parker v. Child*, 25 N. J. Eq. 41.

⁶¹ *Kershaw v. Thompson*, 4 Johns. Ch. 609.

⁶² Code of Civ. Pro. § 1675.

to the suit and who has not acquired such possession from a person who was bound by the decree.⁶³ A person who obtains possession by legal and adverse proceedings against a party to the suit, under a claim of right, the litigation upon which was commenced previous to the filing of a bill in foreclosure, cannot be summarily dispossessed by proceedings in the suit, he not being party to it.⁶⁴ Neither can a person claiming and holding possession, by a tenant, in hostility to the mortgage, have his possession taken away from him by a decree and sale in foreclosure to which he was not a party, even though his tenant had been joined. In such a case the tenant may lawfully and properly surrender possession to his landlord, after the decree, and take a new lease from him which will be protected by the landlord's right of possession.⁶⁵

§ 1089. Provision of the Code.—By section 1675 of the Code of Civil Procedure it is enacted as follows: "Where a judgment in an action specified in this title (actions relating to real property) allots to any person a distinct parcel of real property, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed in this act that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed as if it was an execution for the delivery of the possession of the property."

§ 1090. Writ of assistance.—The process by which a purchaser was let into possession, in case resistance is made, was, prior to the Code of Civil Procedure, a writ of assistance. It was directed to the sheriff of the county; and after reciting the facts entitling the purchaser to possession, it commanded him to re-

⁶³ *Frelinghuysen v. Colden*, 4 Paige, 204; *Van Hook v. Throckmorton*, 8 Paige, 33; *Boynton v. Jackway*, 10 Paige, 307; *Reed v. Marble*, 10 Paige, 409; *Meiggs v. Willis*, 8 N Y Civ. Pro. Rep. 125.

⁶⁴ *Freylinghuysen v. Colden*, 4 Paige, 204.

⁶⁵ *N. Y. Life Ins. & Trust Co. v. Cutler*, 9 How. Pr. 407.

move from the premises any of the parties defendant in the action who may be in possession, and any person who, since the commencement of the action, had come into possession under them or either of them. An order for a writ could be granted *ex parte*,⁶⁶ and on a proper case being shown was a matter of right.⁶⁷ It has even been intimated that it is in the nature of an execution upon the judgment, and under the Code might issue without an order.⁶⁸ So in a case where possession was refused to a purchaser and he obtained an order to show cause why a writ of assistance should not issue commanding the sheriff to place him in possession, the mortgagor who failed to show cause why the writ should not issue, was not entitled to a reversal of the order directing its issuance upon the ground that the purchaser's remedy was by an order under section 1675 of the Code.⁶⁹

It was said by the Court of Appeals, in *Wilbor v. Danolds* (59 N. Y. 657), that, while the purchaser, upon the production of the referee's deed, was presumptively entitled to possession, and although, upon demand therefor and refusal, the writ of assistance was the ordinary and usual process of the court, still the granting or withholding of the writ was in the discretion of the court below. The following is the language of ALLEN, J., in the case cited: "Neither the application for and the granting of the writ of assistance, or the application to set aside a writ, necessarily involved a substantial right. Whether in a particular case, as between a purchaser and a party to the action and bound by the judgment, the former shall have the aid of the court in obtaining the possession of the purchased premises, rests very much in the discretion of the court of original jurisdiction." It will be noted, however, that in *Wilbor v. Danolds* (*supra*), the writ of assistance had been granted *ex parte*, and the order appealed from, denied an application to vacate it on the alleged ground that the purchaser had bought under an agreement to hold the title for the benefit of the mortgagor. It cannot be said that the case decides that it is not a substantial right of a purchaser for

⁶⁶ N. Y. Life Ins. & Trust Co. v. Rand, 8 How. Pr. 35, *aff'd* 8 How. Pr. 352; N. Y. Life Ins. & Trust Co. v. Cutler, 9 How. Pr. 407.

⁶⁷ *Lynde v. O'Donnell*, 21 How. Pr. 34.

⁶⁸ N. Y. Life Ins. & Trust Co. v. Rand, 8 How. Pr. 352.

⁶⁹ Title Guarantee & Trust Co. v. American Power Const. Co., 95 App. Div. 192; 88 N. Y. Supp. 502.

value under a judgment of foreclosure, to have the judgment executed in his favor, and the possession of the property delivered to him. In *Wilbor v. Danolds* (*supra*), possession was given to the purchaser, thus executing and satisfying the judgment of the court, and the question was as to whether a defendant, bound by the judgment, had a substantial right to retain possession of the property because of an alleged equity which arose subsequent to the judgment and independent of it, and while the existence of that equity was in litigation. As was said by the court in the case last mentioned: "The possession of property pending a litigation, and the settlement of a controversy as to the title, is not the legal right of either of the contestants."

§ 1091. Order for possession.—In *Peck v. The Knickerbocker Ice Co.* (18 Hun, 183), the judgment provided "that the purchaser at such sale be let into possession on production of the referee's deed and a certified copy of the order confirming the report of sale." It was held that the purchaser had not the right to possession until the performance of such prerequisites as the judgment required.

Possession may be given to a purchaser as against a person, not a party to the suit, who took possession after the beginning of the suit in collusion with the mortgagor, though under a claim of tax title;⁷⁰ but not against a person who entered pending the suit, without such collusion, under an adverse claim of title.⁷¹

A defendant who has been removed by the order of the court, or by a writ of assistance, cannot afterward litigate the right of possession in another action.⁷²

The order for possession is not executed until the purchaser is put into actual and visible possession.⁷³

§ 1092. Having put the purchaser into possession, the court does not undertake to guard his possession for him and for his grantees forever. If new claimants enter into possession afterward, he must deal with them according to the forms of law, and neither a writ of assistance nor an order for possession is a proper remedy.⁷⁴ The court will, however, put either the purchaser or his

⁷⁰ *Brown v. Marzyck*, 19 Fla. 840.

⁷¹ *Van Hook v. Throckmorton*, 8 Paige, 33.

⁷² *Rawiszer v. Hamilton*, 51 How. Pr. 297.

⁷³ *Newell v. Whigham*, 102 N. Y. 20; 6 N. E. 673; 1 N. Y. S. Repr. 666, rev'g 29 Hun, 204 mem.; *Keeler v. Keeler*, 102 N. Y. 30; 6 N. E. 678.

⁷⁴ *Bell v. Birdsall*, 19 How. Pr.

grantee into possession, and the defendants can no more object to the transfer of the right of possession, than a defendant in an action at law can object to an assignment of the claim against him.⁷⁵

§ 1093. Where tenants in possession are not made parties, the purchaser is not entitled to possession as against them, but, even if their leases were executed before the execution of the mortgage which was foreclosed, they must still attorn to the purchaser, he having by the foreclosure proceedings acquired the title of their landlord. In one case, one of the defendants in the action acquired, subsequently to the decree, a lease of prior date to the mortgage, and the court held that, although he was entitled to retain possession, he must do so as tenant, that being the extent of his rights, and the choice was given him either to attorn to the purchaser, or to be turned out of possession by writ of assistance.⁷⁶ This remedy could not have been enforced if the obstinate tenant had not been a party to the action, and although justice was done, it is perhaps open to argument as to whether the decision was technically correct.

§ 1094. When an order for possession has been improperly granted, or when, being properly granted, persons not properly within the meaning of its terms, are aggrieved by having it executed against them, the court, upon motion, is bound to correct the wrong and to restore possession. The court will not in such a case, stop to inquire into the validity of the respective titles. It is enough for it to know that its process has been abused. If the purchaser has, under cover of a writ against the defendants, ejected another person, he is a trespasser, and the court will not pause to examine into the title of the person dispossessed, before restoring him to his possession; although he may have no legal title, yet the court will protect his possession until he is removed by due process of law.⁷⁷

§ 1095. Summary proceedings to obtain possession.—By Laws of 1874, c. 208, the portion of the Revised Statutes which gave

491; *sub nom.* Betts v. Birdsall, 11 Abb. 222.

⁷⁵ N. Y. Life Ins. & Trust Co. v. Rand, 8 How. Pr. 35.

⁷⁶ Lovett v. The German Reformed Church, 9 How. Pr. 220.

⁷⁷ Chamberlain v. Choles, 35 N. Y. 477; Meiggs v. Willis, 8 N. Y. Civ. Pro. Rep. 125.

to landlords a summary remedy to obtain possession of demised premises, was amended so as to bring within its scope all persons "who shall hold over and continue in possession of any real estate which shall have been sold pursuant to the foreclosure of a mortgage, after a title under such sale shall have been perfected."

This statute was repealed by Laws of 1880, ch. 245, and the provision as re-enacted in section 2232 of the Code of Civil Procedure restricts the remedy by summary proceedings to cases of foreclosure by advertisement without action.

CHAPTER XXXI.

SURPLUS PROCEEDINGS.

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PROVISIONS OF LAW RELATING TO DISTRIBUTING OF SURPLUS.

§ 1096. Prior to the passage of the Revised Statutes in 1830, it was the practice to ascertain the amount of all incumbrances, and to adjudge the rights of all of the defendants before making a decree for the sale of the mortgaged premises.¹ It was therefore necessary that all of the parties to the suit should be served with copies of the bill, and that they should all answer, setting

¹ Renwick v. Macomb, Hopk. 277; Wheeler v. Van Kuren, 1 Barb. Ch. 490.

up their rights, if they did not wish to lose their liens upon the fund which the sale of the mortgaged property would create. It sometimes happened that the complainant was delayed in the enforcement of his claims, though his mortgage was admitted to be valid, in order that subsequent incumbrancers might litigate, as between themselves, their rights to surplus. Costs were allowed to all who appeared and answered, and the fund was consumed or in a great degree diminished by the expenses of a litigation which, in the event of the inadequacy of the security to pay any more than the prior lien, was entirely useless.²

§ 1097. **Present statute.**—To obviate this trouble, the Revised Statutes contained a provision,³ which was re-enacted in the Code of Civil Procedure, and now stands as follows: “If there is any surplus of the proceeds of the sale, after paying the expenses of the sale and satisfying the mortgage debt and the costs of the action, it must be paid into court for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may, if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court.”

Within thirty days after completing the sale, and executing the proper conveyance to the purchaser, unless such time be extended by an order of the court entered in the office of the clerk within said thirty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.⁴

§ 1098. **Rules of court.**—Under this provision of the statute, the 132d and 136th Rules of the Court of Chancery were framed, which still exist with some modifications, as the 61st and 64th General Rules of Practice. The 61st Rule provides that “all surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making

² Eagle Ins. Co. v. Flanagan, 1 How. Ct. of Appeals Cases, 311; Miller v. Case, Clarke, 395; Farmers’

Loan & Trust Company v. Seymour, 9 Paige, 538.

³ 2 R. S. 192, §§ 159, 162.

⁴ Code of Civ. Pro. § 1633.

the sale within five days after the same shall be received and be ascertainable, in the city of New York, to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court, and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment."

Rule 64 provides that, "on filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The referee shall, in all cases be selected by the court. The owner of the equity of redemption and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct. All official searches for conveyances or incumbrances, made in the progress of the cause, shall be filed with the judgment-roll, and notice of the hearing shall be given to any person having or appearing to have an unsatisfied lien on the moneys in such manner as the court shall direct; and the party moving for the reference shall show, by affidavit, what unsatisfied liens appear by such official searches, and whether any, and what other unsatisfied liens are known to him to exist."

§ 1099. The object of these rules was to lighten the expense of foreclosure cases, without impairing in any way the rights of others against the mortgagor, or rather in the equity of redemption. They only alter the old practice of the court, and direct the mode by which the owners of liens inferior to the mortgage foreclosed may ascertain their rights in any surplus, and since the passage of the 136th Rule of the Court of Chancery, in which the substance of these rules was contained, it is no longer proper in mortgage cases for defendants whose claims are upon the equity of redemption merely, and who have no interest in the mortgaged premises in opposition to the plaintiff's claims, to litigate their claims to surplus as between themselves, until it is ascertained that there will be a surplus.⁵

§ 1100. Distribution of surplus by the surrogate.—By chapter 658 of the Laws of 1867, entitled “An Act to extend the jurisdiction of surrogates’ courts,” amended by chapter 170 of the Laws of 1870, provision was made for the distribution by the surrogate of the county of surplus arising from sales of land by virtue of any mortgage or other lien thereon. This statute was held to apply only to cases of foreclosure by advertisement,⁶ and it was subsequently repealed.⁷ A similar provision was re-enacted in the Code of Civil Procedure, and now stands as follows: “Where real property or an interest in real property liable to be disposed of as prescribed in this title (distribution of real property for the payment of debts and funeral expenses), is sold in an action or a special proceeding, specified in the last section, to satisfy a mortgage or other lien thereupon, which accrued during the decedent’s lifetime; and letters testamentary or letters of administration, upon the decedent’s estate, were, within four years before the sale, issued from a surrogate’s court of the State, having jurisdiction to grant them; the surplus money must be paid into the surrogate’s court from which the letters issued pursuant to the provisions of section 2537 of this Code, and the receipt of the county treasurers

⁵ *The Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85; *Eagle Ins. Co. v. Flanagan*, 1 How. Ct. of Appeals Cases, 311; *Miller v. Case*, Clarke, 395; *Farmers’ Loan & Trust Co. v. Seymour*, 9 Paige, 538; *Smart v. Be-*

ment, 4 Abb. App. Dec. 253; 3 Keyes, 241.

⁶ *Loucks v. Van Allen*, 11 Abb. Pr. N. S. 427; *Fleiss v. Buckley*, 24 Hun, 514; *German Savings Bank v. Sharer*, 25 Hun, 409.

⁷ Laws of 1880, ch. 245.

shall be a sufficient discharge to the person paying such money. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money.⁸ This section together with section 2799 of the Code have been held to be constitutional.⁹ And the distribution of surplus moneys arising upon a foreclosure suit and paid into the Surrogate's Court is governed by the latter section.¹⁰

The provisions of section 2798 do not apply where more than four years have elapsed since letters testamentary were issued upon the estate of the owner of the equity of redemption.¹¹ And where over three years had elapsed it was held that the surplus moneys were not required to be paid into the Surrogate's Court but might be distributed in the usual manner.¹²

But where there is a deficiency in the personal estate of deceased mortgagor, his debts and funeral expenses may be paid out of surplus money already deposited in the Surrogate's Court, although the three years within which creditors may apply to such court for the sale of real estate pursuant to section 2750 of the Code, have elapsed.¹³ And it is settled that the surplus proceeds of a sale made under a judgment more than four years after letters testamentary were issued, must be distributed in the action, though the judgment directing the sale was entered within the four years.¹⁴

An order to transfer to the Surrogate's Court surplus moneys deposited with the county treasurer must be made on notice to all parties to the foreclosure.¹⁵ And similarly notice must be

⁸ Code, § 2798. See further as to proceedings in surrogate's court to distribute surplus, Chap. XXXIII., FORECLOSURE BY ADVERTISEMENT.

⁹ *Matter of Estate of Stillwell*, 139 N. Y. 337; 34 N. E. 777; 54 N. Y. St. Rep. 491, aff'g 52 N. Y. St. Rep. 689.

¹⁰ *Matter of Schuessler*, 49 Misc. R. 203; 98 N. Y. Supp. 939.

¹¹ *Lord v. Anderson*, 66 Misc. R. 593; 122 N. Y. Supp. 218.

¹² *Reynolds v. Britton*, 56 Misc. R. 67; 106 N. Y. Supp. 937.

¹³ *Matter of Callaghan*, 69 Hun, 161; 52 N. Y. St. Rep. 537.

¹⁴ *White v. Poillon*, 25 Hun, 69.

¹⁵ *Washington Life Ins. Co. v. Clark*, 79 App. Div. 160; 79 N. Y. Supp. 610.

given to other creditors of the pendency of a proceeding by a creditor to collect his claim against an estate from surplus moneys resulting from a foreclosure sale of real property of a decedent.¹⁶

The judgment should provide that the surplus moneys be paid into the Surrogate's Court from which the letters testamentary issued, and not into the Supreme Court.¹⁷ Such provision contemplates such payment before and not subsequent to proceedings for the distribution of the fund among those having claims upon it.¹⁸

WHAT MAY BE LITIGATED.

§ 1101. *Nature of the proceeding.*—The reference as to liens upon the surplus money in a foreclosure suit is not a collateral reference. A foreclosure suit cannot be said to have terminated until the surplus moneys have been disposed of in that suit. The court has not only the power, but it is its duty in that action to provide for the equitable disposition of the surplus money.¹⁹ The judgment of foreclosure and sale does not terminate the suit or deprive the court of the power to make other orders in it. The equities of lienors subsequent to the mortgage foreclosed are just as much before the court, and as much the objects of its care as those of the mortgage primarily foreclosed, and it will even order a sale of more of the mortgaged premises than is necessary to pay the mortgage, for the purpose of creating a surplus for the benefit of a junior incumbrancer.²⁰

It will be observed that the statutory provision is that the surplus is to be "brought into court for the use of the *person or persons entitled thereto.*"²¹ The rule directs that the referee shall ascertain the amount due to any person "which is a *lien* upon such surplus moneys, and to ascertain the priorities of the several *liens* thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just."²² There may be cases where a person has an equitable

¹⁶ *Di Lorenzo v. Dragone*, 25 Misc. R. 26; 54 N. Y. Supp. 420; 28 Civ. Pro. R. 102.

¹⁷ *Powell v. Harrison*, 88 App. Div. 228; 85 N. Y. Supp. 452.

¹⁸ *Comey v. Clark*, 17 State Rep. 402; 4 N. Y. Supp. 850.

¹⁹ *The Mutual Life Ins. Co. v. Bowen*, 47 Barb. 618.

²⁰ *De Forest v. Farley*, 62 N. Y. 628; *Livingston v. Mildrum*, 19 N. Y. 440; *Beekman v. Gibbs*, 8 Paige, 511.

²¹ Code of Civ. Pro. § 1633.

²² Rule 64.

claim on the surplus, although he has not what may be termed, in strictness, a lien, and it has been a matter of curious inquiry as to what claims can be litigated in these proceedings.

§ 1102. **Controversy as to jurisdiction of referee.**—In one case where a judgment creditor of the husband of the owner of the equity of redemption strove, in the proceedings before the referee, to establish by proof that the property was purchased with funds furnished by the husband, and that it should, therefore, be holden for his debt, the relief was denied. Judge CLERKE, in giving the opinion of the court, said that, “the liens referred to in the rule are those which subject the estate to be sold under execution without any further intervention of the court; claims, however equitable, which have not matured into liens under which the property can be charged in execution and sold without further adjudication, cannot be taken into consideration by the referee under an order of this nature.”²³ The same doctrine was affirmed in *Husted v. Dakin* (17 Abb. 137), the court holding that the referee can only take into consideration absolute liens on the estate, those which subject it to be sold as distinguished from any equitable claims not matured into liens. The court in the last-mentioned case went even further, for it laid it down as the law that the referee, when he finds a lien regular and valid on the record, has no right to go behind it and inquire whether it is irregular or fraudulent or inequitable. He is to inquire simply whether a lien exists, not whether it ought to exist.

§ 1103. (*Continued.*)—In *The Mutual Life Ins. Co. v. Bowen* (47 Barb. 618), a different view was taken, and it was claimed that the two cases of *King v. West* (*supra*), and *Husted v. Dakin* (*supra*), were both decided prior to 1858, while the rule only allowed claims for liens *by judgment or decree*. It was held that the proceedings on the reference are proceedings in the original action; that it is not a collateral reference, and that any issue may be tried in it when such issue must be determined by the court before the whole of the fund can be finally and completely administered.

§ 1104. (*Continued.*)—In the still later case of *The Union Dime Savings Institution v. Osley* (4 Hun, 657), the doctrine of

King v. West and *Husted v. Dakin* was approved, and the court said that the order of reference under the rule is not granted for the investigation and determination of contested claims, but for the purpose of ascertaining liens and claims about which there is no dispute, and to settle the priorities of the liens, that each may be adjusted according to its legal status. The court said that in the matter under consideration, "which was a summary proceeding and not an action, and under the circumstances which marked its progress, and the doubt which existed in relation to the counter-claim urged, the court thought it better to compel the parties claimants to proceed by action in the regular way." It will be noticed that in this case the court was influenced by "the circumstances which marked the progress" of the proceeding, and that the order that was made referred the claims to a referee to hear and determine, thus holding the proceedings in court, and only making a change in the wording of the order of reference.

§ 1105. (*Continued.*)—In *Atlantic Savings Bank v. Hetterick* (5 N. Y. Sup. [T. & C.] 239; s. c. less fully *sub nom. Atlantic Saving Bank v. Hiler*, 3 Hun, 209), the lien of an attorney upon a judgment, which was a lien upon the surplus, was enforced. The case is not authority for holding such to be a regular practice, since it rested largely upon its own special circumstances.

In *The Mutual Life Ins. Co. v. Salem* (5 N. Y. Sup. [T. & C.] 246; 3 Hun, 117), DAVIS, P. J., makes the following remarks: "The object of the reference is to inform the court of the legal and equitable titles to the money; and on the coming in of the report and the testimony, the court, sitting in equity, has the most ample power to confirm, set aside, or refer back the same for further proofs, as to its conscience shall seem just and equitable. The object of making the reference is, as is well recited in the 64th rule of the court, 'to the end that on the coming in and confirmation of the report, such order may be made for the distribution of such surplus money as may be just.' While the moneys remain in court undistributed, the equitable powers of the court over the proceedings must be complete; and on opening the confirmation and referring the matter to the referee for further proofs, the court acts in the exercise of such powers."

In *Sleight v. Reed* (9 How. Pr. 278, aff'd 18 Barb. 159), it was

declared that the surplus moneys brought into court are subject to its jurisdiction as a court of equity, which, in cases where the wife's property (prior to the act of 1848) was taken for the husband's debt, never allowed the fund to be taken out without a suitable provision for the wife and her children.

§ 1106. (*Continued.*)—The case of *Buchan v. Sumner* (2 Barb. Ch. 165) was very fully discussed by eminent counsel. The questions decided arose upon a claim for surplus moneys in proceedings under the rule, and it was held by Chancellor WALWORTH, 'that the equitable claim of a partnership creditor, as against partnership property, must take precedence of a judgment which bound the legal title of one of the copartners. It seems to have been conceded by the chancellor and by the counsel for both sides, that the questions were to be disposed of upon equitable principles, and that the form of the remedy presented no obstacle to the exercise of the equitable jurisdiction of the court. So, too, in *Smith v. Jackson* (2 Edw. 28), the equitable claim of a partner in real estate purchased for partnership purposes, was considered in surplus proceedings, and it was held that the surplus was personal property, and went to a surviving partner for the use of the copartnership, after the widow of the deceased partner had received her dower. But in *Stevens v. Bank of Central New York* (31 Barb. 290) a judgment against two of three copartners was held entitled to priority of payment, as against a subsequent judgment against all the partners, out of a surplus created by the sale of partnership property, on the ground that the priorities should be determined according to the priorities of the legal liens.

§ 1107. Jurisdiction of referee as now settled.—The decision of the Court of Appeals in *Bergen v. Carman* (79 N. Y. 146, reversing s. c. *sub nom. Snedeker v. Snedeker*, 18 Hun, 355) finally settled this controversy. The action was one to foreclose a mortgage, and the questions in dispute all arose on appeal for an order confirming the report of the referee appointed in proceedings under the rule to distribute the surplus. The contest was relative to a conveyance to the wife of the mortgagor through a third person, and to a mortgage, which conveyance and mortgage were held to be void as against creditors. Judge MILLER remarked: "We think that the referee, by virtue of the order to ascertain and

report the liens and their priorities in reference to the surplus moneys, had authority to inquire as to the validity of the conveyances under which Mrs. Snedeker claimed, and of the mortgage of herself and husband to Clayton. The object of the reference was to ascertain to whom the surplus moneys belonged; and this opens a door to an inquiry as to the character of all liens which may be presented. No reason exists why the fraudulent character of conveyances cannot be tested in these proceedings, as well as that of all other liens. One of the objects and purposes of a foreclosure suit is the distribution of the fund arising upon a sale. In *Livingston v. Mildrum* (19 N. Y. 441, 442), it was held that the rights and equities of the defendants, who were lienors or claimants of the equity of redemption, are as much before the court and as much the objects of its care, as those of the owner of the mortgage primarily to be foreclosed. Why then should not the court have power to ascertain what liens are fraudulent? Where jurisdiction of a court of equity is once acquired, such court, as a general rule, has the right to proceed and do justice between all the parties.”²⁴

§ 1108. (*Continued.*)—The reference provided for in cases to distribute surplus is intended to afford an opportunity to the parties to litigate and dispose of their contesting claims asserted by way of liens upon the fund. And the referee has full power and authority to hear all the evidence which may be offered affecting the adjustment of their controversy. He may receive proof that an asserted lien for any cause is without foundation; or that it has been overstated in amount, or otherwise satisfied and discharged, either by payment or the dealings of the parties, or that the claimant has placed himself in a position where the law will not permit him to participate in the surplus. In fact, the authority the referee is entitled to exercise for the hearing and disposition of the claims is as extensive as the claims themselves, and the legal and equitable objections that can be made to their allowance.²⁵

He possesses power to inquire into and determine all questions of law and fact and all circumstances which tend to show the

²⁴ See also to same effect, *Fliess v. Buckley*, 90 N. Y. 286; *Rogers v. Ivers*, 23 Hun, 424.

v. Chetwood, 39 Hun, 602, 607. See also *Bowen v. Kaughran*, 1 N. Y. St. Repr. 121.

²⁵ Per DANIELS, J., in *Kingsland*

equities of the claimants to the end that a final decision on the merits may be reached as to the rights of claimants to the surplus moneys.²⁶

§ 1109. **Questions passed upon.**—The same rules control where it is sought to set aside a deed as fraudulent, as would apply in an action brought for that purpose; and if the return of an execution unsatisfied would be necessary to sustain an action, it would also be necessary to establish a right to similar relief in surplus proceedings.²⁷

A judgment creditor may, in these proceedings, set up usury in a prior mortgage;²⁸ but he cannot set up this defense against a prior judgment.²⁹

An attorney for a judgment creditor claiming a lien upon a judgment for his fees, in procuring it, may have his rights protected by a direction that a portion of the amount due on the judgment be paid to him.³⁰

On a reference in surplus proceedings a clause in a mortgage may be shown to have been inserted by mistake and may be disregarded.³¹

A judgment lien upon surplus moneys cannot be attached collaterally by a junior claimant for mere irregularity not affecting the jurisdiction of the court to render it.³²

WHO IS ENTITLED TO SURPLUS.

§ 1110. **Only persons owning rights in equity of redemption.**—The liens upon, or the rights in, the land which the defendants had before the sale, and which the sale destroys, are, after the sale, transferred to the surplus,³³ and such liens only are so trans-

²⁶ *Wilcox v. Drought*, 36 Misc. R. 351; 73 N. Y. Supp. 587, *aff'd* 71 App. Div. 402; 75 N. Y. Supp. 960; *Mutual Life Ins. Co. v. Anthony*, 23 Week. Dig. 427; *Crombie v. Rosensstock*, 19 Abb. N. C. 312; *Tator v. Adams*, 20 Hun, 131; 58 How. Pr. 355; *Wilcox v. Drought*, 36 Misc. R. 351; 73 N. Y. Supp. 587; *McRoberts v. Pooley*, 5 N. Y. St. Rep. 830; 12 Civ. Pro. Rep. 140. See *Miller v. Dooley*, 1 Law. Bull. 50.

²⁷ *Snedeker v. Snedeker*, 18 Hun, 355. See *Wolfers v. Duffield*, 72

Hun, 637; 55 N. Y. St. Rep. 485; 25 N. Y. Supp. 374.

²⁸ *Mutual Life Ins. Co. v. Bowen*, 47 Barb. 618.

²⁹ *Slosson v. Duff*, 1 Barb. 432.

³⁰ *Atlantic Savings Bank v. Hiler*, 3 Hun, 209.

³¹ *Tator v. Adams*, 20 Hun, 131.

³² *White v. Bogart*, 73 N. Y. 256.

³³ *Averill v. Loucks*, 6 Barb. 470; *Blydenburgh v. Northrop*, 13 How. Pr. 289; *Matthews v. Duryee*, 45 Barb. 69; 17 Abb. 256; 3 Abb. App. Dec. 220.

ferred.³⁴ A person whose claim upon the property is superior to the mortgage foreclosed, has no claim upon the surplus,³⁵ and the same principle excludes a lienor who was not made a party to the suit, and whose lien still remains, from sharing in a fund which the sacrifice of his property did not help to create.³⁶

A senior mortgagee, or one who claims the rights of a senior mortgagee, by subrogation or otherwise, can claim no right to surplus money realized by the foreclosure of a junior mortgage, and his remedy is to foreclose his own lien;³⁷ nor can one who contracted to buy the property when he knew it was advertised for sale under a mortgage foreclosure;³⁸ nor a vendee who refuses to carry out the written contract of sale unless parol modifications thereof are reduced to writing by the vendor;³⁹ nor a mechanic's lienor who has executed a receipt.⁴⁰

Where property has been sold in foreclosure under the terms that the purchaser shall be liable for any deficiency which may occur upon a resale, and where the deposit made by such purchaser, who failed to complete, covers such deficiency and leaves a surplus over, a judgment creditor of the mortgagor is not entitled to such surplus, which belongs to the purchaser at the first sale, who has made up the deficiency as agreed.⁴¹

A second mortgagee has a claim superior to that of a party who, after the second mortgage was given, obtained a judgment against the mortgagor for a one-half interest in the mortgaged premises.⁴²

After a sale on foreclosure and payment of all sums due the mortgagee a surplus consisting of rents collected by a receiver appointed for that purpose should be paid to a junior mortgagee rather than to the owner of the equity of redemption. This is true although the junior mortgagee did not extend the receiver-

³⁴ *Nutt v. Cuming*, 155 N. Y. 309; 49 N. E. 880. See *Crocker v. Lewis*, 144 N. Y. 140; 39 N. E. 1.

³⁵ *De Ruyter v. St. Peter's Church*, 2 Barb. Ch. 555.

³⁶ *Winslow v. McCall*, 32 Barb. 241; *Root v. Wheeler*, 12 Abb. 294; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Bache v. Doscher*, 67 N. Y. 429.

³⁷ *Firestone v. The State*, 100 Ind. 226.

³⁸ *Ellis v. Salomon*, 57 App. Div. 118; 67 N. Y. Supp. 1025.

³⁹ *Rosenberg v. Wilson*, 120 App. Div. 554; 104 N. Y. Supp. 1087, *aff'd* 189 N. Y. 545; 82 N. E. 1132.

⁴⁰ *Taylor v. Dutcher*, 60 App. Div. 531; 69 N. Y. Supp. 951.

⁴¹ *Richardson v. Searles*, 37 Misc. 33; 74 N. Y. Supp. 771.

⁴² *Mechanics' Saving Bank v. Selye*, 83 Hun. 282; 64 N. Y. St. Rep. 728; 31 N. Y. Supp. 921.

ship for the benefit of her mortgage, especially where the junior mortgage by its terms assigned the rents to the mortgagee in the event of a default.⁴³

So where a second mortgagee forecloses and the deed given thereon is subsequently declared null and void, the lien of such second mortgage is restored and the second mortgagee is entitled to be paid out of a surplus arising on the foreclosure of the first mortgage.⁴⁴

Where the owner of realty, encumbered by a mortgage, conveys it to a trustee, in trust to pay her the rents and profits for her life and upon her death to convey to her children, and subsequently executes a second mortgage not on her life interest in the rents, but on the fee, such second mortgagee upon the foreclosure of the first mortgage, becomes entitled to that portion of the surplus properly applicable to her life estate.⁴⁵

The holder of an easement "not to build on rear of lot" has an interest in land, and evidence of its value should be heard by a referee in surplus proceedings, when offered.⁴⁶

When the owner of lands under course of improvement executes a trust mortgage for the benefit of creditors, persons filing mechanic's liens after the execution of the mortgage for material furnished before its execution, who do not elect to take under the mortgage, are entitled to a preference in the surplus on foreclosure.⁴⁷

The county court may direct the payment of a surplus to executors to whom the property was devised in trust, "to be held and invested as trustees thereof upon the trust in said will declared."⁴⁸ A bank which has discounted for the mortgagee a note executed by the mortgagor and which the two latter parties

43 *Vogel v. Nachemson*, 137 App. Div. 200; 121 N. Y. Supp. 927. See *Continental Insurance Co. v. Reeve*, 149 App. Div. 835; *Frankenstein v. Hamburger*, 73 App. Div. 352; 76 N. Y. Supp. 819.

44 *United States Title Guaranty Co. v. Donehue*, 113 App. Div. 882; 99 N. Y. Supp. 639.

45 *Raymond v. Harris*, 84 App. Div. 546; 82 N. Y. Supp. 689.

46 *Winthrop v. Welling*, 2 App. Div. 229; 37 N. Y. Supp. 729.

47 *American Mortgage Co. v. Merrick Construction Co.*, 120 App. Div. 150; 104 N. Y. Supp. 900, *aff'd* 190 N. Y. 526; 83 N. E. 1122.

48 *Peoples' Trust Co. v. Harman*, 43 App. Div. 348; 60 N. Y. Supp. 178.

But not to an executor seeking to carry out a fraud of his testator. *Greason v. Holcomb*, 131 App. Div. 868; 116 N. Y. Supp. 336, *aff'd* 196 N. Y. 571; 96 N. E. 1159.

agreed should operate, when paid, as a payment on the bond secured by the mortgage, may properly claim payment of such note out of a surplus arising on foreclosure.⁴⁹

When a deed has been adjudged to be a mortgage by the courts, and on foreclosure of a prior mortgage an accounting between the real owner and the mortgagee holding under said deed, shows that the former is indebted to the latter in a sum greater than the surplus on the foreclosure of the prior mortgage, the owner is not entitled to the surplus.⁵⁰

A surplus in the hands of a receiver after the satisfaction of a first mortgage represents the mortgaged estate, and that part of the surplus consisting of rents due after the purchaser on foreclosure makes demand for possession under his deed belongs absolutely to him.

So, too, rents payable in advance and collected by the receiver, but extending beyond the date of the purchaser's demand for possession, should be apportioned to him.⁵¹

The purchaser on the foreclosure of a first mortgage and the holder of a second mortgage are not creditors of the same debtor. Hence, although the second mortgagee has other security for his debt, the purchaser on the foreclosure of the first mortgage cannot contend that the lien of the second mortgage does not attach to the surplus, for the equitable rule of marshaling securities applies only where two or more persons are creditors of the same debtor.⁵²

§ 1111. **Prior liens bound by judgment.**—In *The Emigrant Industrial Savings Bank v. Goldman* (75 N. Y. 127), a defendant who claimed under a mechanic's lien, filed before the recording of the mortgage foreclosed, was made a party, and he was included in the number of defendants alleged to have or claim to have some interest or lien which accrued subsequent to the plaintiff's mortgage. He appeared in the action, and the notice of appearance contained a waiver of "service of a copy of all papers, except notice of sale and application for surplus funds."

⁴⁹ *Fitch v. McDowell*, 145 N. Y. 498; 40 N. E. 20.

⁵⁰ *Manhattan Life Ins. Co. v. Johnson*, 115 App. Div. 429; 101 N. Y. Supp. 65, aff'd 188 N. Y. 108; 80 N. E. 658.

⁵¹ *Continental Insurance Co. v. Reeve*, 149 App. Div. 835.

⁵² *Continental Insurance Co. v. Reeve*, 149 App. Div. 835.

The usual judgment was taken against him, and a sale was had which yielded a surplus. An application was made on his behalf for payment out of the fund so created, which was denied. It was held that the rights of the defendant, being paramount to the mortgage, were not affected by the foreclosure, which only operated to bar interests in the equity of redemption,⁵³ and that therefore no claim could be sustained to the proceeds of the sale. It was urged that the waiver of notices operated as a consent to come in subsequently to the plaintiff's mortgage, and that a different rule should prevail. CHURCH, C. J., in giving the opinion of the court, remarked that he should be disposed to adopt this view if it appeared that in fact the premises were sold clear of the lien, and especially with the defendant's knowledge and acquiescence. The notice of waiver did not, however, contain a stipulation waiving any right of priority; and the lienor had, after the commencement of the foreclosure, proceeded upon his lien in a way that was deemed to be inconsistent with an understanding on his part that he had consented to be satisfied with a claim upon the surplus.

§ 1112. *Questions of priority.*—*Prima facie* the mortgagor or his grantees are entitled to the surplus,⁵⁴ and presumptively the mortgage first recorded is the prior lien.⁵⁵ If, however, the mortgage first recorded is shown not to have been a valid lien for its full amount at the time the subsequent mortgage was given, by reason of the consideration not having been advanced or otherwise, the presumption of priority will be destroyed.⁵⁶ So, too, if the mortgagee in the mortgage first recorded had notice, prior to taking his security, of an unrecorded mortgage, his priority will be gone.⁵⁷ So, also, an unregistered mortgage, is entitled to priority over a subsequently docketed judgment.⁵⁸

⁵³ *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *Frost v. Koon*, 30 N. Y. 428; *Lewis v. Smith*, 9 N. Y. 502; *Corning v. Smith*, 6 N. Y. 82; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 318.

⁵⁴ *Franklin v. Van Cott*, 11 Paige, 129.

⁵⁵ *Freeman v. Schroeder*, 29 How. Pr. 263; 43 Barb. 618.

An incorrect description of a note in a mortgage given to secure an ac-

commodation indorser thereof held not to deprive the mortgagee of first lien upon the surplus moneys. *St. Lawrence University v. Farmer*, 32 Misc. R. 410; 66 N. Y. Supp. 584.

⁵⁶ *Freeman v. Schroeder*, 29 How. Pr. 263; 43 Barb. 618.

⁵⁷ *Haywood v. Shaw*, 16 How. Pr. 119.

⁵⁸ *Thomas v. Kelsey*, 30 Barb. 268.

§ 1113. **Adjusting equities.**—The equitable rules regulating the marshaling of assets control in these proceeding, where different parcels of the mortgaged premises are incumbered with separate judgments or mortgages.⁵⁹ The manner the surplus came into court, or the order in which the parcels were sold, will have but little to do with the decision if the amount each parcel produced is known, for the court will adjust the equities as between the parties, whenever they can be made to appear.⁶⁰ So, a defendant who has paid more than his proportion of a prior lien, will be deemed subrogated to the rights of the plaintiff and awarded satisfaction out of the surplus.⁶¹

And in the case of a second mortgage to a building and loan association the court will, upon a foreclosure of the first mortgage, adjust the equities of the parties in respect to the surplus.⁶² But while the court may adjust equities it cannot upon application for surplus moneys displace the lien of a prior mortgage in favor of a junior mortgage merely because the prior mortgage covers other lands which are of value more than sufficient to satisfy it while the junior mortgage covers only the lands foreclosed.⁶³ An agreement between the parties may also control upon the question of the disposition of the surplus.⁶⁴

The priority of liens to a surplus is governed by the rule of law which gives a judgment creditor of a partnership, a lien upon the land of a partner, rather than by the rule of equity as to application of partnership and individual assets to partnership and individual creditors.⁶⁵

⁵⁹ N. Y. Life Ins. & Trust Co. v. Vanderbilt, 12 Abb. 458; Oppenheimer v. Walker, 3 Hun, 30; 5 N. Y. Sup. (T. & C.) 325; Savings Bank of Utica v. Wood, 17 Hun, 133; Thomas v. Moravia F. & M. Co., 7 N. Y. St. Rep. 162; Fancher v. Bonfils, 44, App. Div. 637; 60 N. Y. Supp. 837; Gutwillig v. Wiederman, 26 App. Div. 26; 49 N. Y. Supp. 984.

⁶⁰ Burchell v. Osborne, 119 N. Y. 486; 23 N. E. 896; Snyder v. Stafford, 11 Paige, 78; James v. Hubbard, 1 Paige, 234; Oppenheimer v. Walker, 3 Hun, 30; 5 N. Y. Sup. (T. & C.) 325.

Rights determined as of date of

sale. Elsworth v. Woolsey, 19 App. Div. 385; 46 N. Y. Supp. 486, aff'd 154 N. Y. 748.

⁶¹ Lawrence v. Cornell, 4 Johns. Ch. 545.

⁶² Rochester Savings Bank v. Whitmore, 25 App. Div. 491; 49 N. Y. Supp. 862. See Bertin v. Falk, 101 App. Div. 562; 91 N. Y. Supp. 1037.

⁶³ Quackenbush v. O'Hare, 129 N. Y. 485; 29 N. E. 958. See as to subrogation.

⁶⁴ Spencer v. Richmond, 46 App. Div. 481; 61 N. Y. Supp. 397.

⁶⁵ New York Life Ins. Co. v. Mayer, 19 Abb. N. C. 92.

§ 1114. A lessee from the mortgagor, whose lease has been cut off in foreclosure, has a claim to the surplus money, superior to that of the owner of the equity,⁶⁶ and he is entitled to damages out of that fund equal to the value of the term over and above the rent reserved. The value of the term must depend upon the circumstances of every individual case, the length of the term and conditions of the lease, the character of the property, its location, the readiness with which it may be let, the condition of the buildings, whether substantial and durable or requiring frequent repairs, the uniformity of rents in the neighborhood, or their fluctuating character; in short, every material consideration which would enter into the mind of a purchaser of the term in judging what would be a fair price for it, and, like other ordinary questions of value, should be determined as a matter of fact upon the testimony of witnesses competent to speak upon the subject.⁶⁷ In the absence of proof the presumption is that the rents reserved are the fair value of the use and that no damage is sustained by the lessee. The annual value of the leasehold estate and the amount of rent reserved must both be shown.⁶⁸

§ 1115. Dower in surplus.—The rights of the wife of the mortgagor in the surplus are the same as they were in the land before the sale. This was once doubted, and it was said that if the husband lived until after the sale, the wife could not claim dower.⁶⁹ It is, however, now the settled doctrine in this State that a widow is entitled to dower in the surplus proceeds of her husband's lands, after satisfying all incumbrances to which she is bound to contribute. It is equally well settled that a wife is entitled to have her inchoate right of dower in the surplus protected. If the husband be dead at the time of the distribution of the surplus, the widow is entitled to have one-third of the surplus, over and above claims to which she is bound to contribute, invested for her benefit during her life. If the husband be living at that time, the same amount is to be invested for the joint lives of the husband and wife, the income during the life

⁶⁶ Ely v. Collins, 45 Misc. R. 255; 92 N. Y. Supp. 160.

⁶⁷ Clarkson v. Skidmore, 46 N. Y. 297, overruling 2 Lans. 238; Douglass v. Woodworth, 51 Barb. 79.

⁶⁸ Larkin v. Misland, 100 N. Y. 212; 9 N. E. 79.

⁶⁹ Brackett v. Baum, 50 N. Y. 8; Frost v. Peacock, 4 Edw. 678.

of the husband to be subject to the order of the court; if the wife survive her husband, the income to be paid to her for her dower.⁷⁰

It is said that in a proper case the court may exercise its discretion and make an order directing that money deposited to secure dower should be paid to the husband upon his giving a sufficient bond to insure payment of such dower should his wife survive him.⁷¹

An attorney has no lien for services rendered to a wife upon the fund in court which represents her right of dower in foreclosed premises.⁷²

§ 1116. **Judgments.**—Where judgments have been obtained which were specific liens upon the equity of redemption before the sale, they will be entitled to priority of payment out of the surplus according to their respective dates. But if the person against whom the judgments were obtained had only an equitable interest in the property, which could not be bound by the lien: as, for example, if he was merely in possession under a contract to purchase, the judgments will be paid on the basis of equality only.⁷³

And where work and materials were furnished under a contract with executors for improvements upon a parcel of property of the estate which was not covered by the mortgage foreclosed, a judgment therefor against the executors is held not to be a lien and is not payable out of the surplus moneys,⁷⁴ but where a judgment was not a lien at the time of the foreclosure sale, although ten years had not elapsed when the action to foreclose the mortgage was instituted, it is not so payable.⁷⁵

Where a judgment is a lien at the time of the foreclosure sale it is payable out of the surplus, although ten years have elapsed

70 *Blydenburgh v. Northrop*, 13 How. Pr. 289; *Matthews v. Duryee*, 4 Keyes, 525, aff'g 45 Barb. 69; 17 Abb. 256; 3 Abb. App. Dec. 220; *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 Barb. 561; *Citizens' Savings Bank v. Mooney*, 26 Misc. 67; 56 N. Y. Supp. 548; *New York Life Ins. Co. v. Mayer*, 12 N. Y. St. Rep. 119; 14 Daly, 318; 19 Abb. N. C. 92, aff'd 108 N. Y. 655.

71 *Emigrant Industrial Bank v. Regan*, 41 App. Div. 523; 58 N. Y. Supp. 693.

72 *Mooney v. Mooney*, 29 Misc. R. 707; 62 N. Y. Supp. 769; 7 Ann. Cas. 257.

73 *Purdy v. Doyle*, 1 Paige, 558.

74 *Mander v. Low*, 12 Misc. R. 316; 33 N. Y. Supp. 719.

75 *Nutt v. Cuming*, 155 N. Y. 309; 49 N. E. 880.

from the date it was recovered, before the institution of the surplus proceedings.⁷⁶

§ 1117. **Deceased mortgagor.**—It is said that where there is no other creditor entitled to priority, the court will order the claim of a creditor who has obtained a decree of the surrogate to be paid, and will not appropriate the surplus to a legatee of the deceased mortgagor.⁷⁷ So, too, in the absence of any other creditor, it has been said that the surplus can be applied to the payment of a claim of the mortgagee against the mortgagor, which is not a lien upon the fund.⁷⁸ But this proposition should be received with caution. In default of other persons entitled thereto, surplus money accruing after the death of the mortgagor goes to his heirs.⁷⁹

§ 1118. **Reclaiming money erroneously paid.**—It has been held that surplus moneys paid on an order regularly obtained, cannot be reclaimed; but this proposition may perhaps be qualified with the proviso that the persons receiving the money had some equitable claim to it.⁸⁰

And it has been subsequently determined that where all or a part of surplus moneys have been wrongfully or erroneously paid, such moneys may be recovered.⁸¹

Mere proof that purchaser at foreclosure sale after paying the sum bid at the sale paid off a valid assessment, does not sustain his claim to be the owner of part of the surplus moneys, where the judgment-roll is not in evidence to show whether the foreclosure sale was made free of or subject to taxes and assessments.

The title of such purchaser to a part of the surplus moneys cannot be determined in an action against a party wrongfully in possession of the surplus moneys when the person legally entitled to the surplus arising on the sale is not a party to the action.⁸²

⁷⁶ Terry v. Fuller, 112 N. Y. Supp. 450.

⁷⁷ Clarke's Case, 15 Abb. 227.

⁷⁸ Beekman Fire Ins. Co. v. First Methodist Episcopal Church, 29 Barb. 658; 18 How. Pr. 431.

⁷⁹ Matter of Knapp, 25 Misc. R. 133; 54 N. Y. Supp. 927.

⁸⁰ Burchard v. Phillips, 11 Paige, 66.

⁸¹ Brehm v. Mayor of New York,

104 N. Y. 186; 10 N. E. 158, holding that representatives of mortgagor could recover. Powell v. Harrison, 88 App. Div. 228; 85 N. Y. Supp. 452, holding that simple contract creditor might by motion compel return. Felts v. Martin, 20 App. Div. 60; 46 N. Y. Supp. 741, where general creditor sought this remedy.

⁸² Day v. Town of New Lots, 107 N. Y. 148; 13 N. E. 915.

Where an order confirming the report of a referee and directing the payment of surplus has been entered, the court still has jurisdiction, upon proof that the report of the referee was erroneous, to vacate the order confirming such report, and to refer the matter back for further proof.⁸³

ARE SURPLUS MONEYS REAL OR PERSONAL PROPERTY.

§ 1119. It depends upon circumstances as to whether surplus moneys shall be treated as real or as personal estate. When they are to be divided among persons who had liens upon the land, they are subject for this purpose to the same rules which govern real estate;⁸⁴ but when the rights of the claimants in and to the fund are fixed and determined, the money in their hands is personal property.⁸⁵

When the owner of the equity of redemption dies subsequent to the sale, his interest in the surplus is treated as personal estate, and goes to the executor or administrator;⁸⁶ but when the sale takes place subsequent to the death of the mortgagor, the surplus is regarded as real estate, and goes to the heir.⁸⁷

If a judgment is recovered against the owner of an equity of redemption, before a sale on foreclosure of the mortgage, the judgment is a lien upon surplus moneys arising upon the sale. If the judgment be got after the sale, though before distribution of the surplus, there is no lien upon them.⁸⁸

The proceeds of land is, like any other money, personal property; but it is, under the doctrine of equitable conversion, in some cases treated as real estate. The rule which controls the cases seems to be, that when the rights of the claimants are founded upon interests which they once held in the land itself before any sale had been made; then their rights in the proceeds are

⁸³ *Mutual Life Ins. Co. v. Cockerill*, 150 App. Div. 411.

⁸⁴ *Moses v. Murgatroyd*, 1 Johns. Ch. 119. See *Germania Savings Bank v. Jung*, 18 N. Y. Supp. 709; 28 Abb. N. C. 81.

⁸⁵ *Cope v. Wheeler*, 41 N. Y. 303.

⁸⁶ *Bogert v. Furman*, 10 Paige, 496; *Swezey v. Willis*, 1 Bradf. 495; *Cox v. McBurney*, 2 Sandf. 561; *Horton v. McCoy*, 47 N. Y. 21; *Swezey v. Thayer*, 1 Duer, 286; *Foreman v.*

Foreman, 7 Barb. 215; *Davison v. De Freest*, 3 Sandf. Ch. 456; *Hoey v. Kinney*, 10 Abb. 400; *Denham v. Cornell*, 67 N. Y. 556.

⁸⁷ *Dunning v. Ocean National Bank*, 61 N. Y. 497; *Fliess v. Buckley*, 22 Hun, 551. See also *Beard v. Smith*, 71 Ala. 568.

⁸⁸ Per FOLGER, J., in *Denham v. Cornell*, 67 N. Y. 556, 562; *Sweet v. Jacocks*, 6 Paige, 355; *Douglass v. Houston*, 6 Ohio (Hammond), 182.

measured by the same rules which controlled their rights in the land, and as to them the money is treated as real estate; but if the rights of the claimants did not attach to the land itself, and only came into existence after the money had taken the place of the land, then they must hold, if at all, under the rules which govern personal property.⁸⁹

§ 1120. **Estate of deceased owner.**—The question as to whether property is real or personal, when it arises in determining the rights of conflicting claimants to the estate of a deceased owner, is a question of law, and it is not aided by any declaration made by such owner during his lifetime, which is not executed in such form as to be valid as a will. Neither can it be aided by the terms of an agreement made by such owner, of such a nature that the provisions declaring the property to be personal could be cancelled by him without disturbing any vested right. So, if a mortgage shall contain an authority to the mortgagee to sell, with a direction that the surplus, after the satisfaction of the mortgage debt, shall be paid to the mortgagor, "or his executors or administrators," this language will not render the surplus personal property if the sale shall be made after the death of the mortgagor. It is to be construed to mean that the surplus is to be paid to the personal representatives of the mortgagor, provided the sale takes place while the mortgagor is alive.⁹⁰

The fact that the distribution of the surplus is intrusted to the surrogate does not render it personal property.⁹¹

§ 1121. **The real estate of an infant** and its proceeds, if sold during his minority, continues to be real estate until he reaches full age, for the purposes of descent, notwithstanding the fact that it may, at the time of the death of the infant, be represented by cash in bank or other strictly personal assets. It is provided by statute that a sale of real property, or of an interest in real property, of an infant or incompetent person, made under special proceedings for that purpose, pursuant to an order of the court, does not give to that infant or incompetent person any other or greater interest in the proceeds of the sale than he had in the

⁸⁹ See *Albro v. Blume*, 5 App. Div. 309; 39 N. Y. Supp. 215.

⁹⁰ *Dunning v. Ocean National Bank*, 61 N. Y. 497.

⁹¹ *Dunning v. Ocean National Bank*, 61 N. Y. 497.

property or interest sold. Those proceeds are deemed property of the same nature or estate as the interest sold until the infant arrives at full age or the incompetency is removed.⁹² This principle has been applied to the proceeds of the real estate of an infant sold under a judgment in partition,⁹³ and also where the sale was under a judgment of foreclosure.⁹⁴

PRACTICE IN PROCEEDING TO DISTRIBUTE SURPLUS.

§ 1122. **Who may apply for surplus.**—As the rule was originally framed it was provided that “any defendant” might have an order of reference, etc. Under this provision it was held that the complainant must set up all of his claims in his bill, and could not apply for any part of the surplus in any other right than as holder of the mortgage foreclosed.⁹⁵ The next year after this decision was made, and in order to obviate inconveniences that might arise, the rule was amended so as to allow “any party to the suit,” or any person not a party, who had a lien on the mortgaged premises at the time of the sale, to have an order of reference, to ascertain the priorities of liens.⁹⁶

The plaintiff now has the same right that any one else has to procure the order of reference and to assert and prove a lien junior to the mortgage foreclosed.⁹⁷ It is unnecessary, and in most cases it is improper, for him to allege all of his demands in his complaint. If such demands are junior to the mortgage foreclosed and not alleged in the complaint, they will be cut off by the sale.⁹⁸ The sale cannot, therefore, be made subject to them.⁹⁹

A subsequent mortgagee who demands in his answer that his mortgage be next payable from the surplus and the answer is served upon all of the defendants who have appeared and they

⁹² Code of Civil Pro. § 2359.

⁹³ *Horton v. McCoy*, 47 N. Y. 21.

⁹⁴ *Sweezy v. Thayer*, 1 Duer, 286; *Forman v. Marsh*, 11 N. Y. 544, overruling *Robinson v. McGregor*, 16 Barb. 534, which extends the rule after majority until election by the infant; *Petition of Thomas*, 4 T. & C. 413; 1 Hun, 475; *Denham v. Cornell*, 7 Hun, 664; *Cutting v. Lincoln*, 9 Abb. N. S. 436, applies the same rule to a lunatic's property.

⁹⁵ *Tower v. White*, 10 Paige, 395.

⁹⁶ *Field v. Hawxhurst*, 9 How. Pr. 75.

⁹⁷ *Mutual Ins. Co. v. Transch-nicht*, 3 Abb. N. C. 135.

⁹⁸ *Tower v. White*, 10 Paige, 395; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Wheeler v. Van Keuren*, 1 Barb. Ch. 490; *Homeopathic Mutual Life Ins. Co. v. Sixbury*, 17 Hun, 424.

⁹⁹ *Homeopathic Mutual Life Ins. Co. v. Sixbury*, 17 Hun, 424.

do not take issue upon it, is not entitled to relief until a referee has been appointed, a sale had and surplus proceedings taken as they may be other prior lienors who have not appeared who must also be served with the answer.¹

§ 1123. Where person appointed to receive service for an incompetent.—The duty is imposed upon a person appointed to receive service of summons for an incompetent in an action to foreclose a mortgage to represent him in proceedings for the distribution of a surplus. If the order for such service does not in terms empower him to so act, it may be amended by the court at the time surplus proceedings are commenced, so as to confer such power or such proceedings may be treated as new and independent and the court may by virtue of its inherent power designate the same or another person to appear and represent the incompetent therein.²

§ 1124. Notice of application for the order of reference should be given to the owner of the equity of redemption, to every party who appeared in the cause, or who shall have filed a notice of claim with the clerk previous to the entry of the order of reference, and also to any person having, or appearing to have, an unsatisfied lien shown by the official searches for conveyances or incumbrances filed with the judgment-roll. This notice should be served upon the attorneys for those who appeared in the action, and also upon the attorney for those claimants who have filed notices of claim through attorneys. If notices of claim have been filed by claimants personally, no name of an attorney appearing, the notice of application for the order may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim. If the owner of the equity of redemption has not appeared by attorney in the action, or if any apparent claim of a person who has not appeared by attorney in the action appears from the official searchers, an order of the court must be procured, directing the manner in which service shall be made.³

An incumbrancer *pendente lite* need not be made a party to

1 Cromwell v. Foster, 27 Misc. R. 121; 57 N. Y. Supp. 362. See Code Civ. Pro. § 521

2 American Mortgage Co. v. Dewey, 106 App. Div. 389; 94 N. Y. Supp.

808; 35 Civ. Pro. R. 48. See Code Civ. Pro. § 427.

3 Rule 64. See Matter of Schuessler, 49 Misc. R. 203; 98 N. Y. Supp. 939.

the foreclosure, and if his lien is not known to exist, it is possible that the surplus may be distributed without notice to him. But if his lien is "known to exist," he is entitled to notice of the surplus proceedings,⁴ and he will be protected by the court.⁵

Under this same rule⁶ one who has filed his claim between the time of the application for the reference and the entry of the order is entitled to notice *nunc pro tunc* of the application for the reference before the justice can sign the order.⁷

§ 1125. Referee should be sworn.—The referee, before proceeding to hear the testimony, should be sworn faithfully and fairly to try the issues, and to determine the questions referred to him, as the case requires, and to make a just and true report according to the best of his understanding.⁸ But an omission of the oath of the referee is not fatal, and may be supplied.⁹

§ 1126. Certificates and proofs to be produced.—The moving party should present to the referee a certificate of the county treasurer or (in the city of New York) of the chamberlain of that city, showing the amount to the credit of the action as surplus; also, the certificate of the clerk showing what notices of claim have been filed up to the granting of the order of reference, and what parties have appeared in the action, and what unsatisfied liens appear upon the searches on file. He should also show, by affidavit, whether any, and what other unsatisfied liens are known to him to exist. And before the referee proceeds to make his report, he should ascertain by the proper certificates and other evidences, that the owner of the equity of redemption and all claimants and other proper parties have been notified to attend before him on the reference.¹⁰

§ 1127. Testimony must be signed and filed.—A reference to ascertain and report the amount due to any party which is a lien upon surplus moneys, is within rule 30, which provides that

⁴ Rule 64.

⁵ Cook v. Mancius, 5 Johns. Ch. 89.

⁶ Rule 64.

⁷ Schieck v. Donohue, 44 Misc. R. 425; 90 N. Y. Supp. 36.

As to opening default of junior lienor after notice. See Irving Sav-

ings Institution v. Smith, 100 App. Div. 460; 91 N. Y. Supp. 446.

⁸ Code of Civ. Pro. § 1016.

⁹ Code of Civ. Pro. § 721.

¹⁰ Rules 61, 64. Hulbert v. McKay, 8 Paige, 651; Franklin v. Van Cott, 11 Paige, 129; Van Voast v. Cushing, 32 App. Div. 116; 52 N. Y. Supp. 934.

“in references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding.”

When the witnesses fail to sign the testimony, the proper remedy is by a motion, and no exception to the report on that ground will be available.¹¹

§ 1128. *Duty of referee.*—The order of reference directs the referee not only to inquire and report as to the amount due to the parties obtaining the reference, but also as to the lien of any other person on the surplus moneys. The referee, therefore, should ascertain the whole amount of such surplus moneys by the certificate of the county treasurer or city chamberlain, as the case may be; and if the incumbrance of the party obtaining the reference and entitled to priority is not large enough to exhaust the whole surplus moneys, the referee must go further and ascertain who is entitled to the residue of such surplus, so that upon the coming in of the report an order may be made to dispose of the whole surplus fund. *Prima facie* the mortgagor, or those who are stated in the complaint to be his heirs or devisees or grantees, if he is dead, or has sold the property, are entitled to the surplus. And if no one attends before the referee and produces evidence of a better right, and there is no evidence before him that the person *prima facie* entitled has parted with his interest, the referee should report that the residue of such surplus belongs to the mortgagor or to the person *prima facie* entitled to it.¹²

It is the duty of the referee to embody in his report all the facts found by him, including those found at the request of a party to the proceedings.¹³

§ 1129. *Rights of claimant.*—An incumbrancer who has neglected to file a notice of his claim may go before the referee, pending the reference, and file his claim with him, and he will

¹¹ Nat. State Bank v. Hibbard, 45 How. Pr. 281.

Day v. Town of New Lots, 11 N. Y. St. Rep. 361.

¹² Per WALWORTH, Ch., in Franklin v. Van Cott, 11 Paige, 129. See

¹³ Bigelow v. Doying, 36 N. Y. St. Rep. 636.

then be entitled to be heard upon the reference upon such equitable terms as to costs as the referee shall direct.¹⁴ A claimant may not, pending a reference to ascertain the rights of all persons to the surplus fund, maintain an independent proceeding by a new petition.¹⁵

§ 1130. **The report of the referee** should show upon its face that the persons entitled to be summoned to attend the reference, either attended or had due notice to attend, and also who is entitled to the residue of the surplus beyond the amount due to the applicants upon the order of reference.¹⁶ If any persons have appeared upon the reference, so as to entitle them to file exceptions to the report, a notice of the filing of such report must be served upon them, and their exceptions must be filed within eight days thereafter, or the report will stand confirmed.¹⁷ No order of distribution should be made until the time for filing exceptions has expired.¹⁸

§ 1131. **Confirming report.**—The court at Special Term has ample power to confirm, set aside, or refer back the report; but it is not authorized to make new findings, or to modify those made by the referee. It is the right of each party to have all of the facts found by the referee who saw the witnesses and heard their testimony.¹⁹

Notice of an application to confirm the report should be given to all who appeared in the foreclosure action or who filed a notice of claim to the surplus.²⁰

Upon confirmation, the report of the referee becomes a valid and binding judgment, from which either party may, it seems, appeal.²¹

Where an order of the Special Term confirming the report has been reversed by the Appellate Division, the Court of Appeals may upon appeal from the order of reversal, modify such order.²²

¹⁴ Hulbert v. McKay, 8 Paige, 651.

¹⁵ De Ruyter v. The Trustees of St. Peter's Church, 2 Barb. Ch. 555.

¹⁶ Franklin v. Van Cott, 11 Paige, 129.

¹⁷ Rule 30.

¹⁸ Franklin v. Van Cott, 11 Paige, 129.

¹⁹ Mutual Life Ins. Co. v. Anthony, 23 W. Dig. 427. See Irving

Savings Institution v. Smith, 100 App. Div. 460; 91 N. Y. Supp. 446.

²⁰ Van Voast v. Cushing, 32 App. Div. 116; 52 N. Y. Supp. 934.

²¹ McRoberts v. Pooley, 12 Civ. Pro. Rep. 140; 5 N. Y. St. Rep. 830. See Rutherford Realty Co. v. Cook, 198 N. Y. 29; 90 N. E. 1112.

²² Wendt v. Walsh, 164 N. Y. 154; 58 N. E. 2.

§ 1132. **Costs.**—The expenses of the proceeding may be directed to be paid from the fund,²³ but motion costs are all that can properly be awarded to the successful party in proceedings to obtain surplus after a sale under a judgment of foreclosure;²⁴ no trial fee can be granted,²⁵ nor can any extra allowance be made.²⁶

Ordinarily the costs of the proceeding are chargeable on the fund; but where the facts are such as to make another rule more equitable, they may be charged upon a party individually,²⁷ and the exercise of the court's discretion in regard to this is not reviewable in the Court of Appeals.²⁸

Compare *Mutual Life Ins. Co. v. Anthony*, 105 N. Y. 57; 11 N. E. 281, holding that an order of the General Term reversing an order of confirmation by the Special Term is not reviewable in the Court of Appeals.

23 *Oppenheimer v. Walke*, 3 Hun, 30.

24 *McDermott v. Hennesy*, 9 Hun, 59; *Elwell v. Robbins*, 43 How. Pr. 108; *N. Y. Life Ins. Co. v. Vanderbilt*, 12 Abb. 458; *American Mortgage Co. v. Butler*, 36 Misc. R. 253; 73 N. Y. Supp. 334.

25 *Dudgeon v. Smith*, 23 W. Dig. 400; *Matter of Gibbs*, 58 How. Pr.

502; *German Savings Bank v. Sharer*, 25 Hun, 409.

26 *German Savings Bank v. Sharer*, 25 Hun, 409; *Syracuse Savings Bank v. Stokes*, 71 Misc. R. 508; 130 N. Y. Supp. 596.

27 *Lawton v. Sager*, 11 Barb. 349; *Bevier v. Schoonmaker*, 29 How. Pr. 411, 422; *Fosdick v. Lyons*, 38 App. Div. 609; 56 N. Y. Supp. 942; *Hyman v. Hauff*, 2 Misc. R. 388; 21 N. Y. Supp. 984; 50 N. Y. St. Rep. 603, aff'd 138 N. Y. 48; 33 N. E. 735.

28 *Hyman v. Hauff*, 138 N. Y. 48; 33 N. E. 735.

CHAPTER XXXII.

REMEDIES OF THE MORTGAGEE, OTHER THAN BY PROCURING A SALE OF THE MORTGAGED ESTATE.

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STRICT FORECLOSURE.

§ 1133. Common remedy in England.—The doctrine of the equity of redemption, as established in England, amounted to but little more than that it was not competent for parties by their contracts, to fix a time when an estate would be forfeited for non-payment of a debt, and that the Court of Chancery would always enlarge the time for performance of the condition, so that the debtor might not be taken by surprise, or be without opportunity to protect himself. The mortgagee was allowed the possession of the premises, being accountable for the rents, but it was not thought to be just that he should be subject to a perpetual account, or be converted into a perpetual bailiff, but that,

after a fair and reasonable time give to the mortgagor to discharge the debt, he should lose his equity, or in other words, be foreclosed of his right of redemption.¹ This is what is known as strict foreclosure; it is the common remedy of a mortgagee in England,² though a sale will be ordered there in some special cases;³ and it is believed still to be the approved method of foreclosure in some of our States.⁴

§ 1134. **Regarded as a severe remedy.**—A strict foreclosure has been regarded as a severe remedy, since it transfers the absolute title without any sale, no matter what the value of the premises.⁵ This may be a question of opinion fairly open to discussion. In populous cities, where property can generally be sold at public auction for nearly its value, the sale of a debtor's property is a simple way of determining the rights of the parties; but in country districts, where a sale at public auction almost necessarily involves a sacrifice, there are humane considerations in favor of a remedy which leaves it to the debtor to sell his property as he thinks best, and gives him an opportunity to find a customer for his equity, who will be able to discharge the incumbrance.

§ 1135. **Rarely allowed in this State.**—The practice in this State has been to sell and not to foreclose,⁶ and the provision of the Revised Statutes, which enacted that the court shall have power to decree a sale of the mortgaged premises, was merely declaratory of the law as it stood prior to their enactment.⁷ Strict foreclosure should be resorted to only in extreme cases.⁸ It has rarely been pursued or allowed in this State, except in cases where a foreclosure in the common form has once been had and the premises sold, but some judgment creditor or person similarly situated, not having been made a party, has a right to redeem. As to him, a strict foreclosure has been held to be proper.⁹ So, too, where property has been sold under a judg-

1 Coote on Morts. 510.

2 Fisher on Morts. pp. 1, 2.

3 15 & 16 Vict., c. 86, § 48.

4 Hitchcock v. U. S. Bank of Penn., 7 Ala. 386; Goodenow v. Ewer, 16 Cal. 461; Palmer v. Mead, 7 Conn. 149; Paris v. Hulett, 26 Vt. 308; Sage v. McLaughlin, 34 Wis. 550.

5 Per PECKHAM, J., in Bolles v.

Duff, 43 N. Y. 469. See also opinion of JONES, Ch., in Lansing v. Goelet, 9 Cow. 352.

6 Mills v. Dennis, 3 Johns. Ch. 367.

7 2 R. S. 191, § 151; Bolles v. Duff, 43 N. Y. 469.

8 Denton v. Ontario County Nat. Bank, 150 N. Y. 126; 44 N. E. 781.

9 Bolles v. Duff, 43 N. Y. 469; 10 Abb. N. S. 399; 41 How. Pr. 355;

ment of foreclosure, a strict foreclosure has been determined to be proper if there is any doubt as to the jurisdiction of the court which ordered the sale, or as to the regularity of the proceedings.¹⁰

The preference of our courts for a sale rather than a foreclosure is illustrated by the fact that, even where the action was brought to have a deed declared to be a mortgage, the court held that a sale should be directed rather than a redemption in a limited time.¹¹

The wording of section 1626 of the Code raises a doubt as to whether strict foreclosure could now be allowed in any circumstances.

§ 1136. *Lands outside the State.*—When the parties are within the jurisdiction of the courts of this State, and process is personally served upon them here, an action may be maintained for the strict foreclosure of land situated in another State. The court cannot act upon the land directly, but acts upon the conscience of the persons here. This relief was granted in a case where the mortgage was in form an absolute deed, and the property was situated in Illinois.¹²

§ 1137. *Infants.*—It was the ancient and settled practice of the Court of Chancery, that no decree should be made against an infant without giving him a day in court after he came of age. In the case of a strict foreclosure of a mortgage, it was usual to allow him to show cause why the decree should not bind him, but this did not permit him to unravel the accounts or to redeem the mortgage, and he was only entitled to show error in the decree. Since there can be no question as to the power of the court to order a sale, such a proceeding is ordinarily preferable when an infant is concerned.¹³

§ 1138. *Strict foreclosure to remedy defective foreclosure.*—Where a mortgage has been foreclosed, and the property has been

Benedict v. Gilman, 4 Paige, 58;
Kendall v. Treadwell, 14 How. Pr.
165; Blanco v. Foote, 32 Barb. 535;
Ross v. Boardman, 22 Hun, 527;
Franklyn v. Hayward, 61 How. Pr.
43. See also Shaw v. Heisey, 48
Iowa, 468.

10 Kendall v. Treadwell, 14 How.
Pr. 165.

11 Smidt v. Jackson, 11 Hun, 361.

12 House v. Lockwood, 40 Hun,
532; 1 N. Y. S. Repr. 196; 2 Story
Eq. Jur. §§ 1291, 1292.

13 Mills v. Dennis, 3 Johns. Ch.
367.

sold thereunder, the purchaser stands as the assignee of the mortgage, and he also holds the rights of the owner of the equity of redemption, and of all other persons who have been made parties to the action.¹⁴ If the holder of a subsequent incumbrance is not made a party, he will still retain the right to redeem from the mortgage, but the purchaser will also, as the assignee of the owner of the equity of redemption, have the right to redeem from him. In such a case it will be the right of the purchaser either to redeem from the subsequent incumbrancer, or to compel the subsequent incumbrancer to redeem from him.¹⁵

If the amount of the subsequent lien is ascertained and admitted, it will not, in general, be difficult for the purchaser to determine what is his proper course; but if its amount is unliquidated, or if it is claimed to be paid, the course of procedure will be more complex. It is believed that, in such a contingency, it would be proper to commence an action in the nature of a suit in equity for the purpose of removing such lien as a cloud upon the plaintiff's title; or, if the lien is adjudged to be valid for any amount, to have an account taken and the amount ascertained.

A sale of the premises to adjust the equities of the parties would, in all cases, be permissible,¹⁶ or, if it was thought more convenient, the junior lienor might be compelled either to redeem by paying the amount due upon the original prior mortgage, exclusive of the costs of the defective foreclosure, but with the costs of the action, within a certain time, or in default thereof to stand foreclosed. The judgment would also provide that the plaintiff might redeem from the defendant, in respect both to the moneys paid by him and also to his own lien, or in default thereof that the purchaser be foreclosed. This was the practice in chancery, where a first mortgagee filed a bill against the second mortgagee and the mortgagor.¹⁷

Where a subsequent mortgagee was not made a party to a foreclosure action in which the premises were purchased by

¹⁴ Robinson v. Ryan, 25 N. Y. 320; Jackson v. Bowen, 7 Cow. 13; Winslow v. Clark, 47 N. Y. 261.

¹⁵ Salmon v. Allen, 11 Hun, 29. See also Parker v. Child, 25 N. J. Eq. 41.

¹⁶ Franklyn v. Hayward, 61 How. Pr. 43.

¹⁷ 2 Barb. Ch. Pr. 189; Salmon v. Allen, 11 Hun, 29. See also Parker v. Child, 25 N. J. Eq. 41.

the plaintiff, the latter, in order to obtain relief by way of an action for strict foreclosure must show not only that he purchased in good faith in reliance upon the regularity and sufficiency of the proceedings but also that the subsequent lienor had knowledge of the sale and permitted the purchaser to make the purchase without disclosing the existence of his incumbrance, or calling attention to the defect in the proceedings.¹⁸

§ 1139. **Parties to action.**—An action for a strict foreclosure is in the nature of a suit in equity, and the parties are the same as would be necessary in an action for an enforcement of the mortgage by a sale, with the exception that it will not be necessary to join the mortgagor or any other parties whose rights, by previous proceedings, had become vested in the plaintiff.¹⁹

§ 1140. **Judgment.**—The judgment recovered, is that the person entitled to redeem do so within a certain specified time, or in default of such redemption, that the title vest absolutely in the plaintiff.²⁰ The time usually specified in decrees of foreclosure in chancery was six months, though the time was entirely within the discretion of the court, and in proper cases it was usual to enlarge the time, upon motion and upon terms.²¹

The title does not pass to the plaintiff on a strict foreclosure, until a final order is obtained after the expiration of the time allowed to redeem. Until that order is obtained, the records of the court do not show which party has finally obtained the judgment or who is the owner of the land, and the person desiring to redeem may apply to have the time to pay the amount decreed to be due, extended.²²

An action of strict foreclosure is the direct converse of an action to redeem. In the one the judgment requires that the defendant redeem within a certain time or lose his rights, and in the other it directs that the plaintiff may redeem within a certain time, and that if he fails to do so he loses his rights. If the plaintiff in an action for redemption fails to redeem within

¹⁸ Moulton v. Cornish, 138 N. Y. 133; 33 N. E. 842.

¹⁹ Benedict v. Gilman, 4 Paige, 58.

²⁰ See the form of complaint and judgment in a case in which there were many conflicting equities: Ken-

dall v. Treadwell, 14 How. Pr. 165; 5 Abb. 16.

²¹ Perine v. Dunn, 4 Johns. Ch. 140; McKinstry v. Merwin, 3 Johns. Ch. 466; Bolles v. Duff, 43 N. Y.

²² Bolles v. Duff, 43 N. Y. 469. 469.

the time appointed, the dismissal of his complaint as the consequence of such failure, operates as a strict foreclosure.²³ In the case of an action for a strict foreclosure, it was a common thing to extend the time for redemption, but in actions to redeem the rule was more strict in requiring the person seeking redemption to do so within the time appointed.²⁴

If the value of the land be equal to the debt, the debt will be extinguished by a strict foreclosure,²⁵ but otherwise it will be reduced to the extent of the value of the land, to be ascertained in an action at law upon the obligation of the debtor.²⁶

ACTION AT LAW ON DEBT.

§ 1141. **May be maintained.**—A mortgage is a mere security for a debt, and an action for the debt may be maintained in all respects as if no mortgage accompanied it.²⁷ A judgment at law upon the debt without satisfaction, will not be a bar to a subsequent foreclosure of the mortgage, and it will not affect the validity of the mortgage in any way.²⁸

A judgment on a bond secured by mortgage, upon which an execution has been returned unsatisfied, will serve as a foundation for a creditor's bill against a judgment debtor to reach any property, other than that covered by the mortgage, which has been fraudulently transferred by the judgment debtor.²⁹

§ 1142. **After conveyance with covenant against mortgage.**—Where a mortgagor conveyed the mortgaged estate to a third person for a full consideration and without naming the mortgage, and the owner of the mortgage purchased and took a conveyance of the land, and brought an action on the bond, it was held that he could recover without setting up the special equities. If the mortgagor urged that the mortgagee owned the estate charged with

²³ *Perine v. Dunn*, 4 Johns. Ch. 140; *Beach v. Cooke*, 28 N. Y. 535; *Bolles v. Duff*, 43 N. Y. 474; *Hansard v. Hardy*, 18 Ves. 460; *Wood v. Surr*, 19 Beav. 551.

²⁴ *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Perine v. Dunn*, 4 Johns. Ch. 140; *Fisher on Morts*. 606.

²⁵ *Morgan v. Plumb*, 9 Wend. 287.

²⁶ *Spencer v. Harford*, 4 Wend. 381; *De Grant v. Graham*, 1 N. Y.

Leg. Obs. 75. See also *Marston v. Marston*, 45 Me. 412.

²⁷ *Allen v. Dermott*, 80 Mo. 56.

²⁸ *Gillette v. Smith*, 18 Hun, 10. See also *Jenkinson v. Ewing*, 17 Ind. 505; *Jewitt v. Hamlin*, 68 Me. 172; *Jordan v. Smith*, 30 Iowa, 499; *Allen v. Dermott*, 80 Mo. 56; *Thornton v. Pigg*, 24 Mo. 249; *Hale v. Rider*, 59 Mass. (5 Cush.) 231.

²⁹ *Palmer v. Foote*, 7 Paige, 437.

the debt, the facts could then be shown from which it would appear that the conduct of the mortgagor made it equitable that he should pay the debt personally.³⁰

§ 1143. **Mortgaged property cannot be sold under execution for mortgage debt.**—The fact that a debt is secured by a specific lien upon a portion of the property of the debtor, can furnish no reason why a judgment upon it should not be enforceable against the remainder of his estate.³¹ It is provided by statute, however, that the judgment debtor's equity of redemption in real estate, mortgaged shall not be sold by virtue of an execution issued upon a judgment recovered for the mortgage debt or any part thereof,³² and prior to the passage of this statute it was said by Chancellor KENT, that the mortgagor ought to proceed directly on the mortgage, or else seek other property to obtain satisfaction for his debt.³³

Where an execution against property is issued upon a judgment recovered for the whole or any part of the mortgage debt to the county where the mortgaged property is situated, the attorney or other person who subscribes it must indorse thereupon a direction to the sheriff not to levy it upon the mortgaged property or any part thereof. The direction must briefly describe the mortgaged property and refer to the book and page where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied, as the case requires.³⁴

§ 1144. **Effect of judgment at law on right to foreclose.**—The complaint in an action to foreclose a mortgage upon real property must state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected.³⁵ If a judgment has been obtained

³⁰ Wadsworth v. Lyon, 93 N. Y. 201; 45 Am. R. 190.

³¹ Roosevelt v. Carpenter, 28 Barb. 426. See also Simpson v. Simpson, 93 N. C. 373; Camp v. Cox, 1 Dev. & Bat. 52.

³² Code of Civ. Pro. § 1432; 2 R. S. 368, § 31.

³³ Tice v. Annin, 2 Johns. Ch. 130.

³⁴ Code of Civ. Pro. § 1433.

³⁵ Code of Civ. Pro. § 1629.

The plaintiff is not required to prove as an affirmative fact on an inquest taken by default that no other action has been brought to recover any part of the mortgage debt. For the allegation is required by the Code merely for the information of the court. Riesgo v. Glengariffe Realty Co., 116 App. Div. 414; 101 N. Y. Supp. 832; 38 Civ. Pro. R. 407, aff'd 194 N. Y. 600; 88 N. E. 1130.

in an action at law, no proceedings can be taken upon the mortgage until the remedy of the plaintiff upon the judgment is exhausted,³⁶ and this is true even if the judgment taken was against a third party who had given additional security.³⁷

If the fact of the recovery of such judgment appears upon the face of the complaint, the court cannot make a decree of foreclosure until the execution has been returned unsatisfied, even if the defendant has made default.³⁸ If the objection does not appear upon the face of the complaint and the plaintiff has falsely alleged that no proceedings at law have been had, the defendant may plead the recovery of such judgment in bar of the foreclosure suit.³⁹ So, where the plaintiff in a bill for the foreclosure of a mortgage stated that no proceedings had been had at law to recover the amount due on the bond and mortgage, and the defendants pleaded a judgment which the plaintiff held against them, as being for part of the debt secured by the bond and mortgage in suit, and the testimony sustained the plea, it was decided that it was a fatal objection to such bill and it was dismissed with liberty to the plaintiff to amend if he had exhausted his remedy at law, upon the judgment.⁴⁰ An answer alleging the judgment need not allege a failure to collect upon execution, since the plaintiff cannot, by a false averment in his complaint that no judgment has been recovered for the mortgage debt, cast the burden upon the defendant of alleging and proving that the remedy at law has not been exhausted by the return of an execution unsatisfied.⁴¹

§ 1145. **Exhausting remedy on prior judgment.**—The provision of the Code that “where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage

The complaint is not demurrable although the pleader has not used the precise language of § 1629 of the Code of Civ. Pro. *Bottom v. Chamberlain*, 21 Misc. R. 556; 47 N. Y. Supp. 733.

A complaint is sufficient which alleged “that no other action has been had for the recovery of the said sum secured by the said bond and mortgage.” *Schieck v. Donohue*, 77 App. Div. 321; 79 N. Y. Supp. 233.

³⁶ Code of Civ. Pro. § 1630. See following section.

³⁷ *Pattison v. Powers*, 4 Paige, 549.

³⁸ *The North River Bank v. Rogers*, 8 Paige, 648.

³⁹ *Shufelt v. Shufelt*, 9 Paige, 137; *Grosvenor v. Day, Clarke*, 109.

⁴⁰ *Lovett v. The German Reformed Church*, 12 Barb. 67.

⁴¹ *North River Bank v. Rogers*, 8 Paige, 648; *Shufelt v. Shufelt*, 9 Paige, 137.

debt, an action shall not be commenced or maintained to foreclose the mortgage unless an execution . . . has been returned wholly or partly unsatisfied" ⁴² has been held to apply to a judgment by confession. ⁴³

While under this section a judgment which would prevent an action to foreclose a mortgage must have been obtained on account of the mortgage debt or some part thereof, it need not have been recovered on the bond and mortgage or against the mortgagor. ⁴⁴

This section of the Code, however, has been held not to prevent one who has filed a notice of claims to surplus moneys arising upon foreclosure of a prior mortgage and who is a party to proceedings for a distribution of such surplus, from bringing, without leave of court, an action to recover the debt secured by the mortgage. ⁴⁵

§ 1146. Effect of judgment as an estoppel.—After a judgment at law upon the bond establishing its validity, the defendant cannot in an action to foreclose the mortgage contest his liability. ⁴⁶

42 Code Civ. Pro. § 1630.

By the statute prior to the Code it was provided that "If it appear that any judgment has been obtained in a suit at law for the moneys demanded by such bill or any part thereof, no proceedings shall be had in such case unless to an execution against the property of the defendant . . . the sheriff shall have returned that the said execution is unsatisfied." 2 R. S. § 156, p. 192.

The object of this provision is to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt. Reichert v. Stillwell, 172 N. Y. 83; 64 N. E. 790, aff'g 57 App. Div. 480; 67 N. Y. Supp. 1062, per VANN, J., who further said: "This is the policy of the law in statutory foreclosures and was the policy of the Revised Statutes relating to foreclosures by action, prior to the enactment of the Code (2 R. S. 191, § 156, id. 544, § 1). In other words only one

action is permitted at the same time, except as the statute provides, for it forbids a suit in equity to foreclose the mortgage until the remedy at law on the bond, if resorted to, has been exhausted, and an action at law on the bond, while a suit in equity to foreclose the mortgage is pending, without leave of the court." See also Suydam v. Bartle, 9 Paige Ch. 294.

43 Guilford v. Crandall, 69 Hun, 414; 23 N. Y. Supp. 465, in which it was declared that the provision of the Revised Statutes which was similar to § 1630 was held to prevent a foreclosure of a mortgage where a judgment by confession had been obtained for a part of the mortgage debt, citing Pattison v. Powers, 4 Paige's Ch. 549; Lovett v. The German Reformed Church, 12 Barb. 67.

44 Guilford v. Crandall, 69 Hun, 414; 23 N. Y. Supp. 465.

45 Wyckoff v. Devlin, 12 Daly, 144.

46 Hosford v. Nichols, 1 Paige, 220.

The same principle would preclude a defendant in an action to foreclose, in which final judgment was rendered against him, from litigating the same questions in an action upon the debt; but to have this effect the judgment of foreclosure must be both final and operative, and the rule was held not to apply where the action to foreclose was discontinued after judgment, but before sale.⁴⁷

Where, in an action to foreclose, a personal judgment was demanded, but the judgment did not contain any provision as to personal liability, this was held to be an adjudication against the plaintiff which would defeat a subsequent action for the deficiency.⁴⁸

§ 1147. Action on guaranty.—A guaranty of “collection” of a bond and mortgage can only be enforced after an honest effort to collect has been made and all legal remedies have been exhausted. This applies, however, only to the remedies existing at the time of the guaranty, and of which the parties to the guaranty then had notice. The creditor cannot be required to exhaust his remedy against a person who subsequently assumed the debt on a purchase of the mortgaged property; or even against a grantee whose deed was recorded at the time of the contract of guaranty containing an agreement to assume, this fact being unknown to the parties to such contract.⁴⁹

A guaranty “from loss” to a purchaser of a bond and mortgage is limited to the amount paid by him.⁵⁰

A guaranty of the “payment and collection” is an undertaking to pay a deficiency after the remedy on the bond and mortgage is exhausted.⁵¹

A provision in an assignment of a bond and mortgage guaranteeing the payment “by due foreclosure and sale,” is not an absolute guaranty of payment, but is a covenant to pay any deficiency existing after foreclosure and sale. An independent action cannot be sustained upon it until after the sale, but a personal judgment may be obtained against the guarantor in the action to foreclose.⁵²

⁴⁷ *Lobe v. Willis*, 100 N. Y. 231; 3 N. E. 177.

⁴⁸ *Lockwood v. Fawcett*, 17 Hun, 146.

⁴⁹ *Mead v. Parker*, 29 Hun, 62.

⁵⁰ *Griffith v. Robertson*, 15 Hun 344.

⁵¹ *Baxter v. Smack*, 17 How. Pr. 183.

⁵² *Vanderbilt v. Schreyer*, 91 N.

A guarantor of "collection" may be discharged by the laches of the creditor.⁵³

A guaranty of payment of a mortgage implies a guaranty of payment of the debt which the mortgage was made to secure.⁵⁴

An action to enforce a guaranty of payment contained in an assignment of a mortgage, though prosecuted to judgment, does not prevent a subsequent action for damages because of the fraud of the guarantor in the sale of the securities. The actions do not bar each other, because one being founded on contract, and the other in tort, they are not identical; and each being in affirmation of the contract they are not inconsistent.⁵⁵

LEAVE OF COURT TO SUE, AFTER FORECLOSURE.

§ 1148. **Statute.**—It is provided by the Code of Civil Procedure that "while an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt, without leave of the court in which the former action was brought."⁵⁶

The object of this provision, as is that of section 1629 and 1630, is to confine all the proceedings for the collection of the mortgage debt to one court and one action.⁵⁷

After the mortgagee has obtained judgment of foreclosure, he will not be allowed to sue on the debt at law until the remedy on the judgment is exhausted, and the fact that he has elected to proceed *in rem* against the property will be a defense to the action at law.⁵⁸

The lack of authority from the court to sue is not a defense which must be pleaded and proved affirmatively by the defendant. The authority to sue is at the very basis of the right to sue. There is no right of action until the court has given one; so the

Y. 392; The Mahaiwe Bank v. Culver, 30 N. Y. 313.

53 Tiffany v. Willis, 30 Hun, 266.

54 Ross v. Terry, 63 N. Y. 613.

55 Bowen v. Mandeville, 29 Hun, 42, aff'd 95 N. Y. 237.

56 Code Civ. Pro. § 1628; 2 R. S. p. 191, § 153; Williamson v. Cham-

plin, 8 Paige, 70, aff'g Clarke, 9.

57 Reichert v. Stillwell, 172 N. Y. 83; 64 N. E. 790, aff'g 57 App. Div. 48; 67 N. Y. Supp. 1062; Scofield v. Doscher, 72 N. Y. 491.

58 Nichols v. Smith, 42 Barb. 381; Suydam v. Bartle, 9 Paige's Ch. 294.

permission to sue must be alleged, or at least proved, by the plaintiff before he can make out his action.⁵⁹

§ 1149. Principles on which right to sue is restrained.—As soon as the action to foreclose the mortgage is commenced, and at all times thereafter, the court in which that action is pending is vested with complete control over all remedies for the collection of the mortgage debt.

Any person who is liable to the plaintiff for the payment of the mortgage debt may be made a defendant in the action; and if he has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein.⁶⁰

Having offered this complete remedy to the creditor, the legislature has taken away from him the right which he might otherwise possess, to appropriate the land by a suit in equity, while, at the same time, he pursued the several persons by whose obligations the debt was secured, in actions at law. The statute does not take away entirely from the courts of law the right to entertain actions for the collection of debts secured by mortgage, but it deprives a mortgagee of the right, either to commence or to proceed with, any such action after he has invoked the jurisdiction of a court of equity in an action to foreclose, without first obtaining special permission of the court of equity in which such foreclosure was commenced.

The fact that the mortgagee has proceeded with the foreclosure, and that, having obtained all the relief he asked for in that action, and the land having all been sold, the mortgage debt still remains unsatisfied, does not authorize the mortgagee to proceed at law without the authority of the court of equity. The statute is explicit, and, at no time after the commencement of the action to foreclose, can a remedy be had in a court of law without the consent of the tribunal in which the foreclosure was instituted.⁶¹

§ 1150. Granting leave to sue is discretionary.—An application

⁵⁹ Scofield v. Doscher, 72 N. Y. 491, aff'd 10 Hun, 582.

⁶⁰ Code Civ. Pro. § 1627.

⁶¹ Code Civ. Pro. § 1628; Equita-

ble Life Ins. Co. v. Stevens, 63 N. Y. 341; Scofield v. Doscher, 72 N. Y. 491.

for leave to sue on a bond after a foreclosure action has been commenced, may be granted or refused by the court in the exercise of a sound discretion according to the equities of the case, as a general rule unless extraordinary and exceptional circumstances exist the petitioner should proceed with his foreclosure action and sell the property and then if necessary, he may enter a deficiency judgment.⁶²

The defense of a former action pending for the same cause between the same parties is not available where the courts are in different States, or one is a Federal and the other a State court, and this latter is said to be true though the Federal court is in the district embracing the State. Each action may proceed to judgment, unless the court in which the latter action is brought, stays its prosecution, and the party first obtaining judgment may, in a proper case, use it by an amended pleading, or as evidence in the other action.⁶³

The rule as to permitting a separate action to be brought, after foreclosure, against one who guaranteed the payment of a mortgage debt is the same as in the case of an obligor on the bond. Such guarantors might have been made parties defendant in the foreclosure action, and leave to sue them subsequently will be granted only upon specific reasons being shown why their liability was not established therein.⁶⁴

§ 1151. In what cases permission to sue is necessary.—The provision of the statute is not limited to an action at law against the mortgagor only, or upon the securities originally given as collateral to the mortgage, but extends to proceedings at law to enforce the liability of a purchaser of the mortgaged premises, who has assumed the mortgage debt.⁶⁵

A covenant of guaranty made by the mortgagee on a sale of the mortgage, that the mortgage debt will be paid when due, is

⁶² *Matter of Byrne*, 81 App. Div. 74; 80 N. Y. Supp. 977, citing *Matter of Marshall*, 53 App. Div. 136; 65 N. Y. Supp. 760; *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341; *Engle v. Underhill*, 3 Edw. Ch. 249; *Matter of Moore*, 81 Hun, 389; 31 N. Y. Supp. 110. See also *Darmstadt v. Manson*, 144 App. Div. 249; 128 N. Y. Supp. 992.

⁶³ *Curlette v. Olds*, 110 App. Div. 596; 97 N. Y. Supp. 144. See also *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660; 26 N. E. 732.

⁶⁴ *Morrison v. Slater*, 128 App. Div. 467; 112 N. Y. Supp. 855.

⁶⁵ *Pattison v. Powers*, 4 Paige, 549.

within the provision of the statute, and after a judgment of foreclosure and sale has been rendered in an action to foreclose the mortgage, no action upon the guaranty can be sustained without first procuring the permission of the court to sue.⁶⁶

The statute is also held to show an intention on the part of the legislature to place a restriction upon the holders of bonds secured by a mortgage which is in process of foreclosure. Under this section, unless cogent reason is presented for the granting of an order of the court giving leave to a bondholder to commence an action on his bond during the pendency of an action brought to foreclose the mortgage securing the same, an application for such an order should be denied.⁶⁷

§ 1152. In what cases separate actions not prohibited.—The sections of the Code of Civil Procedure as to exhausting the remedy upon a judgment and obtaining leave to sue⁶⁸ were not intended to prohibit a separate foreclosure in equity, of two separate mortgages, upon separate pieces of property, although each may have been given to secure the payment of the same indebtedness. So, where there were two mortgages upon the same property, made by the same mortgagor and held by the same assignee, it was decided that an action to foreclose them was not prohibited by these sections, by the fact that a subsequent mortgage upon other premises given by the same mortgagor to the same mortgagee, to secure the payment of another debt, and also as a further and additional security for the debts represented by the first two mortgages, had been foreclosed by such mortgagee, and the proceeds of the sale, after paying the expenses of foreclosing the last mortgage and the amount for which it was given, had been applied upon the payment of the debts secured by the first two mortgages.⁶⁹ And it is no ground for denying a motion by an assignee of a bond, secured by a mortgage, to sue thereon that the mortgagor claims to have a valid defense for the balance unpaid on the bond.⁷⁰

Nor will an action for the foreclosure of a mortgage be barred

⁶⁶ McKernan v. Robinson, 84 N. Y. 105; In re Collins, 17 Hun, 289; 6 Abb. N. Cas. 227; *contra*, Schaff v. O'Brien, 8 Daly, 181.

⁶⁷ Matter of Moore, 81 Hun, 389; 31 N. Y. Supp. 110.

⁶⁸ §§ 1628, 1630.

⁶⁹ Reichert v. Stillwell, 172 N. Y. 83; 64 N. E. 790, *aff'd* 57 App. Div. 480; 67 N. Y. Supp. 1062.

⁷⁰ Lagrace v. Hellinger, 109 App. Div. 515; 96 N. Y. Supp. 564.

by the pendency of another action, where the causes of action are not the same, and the relief sought in the foreclosure suit cannot be had in the other.⁷¹

So, the foreclosure of a mortgage for interest only does not bar a subsequent foreclosure for principal and interest. In such a case the subsequent action is not one to recover a mortgage debt within the meaning of sections 1628 and 1629 of the Code of Civil Procedure and leave to sue need not be obtained. And where a mortgage has been foreclosed for interest only, one who takes a deed from the grantee of the referee which is expressly made subject to the mortgage cannot resist a subsequent foreclosure of it for principal and interest.⁷²

And an answer in an action to foreclose a mortgage, setting up that the defendant is the owner of a subsequent mortgage upon the premises and setting up another action pending which is based entirely upon such junior lien, constitutes no defense to the plaintiff's action. Nor does an answer by a defendant sued as a trustee, in which he sets up another action brought by him individually constitute a good defense.⁷³

The fact that the mortgagor has been appointed receiver of the property in question in an action of partition between some of the same parties and that he has been sued in the foreclosure action without leave of court furnishes no defense to the latter action, there being nothing to show that such party, as receiver, is a necessary or proper party to the foreclosure action.⁷⁴

§ 1153. Independent collateral obligation.—The statute in making it unlawful for a creditor to seek to collect his debt by an action at law after he has instituted a proceeding in equity for the same purpose, does not in any manner affect the right of a party who has been compelled to pay the mortgage debt, wholly or partially, from maintaining an action for his reimbursement against another who had become liable upon an independent agreement to indemnify him. So, where a person obligated to pay a mortgage, conveyed the mortgaged premises to another,

⁷¹ Pullman v. Alley, 53 N. Y. 637; Church of Transfiguration v. St. Stephen's Church, 135 App. Div. 501; 120 N. Y. Supp. 422. See Leighton v. Leighton Lea Ass'n, 62 Misc. 73; 114 N. Y. Supp. 918.

⁷² Pretzfeld v. Lawrence, 34 Misc. R. 329; 60 N. Y. Supp. 807.

⁷³ White v. Gibson, 61 Misc. R. 436; 113 N. Y. Supp. 983.

⁷⁴ Snedecker v. Thompson, 26 Misc. R. 160; 56 N. Y. Supp. 775.

who assumed the obligation and covenanted to pay it, and the mortgagee did not make such grantee a party to the foreclosure, but compelled the grantor to pay the deficiency, it was held that it was not necessary for the grantor to obtain the consent of the court in which the mortgage had been foreclosed, before commencing an action against the grantee upon his covenant.⁷⁵

And where one of the makers of a joint and several bond died, and two of the other makers became insolvent, and the remaining obligors were compelled to pay a deficiency in an action to foreclose to which the personal representatives of the deceased obligor were not made parties, contribution was enforced as against such personal representatives, and permission to bring the action was held not to be necessary.⁷⁶

§ 1154. **Granting permission to sue nunc pro tunc.**—The permission of the court to sue, simply removes an obstruction against the enforcement of the obligation of the party by suit. If the action has been commenced without previous authority, the fact may be pleaded, and the plea would be in the nature of a plea in abatement of the action. If the plaintiff is defeated upon this ground, he may afterward apply to the court for leave to sue, and if granted, he may commence a new action for the same cause. If the plaintiff has commenced his action without leave, the court may in a proper case manifest its consent to the prosecution of the action by a retroactive order, to take effect as of a time anterior to its commencement.⁷⁷

§ 1155. **When permission to sue at law will be denied.**—The statute confers in general terms upon the court of equity the power to authorize proceedings at law, but it does not specially define the manner in which that power shall be exercised. Proceedings at law are forbidden unless authorized, and the presumption is that the granting or refusing of such authorization is a matter of judicial discretion, based upon and controlled by the rules and principles of enlightened justice which prevailed in all courts of equity. There is, therefore, no case in which, as a matter of legal right, a mortgagee can insist upon the granting

⁷⁵ Comstock v. Drohan, 71 N. Y. 9, aff'g 8 Hun, 373; Campbell v. Smith, 71 N. Y. 26.

⁷⁶ Weed v. Calkins, 24 Hun, 582.

⁷⁷ Per ANDREWS, J., in McKernan v. Robinson, 84 N. Y. 105; Earle v. David, 86 N. Y. 634, aff'g 20 Hun, 527.

of the authority necessary to enforce his legal remedy after he has commenced an action to foreclose. In each case the court has the right, and it is its duty, to take into consideration the equities and circumstances of the case, and to exercise a sound discretion in granting or refusing the application.⁷⁸

Where the mortgage debt is secured by the personal obligation of a person who was a non-resident at the time the action to foreclose was commenced, and against whom, therefore, at that time, no valid judgment for deficiency could have been rendered,⁷⁹ authority to sue such person for a deficiency remaining after the sale of the mortgaged premises could not properly be refused; but where it is evident that the plaintiff could have had a perfect remedy against all persons who are liable for the payment of the debt, by a decree over against them for the deficiency, if he had chosen to make them parties to his foreclosure suit, it might not be a proper exercise of discretion for the court to permit any proceedings in an action at law.⁸⁰ And where the mortgagee has voluntarily refrained from asking for a judgment for the deficiency in the foreclosure suit, some satisfactory reason should be assigned for permitting him to institute a separate action for its recovery.⁸¹

§ 1156. When foreclosure and action on debt may both be permitted.—Where the defendant in an action at law which was pending when the foreclosure was commenced, sets up a defense which cannot be tried in the action to foreclose, he not being a party to that action, because of a doubt as to whether a decree could be rendered against him in the action to foreclose, the court may allow the parties to proceed so far, at least, as shall be necessary to test the validity of the defense.⁸² So, too, if an action at law be begun in good faith before the commencement of the foreclosure, the court will permit the plaintiff to proceed to judgment in that action rather than allow the defendants to obtain an inequitable advantage.⁸³ But the fact of a deterioration in the value of the mortgaged premises by fire, against which the plain-

⁷⁸ *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341.

⁷⁹ *Bartlett v. McNeil*, 60 N. Y. 53.

⁸⁰ *Suydam v. Bartle*, 9 Paige, 294.

⁸¹ *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341.

⁸² *Suydam v. Bartle*, 9 Paige, 294; *Williamson v. Champlin, Clarke*, 9, *aff'd* 8 Paige, 70.

⁸³ *Thomas v. Brown*, 9 Paige, 370.

tiff might have guarded himself by insurance, is not a sufficient ground to allow him to work two remedies at the same time.⁸⁴

There is no rule that requires that an application by a second mortgagee to sue upon the bond shall be made at any particular time, and where the statute of limitations has not run mere delay in making the application is no reason for denying it.⁸⁵

EJECTMENT.

§ 1157. **Prior to the Revised Statutes**, the mortgagee might, after default, obtain possession of the mortgaged premises by an action of ejectment, and hold them until his debt had been satisfied by the rents and profits, or otherwise.⁸⁶ The Revised Statutes provided, however, that no action of ejectment should thereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises.⁸⁷ This provision applied to all mortgages, whether executed before or after its passage.⁸⁸ It was taken over into the Code of Civil Procedure and is now in force.⁸⁹ It controls all contracts in the nature of mortgages, or which the law declares to be such.⁹⁰

§ 1158. **Effect of statute.**—The statute only takes away from the mortgagee the right to obtain possession of the mortgaged premises after default. It has not changed the rule that he may protect his possession when he has obtained it without force, by some legal mode other than by action, and the authorities are decisive that ejectment will not lie against a mortgagee in possession.⁹¹

The mortgagor cannot try the question as to whether the mortgage has been satisfied from the rents and profits received by the mortgagee while in possession, in an action of ejectment; the

⁸⁴ Engle v. Underhill, 3 Edw. Ch. 240.

⁸⁵ Matter of Howe, 61 Hun, 608; 16 N. Y. Supp. 465.

⁸⁶ Jackson v. Stafford, 2 Cow. 547; Jackson v. Dubois, 4 Johns. 216.

⁸⁷ 2 R. S. 312, § 57.

⁸⁸ Stewart v. Hutchins, 6 Hill, 143, aff'g 13 Wend. 485.

⁸⁹ Code Civ. Pro. § 1498.

⁹⁰ Murray v. Walker, 31 N. Y. 399; McBurney v. Wellman, 42 Barb. 300.

⁹¹ Van Duyne v. Thayre, 14 Wend. 233; Phyfe v. Riley, 15 Wend. 248; Watson v. Spence, 20 Wend. 260; Fox v. Lipe, 24 Wend. 164; Pell v. Ulmar, 18 N. Y. 139; Hubbell v. Moulson, 53 N.Y. 225; Becker v. McCrea, 48 Misc. R. 341; 94 N. Y. Supp. 20. Compare Bonacker v. Weyrick, 48 Misc. R. 189; 96 N. Y. Supp. 775. See further, and as to rights of mortgagee in possession, *ante*, §§ 235 to 244.

only way to determine the complicated equities which arise in such a case, is by an action in the nature of a suit in equity.⁹² But if the mortgage has been paid in full by the mortgagor, and no account is required to be taken, ejectment would be a proper remedy, as it would, also, if the lien of the mortgage had been destroyed by a tender.⁹³

92 *Beach v. Cooke*, 28 N. Y. 508. *Ins. & Loan Co.*, 21 Wend. 467; 26

93 *Edwards v. The Farmers' Fire* Wend. 541.

CHAPTER XXXIII.

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GENERAL POLICY OF THE STATUTES.

§ 1159. **Early statutes.**—With us, ^{N.Y.} in the first stages of our colonial government, lands were easily procured, and were not valued more than personal property. The party holding a mortgage on real estate was accordingly permitted, under a power for such purpose, to sell without a bill of foreclosure, as he might on a mortgage of personal property. The state of the courts, too, made this necessary, as the Court of Chancery, as held by the governor, was deemed a usurpation, and was so managed that the extraordinary delays, and fruitless expense attending it, rendered it not only useless, but a grievance to the inhabitants, especially those who were so unfortunate as to be concerned in it. These powers accordingly took deep root, and to prevent any question as to sales under them, the act of the 19th of March, 1774, was passed; the second section whereof recited that many real estates were held under sales made by the mortgagees, who were authorized by the mortgagor to make a conveyance of the same for the payment of the debt, and to return the overplus, and thus many inconveniences might arise if such estates should be redeemable in equity, vexatious suits promoted, and *bona fide* purchasers ruined. And it was enacted that no good and *bona fide* sale of lands made, or to be made, by mortgagees or other authorized by a special power, should be defeated to the prejudice of the *bona fide* purchaser, in favor or for the advantage of any person claiming a right of redemption in equity, with a saving to other mortgagees and to judgment creditors.¹

§ 1160. **Powers to sell are customary.**—Various changes have been made in the statutory regulations concerning the execution of powers to sell, but the foreclosure of mortgages by public sales, under powers without judicial decree, has always been rec-

¹ Per Chancellor WALWORTH, in 48, 69; Doolittle v. Lewis, 7 Johns. Slee v. Manhattan Company, 1 Paige, Ch. 45, 50.

ognized in this State. Such a foreclosure is simple, cheap, and apparently as little liable to abuse as a judicial foreclosure, and the proceedings have, accordingly, been regarded favorably by our courts.^{1a}

But the method has been little used of recent years because of the inadequacy of the costs allowed, the strictness with which the statute must be followed and the consequent greater security of title which is obtained in foreclosure by action. The power of sale has been deemed to affect merely the remedy of the mortgagee, and not to divest the mortgagor of any of his rights, and so customary has it become to insert a power to sell in mortgages, that it has been determined that a general power to execute a mortgage carries with it an authority to insert a power to sell upon default.²

§ 1161. Remedy must be strictly pursued.—In the absence of fraud or some statutory regulation upon the subject, parties may contract for a private sale, and without notice.³ The provisions of our statutes and their whole policy are, however, incompatible with the right of the parties to regulate the mode of sale under powers of this description, by their own contract. The statute adopts the power and assumes to regulate its exercise in a manner which the legislators supposed would give effect to the mortgage security, while it guards the mortgagor against oppression, and protects the rights of other incumbrancers. The statute was designed to include, and in terms does extend to, all sales made in virtue of powers made for that purpose, contained in mortgages, except those directed by order of some judicial tribunal; and the party availing himself of the power must consequently conform to the requirements of the statute in order to bar the equity of redemption.⁴ The remedy laid down by the statute must be strictly pursued, or the proceeding will be void.⁵ And a person

^{1a} *Slee v. Manhattan Company*, 1 Paige, 48, 70; *Jackson v. Henry*, 10 Johns. 193; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Wilson v. Troup*, 2 Cow. 195, 202.

² *Wilson v. Troup*, 2 Cow. 195, aff'g s. c. 7 Johns. Ch. 25. •

³ *Elliott v. Wood*, 45 N. Y. 71, 78, aff'g s. c. 53 Barb. 285; *Montague v. Dawes*, 12 Allen, 397; *Lawrence v.*

The Farmers' Loan & Trust Co., 13 N. Y. (3 Kern.) 200.

⁴ *Lawrence v. The Farmers' Loan & Trust Co.*, 13 N. Y. (3 Kern.) 200, 211, 213.

⁵ *Deutsch v. Haab*, 135 App. Div. 756; *Cole v. Moffitt*, 20 Barb. 18; *Cohoes Co. v. Goss*, 13 Barb. 137; *King v. Duntz*, 11 Barb. 191; *Stanton v. Kline*, 16 Barb. 9; *St. John*

claiming title under such a foreclosure assumes the burden of showing that the statutory requirements were complied with.⁶

§ 1162. The statute regulates the remedy merely, and not the rights of the parties, and the statutory provision which controls, is, therefore, the one which is in force at the time when the power of sale comes to be executed.⁷ But while the proceeding is regulated by statute it is not a proceeding in court, and the court is not authorized to supply omissions or remedy defects in affidavits.⁸

PRACTICE BEFORE SALE.

§ 1163. When mortgage may be foreclosed by advertisement.—A mortgage upon real property situated within the State, containing therein a power to the mortgagee, or any other person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed in the manner prescribed in title 9, of chapter 17, of the Code of Civil Procedure, where the following requisites occur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution issued upon a judgment rendered therein in favor of the plaintiff, has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.⁹

§ 1164. What mortgages may be foreclosed.—The mortgage containing the power should be recorded in the offices of the clerks of each county where the land upon which it is a lien is situated;¹⁰ but it has been said that this provision is wholly for the benefit

v. Bumpstead, 17 Barb. 100; Van Slyke v. Sheldon, 9 Barb. 278; Bloom v. Burdick, 1 Hill, 130; Low v. Purdy, 2 Lans. 422.

⁶ Weir v. Birdsall, 27 App. Div. 404, and cases cited.

⁷ James v. Stull, 9 Barb. 482.

⁸ Dwight v. Phillips, 48 Barb. 116.

⁹ Code of Civ. Pro. § 2387; 2 R. S. 545, §§ 1, 2.

¹⁰ Wells v. Wells, 47 Barb. 416.

of the purchaser, and that the omission does not affect the validity of the sale.¹¹

The notice of foreclosure must contain a statement of the amount due thereon at the time of the first publication, and for this reason, a mortgage given as security for unliquidated damages cannot be foreclosed under the statute;¹² unless it contains, within itself, a measure by which the amount of damages may be definitely liquidated and ascertained.¹³ But a mortgage given to secure the payment of commercial paper or judgments up to a certain fixed amount is not given to secure unliquidated damages, and it may be foreclosed by advertisement.

Where such a mortgage is so foreclosed and proper notices of sale are served, which disclose the amount claimed to be due thereon, and the mortgagor stands by silently and with approval, making no complaint as to the amount asserted to be due until long after the sale, in the absence of any claim of fraud this court will be slow to criticise or dispute that amount.¹⁴

When the mortgage contains a covenant to insure in a specific sum, failure to insure constitutes such a default as will justify a sale under a power contained in the mortgage, even if the covenant is impossible of execution.¹⁵

Our statute has reference only to real estate, and to mortgages recorded in this State. It does not apply to real estate situated in other States.¹⁶ But where a mortgage on realty in the State of Colorado included a provision that upon default and after certain specified notices, the land might be sold in this State, it was held that, in the absence of any statutory regulation, the parties had the power to agree upon the manner of sale, and that, while the statute of this State, in reference to the sale of mortgaged premises, has reference only to real estate in the State, there was no ground for equitable interference in the absence of proof that a sale as provided for in the mortgage was in conflict with the laws of Colorado.¹⁷

¹¹ *Wilson v. Troup*, 2 Cow. 195, aff'g 7 Johns. Ch. 25.

¹² *Ferguson v. Kimball*, 3 Barb. Ch. 616, 619.

¹³ *Jackson v. Turner*, 7 Wend. 458; *Mowry v. Sanborn*, 68 N. Y. 153.

¹⁴ *Lewis v. Duane*, 141 N. Y. 302; 36 N. E. 322.

¹⁵ *Walker v. Cockey*, 38 Md. 75.

¹⁶ *Elliott v. Wood*, 45 N. Y. 71; *Mead v. Brockner*, 82 App. Div. 480.

¹⁷ *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43.

§ 1165. Who may foreclose.—The personal representatives of the mortgagee may institute proceedings to foreclose; a mortgage interest in this State being regarded as a mere chattel.¹⁸ This would include his assignee;¹⁹ and his executors and administrators. If the mortgage has been assigned as security for a debt owing from the mortgagee to a third person, the assignee holds as assignee of the power of sale, and may foreclose under the statute;²⁰ but such foreclosure will not divest the interest of the mortgagee in the debt, and if the assignee purchases the land at the sale, he will hold it subject to the right of the mortgagee to redeem, on payment of the debt to secure which the assignment was made.²¹ If two or more persons are jointly interested in a mortgage, it is the better practice for all to join in foreclosing it.²²

Where one mortgage secures several notes held by different parties, only the holder of the mortgage can foreclose by advertisement under the power, and he will hold the proceeds as trustee for the parties in interest.²³

A surviving executor of the mortgagee may foreclose, and since the exercise of the power is a matter of contract and not of jurisdiction, the power of sale contained in a mortgage of land in this State, when the mortgagee resides and dies in another State, may be executed by his executors or administrators appointed in the State of his domicile.²⁴

§ 1166. Notice of sale; how given.—Section 2388 of the Code of Civil Procedure provides that the person entitled to execute the power of sale must give notice in the following manner, that the mortgage will be foreclosed by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

1. A copy of the notice must be published, at least once in

¹⁸ *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 145.

¹⁹ *Cohoes Co. v. Goss*, 13 Barb. 137; *Wilson v. Troup*, 2 Cow. 195, 231; 1 R. S. 737.

²⁰ *Strother v. Law*, 54 Ill. 413.

²¹ *Slee v. The Manhattan Co.*, 1 Paige, 48.

²² *Wilson v. Troup*, 2 Cow. 195, 231.

²³ *Wilson v. Troup*, 2 Cow. 195; *Slee v. The Manhattan Co.*, 1 Paige, 48; *Solberg v. Wright*, 33 Minn. 224; *Bottineau v. Ins. Co.*, 31 Minn. 125; *Brown v. Delaney*, 22 Minn. 349.

²⁴ *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Averill v. Taylor*, 5 How. Pr. 476; 1 Code R. N. S. 213.

each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property, or, in the city and county of New York, in a like place, at or near the entrance of the building, where the trial and special terms of the Supreme court of the first judicial district are directed by law to be held.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, provided he died the owner of the mortgaged premises. A copy of the notice may also be served, in a like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, or the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee; or in the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, then upon his heirs; or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

§ 1167. **Notice of sale; how served.**—Service of notice of sale, as prescribed in subdivision fourth of section 2388, must be made as follows: ²⁵

1. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed in article first, of title first, of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion, at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his wife, widow, executor or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a post-paid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.

§ 1168. **Duty of county clerk.**—A county clerk to whom a copy of a notice of sale is delivered, as prescribed in section 2388 of the Code, must forthwith affix it in a book, kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.²⁶

§ 1169. **Publishing notice.**—The mortgagee may select the paper in which the publication is to be made, and in the absence of actual fraud resulting in damage to the mortgagor, a sale will not be set aside because the paper in which the notice was published was not well calculated to give that general information which, in such cases, should be afforded.²⁷ The newspaper should be one published ²⁸ in the county where the mortgaged premises are sit-

²⁵ Code of Civ. Pro. § 2389.

²⁶ Code of Civ. Pro. § 2390.

²⁷ Wake v. Hart, 12 How. Pr. 444.

²⁸ Under a statute requiring publication in a newspaper "printed" in the county, it is not sufficient to

uated; and in the first department the New York Law Journal has been designated by the judges of the courts of record, under an act passed for that purpose by the legislature, as the paper in which to publish all legal notices.²⁹

The foreclosure will not be invalidated by a change in the name of the newspaper in which the foreclosure advertisement is published, and by the removal of the publication office to another place in the same county, if the paper otherwise retains its identity.³⁰

Publication in weekly newspaper, dated Saturday, five-sixths of the edition of which are actually published on Friday, is not a sufficient first publication of notice of foreclosure of a mortgage falling due on such Friday.³¹

If the land is situated in more than one county, the publication may be made in a newspaper printed in either.³²

Publication in one of several editions of the same paper issued on the same day is sufficient.³³

The first publication of the notice must be eighty-four days prior to the day of sale specified in the notice; but the twelve publications may be made in less than eighty-four days, provided the publication be made once in each week for twelve weeks.³⁴

The publication must be according to the law in force at the time when it is made, notwithstanding the mortgage was executed prior to the passage of such law.³⁵

§ 1170. Service of notice by mail.—If the service of the notice is made by mail, the statute requires that it should be addressed to the residence of the party intended to be served. No provision is made for defective information, and if the notice be wrongly addressed, the mistake will be fatal.³⁶

If the person served is notified as being an executor or administrator that the newspaper was "published" in the county. *Bragdon v. Hatch*, 77 Me. 433; *Blake v. Dennett*, 49 Me. 102. This was the requirement under the Revised Statutes, and prior to the Code of Civil Procedure. 2 R. S. 545, § 3.

²⁹ *Judiciary Law*, § 97.

³⁰ *Perkins v. Keller*, 43 Mich. 53.

³¹ *Pratt v. Tinkcom*, 21 Minn. 142.

³² *Wells v. Wells*, 47 Barb. 416.

³³ *Guest v. City of Brooklyn*, 9 Hun, 198.

³⁴ *Howard v. Hatch*, 29 Barb. 297; *George v. Arthur*, 2 Hun, 406; *Gantz v. Toles*, 40 Mich. 725.

³⁵ *Atkinson v. Duffey*, 16 Minn. 45.

³⁶ *Robinson v. Ryan*, 25 N. Y. 320; *Mowry v. Sanborn*, 7 Hun, 380, rev'd 68 N. Y. 153.

ministrator, it is sufficient if the notice be sent by mail addressed to the proper person, though the word executor or administrator be not added.³⁷

The method of service by mail may be adopted, even though the persons to whom the notices are sent reside in the same place with the party foreclosing and his attorney;³⁸ and, on the other hand, the notice to the mortgagor may be mailed anywhere within the State.³⁹ The time is counted from the deposit of the letter in the post-office.⁴⁰

§ 1171. Notice to be served only on those mentioned in statute.—A suit in equity is a proceeding of different character from a sale under a power. It is a judicial proceeding, directly against the parties, to obtain a decree against them, barring their respective rights and equities in the premises; and, of course, no one but parties, or those claiming under them, can be affected by the decree. But so long as the law permits equities of redemption to be barred under powers, the sale under a power which conforms to the statute should be deemed to cut off all rights and interests which are subject to the power, except so far as the effect of the sale is restricted by the statute.⁴¹ The persons who are to be served with notice of sale are, therefore, those whom the statute directs to be served, and none other.

§ 1172. On whom notice must be served.—Notice must be served upon "the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed," and where none has been appointed none need be served.⁴²

The owner of the equity of redemption must be notified, and if he is not, the sale is void and operates only as an assignment to the purchaser of the title to the mortgage interest.⁴³

³⁷ *George v. Arthur*, 2 Hun, 406.

³⁸ *Stanton v. Kline*, 11 N. Y. (1 Kern.) 196.

³⁹ *Bunce v. Reed*, 16 Barb. 347.

⁴⁰ *Hornby v. Cramer*, 12 How. Pr. 490.

⁴¹ *Per RAPALLO, J.*, in *Brackett v. Baum*, 50 N. Y. 8. See *contra*, *Hornby v. Cramer*, 12 How. Pr. 490. The question which is raised in this case upon the wording of the statute is interesting.

⁴² *Jefferson v. Bangs*, 197 N. Y. 35; 90 N. E. 109; *Anderson v. Austin*, 34 Barb. 319; *Low v. Purdy*, 2 Lans. 422; *Stanley v. Freckelton*, 65 Hun, 138; 19 N. Y. Supp. 913; *Bond v. Bond*, 51 Hun, 507; 4 N. Y. Supp. 569. See *contra*, *Mackenzie v. Alster*, 64 How. Pr. 388; 12 Abb. N. C. 110; *Van Schaack v. Saunders*, 32 Hun, 515.

⁴³ *Kellogg v. Dennis*, 38 Misc. 82; 77 N. Y. Supp. 172.

§ 1173. **Wife of mortgagor.**—If the wife of the owner of the equity joins in the mortgage she would be a mortgagor, and as such entitled to notice.⁴⁴ If the mortgage be given for purchase money, or if it be made by the husband before marriage, notice is still required to be served upon the wife.⁴⁵ Though the wife does not derive title from her husband, yet she claims under him within the intent of the statute, and a sale under a power regularly conducted will be a bar to her claim to dower.⁴⁶

The wife of a grantee of the mortgaged premises is a "subsequent grantee" within the statute claiming under the mortgagor by virtue of a title subject to the mortgage," and if not served with notice of the sale, her right of dower will not be foreclosed.⁴⁷

§ 1174. **Junior lienors.**—The assignee of a junior mortgage, whose assignment is recorded, is entitled to notice.⁴⁸ And if the mortgagee who is making the sale has knowledge of an unrecorded assignment of a junior mortgage, he is bound, as a matter of honesty and fair dealing, to give notice to such assignee, and if he fails to do so, his sale may be set aside as fraudulent.⁴⁹

The statute makes a curious distinction between persons who hold under conveyances or mortgages from the mortgagor and the judgment creditors of the mortgagor. Those grantees and mortgagees whose conveyances and mortgages shall be on record at the time of the first publication of the notice, and those only, are entitled to service of the notice upon them, either personally or at their dwellings, or by mail.⁵⁰ But *all* judgment creditors whose liens were acquired subsequent to the mortgage, are entitled to such notice. The lien of a judgment, therefore, perfected after the first publication of notice and before sale, is not cut off, nor is the right of redemption of the judgment creditor barred unless notice is served upon him as prescribed by the statute.⁵¹

The lien of a person entitled to notice and not receiving it, is not destroyed, and this seems to be so even though he knew of the sale.⁵²

⁴⁴ King v. Duntz, 11 Barb. 191.

⁴⁵ Code of Civ. Pro. § 2388.

⁴⁶ Brackett v. Baum, 50 N. Y. 8.

⁴⁷ Raynor v. Raynor, 21 Hun, 36;
Northup v. Wheeler, 43 How. Pr. 122.

⁴⁸ Winslow v. McCall, 32 Barb.
241; Wetmore v. Roberts, 10 How.
Pr. 51; Decker v. Boice, 19 Hun, 152.

⁴⁹ Soule v. Ludlow, 3 Hun, 503;
s. c. 6 T. & C. 24.

⁵⁰ Code of Civ. Pro. § 2388; Os-
trander v. Hart, 43 St. Rep. 910.

⁵¹ Groff v. Morehouse, 51 N. Y.
503.

⁵² Root v. Wheeler, 12 Abb. 294;
Wetmore v. Roberts, 10 How. Pr. 51.

NOTICE OF SALE.

§ 1175. **Contents of notice of sale.**—Section 2391 of the Code of Civil Procedure provides that “the notice of sale must specify:

“1. The names of the mortgagor, of the mortgagee, and of each assignee of the mortgage.

“2. The date of the mortgage, and the time when, and the place where, it is recorded.

“3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.

“4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.”⁵³

§ 1176. **Purpose of sale to be set forth.**—The statute says that “The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice.”⁵⁴ The notice should therefore show upon its face that the sale which is spoken of is for the purpose of foreclosure, or, what would be equivalent, that the sale is to be by virtue of a power of sale contained in the mortgage. Most persons would readily enough conjecture the purpose of the notice, though not distinctly stated; but titles to land should not be left to depend upon vague inferences.⁵⁵

§ 1177. **Executors or administrators** are not assignees within the meaning of the statute, and it is not necessary that the derivation of the executors' power to foreclose should appear in the notice. It is enough that they should subscribe the notice as “executors of the last will and testament of the mortgagee, deceased.” The addition of these words is not only *descriptio personæ*, but is descriptive of the character in which they act.⁵⁶

§ 1178. **Description of mortgage in notice.**—The statement of the date of the mortgage and where it was recorded must be sufficiently accurate to accomplish the purpose of the statute, and if

⁵³ 2 R. S. 546, § 4; 3 R. S. (6th ed.) 847, § 4. 190; Leet v. McMaster, 51 Barb. 236.

⁵⁴ Code of Civ. Pro. § 2388.

⁵⁶ The People v. Prescott, 3 Hun, 419.

⁵⁵ Judd v. O'Brien, 21 N. Y. 186,

there be a positive error, the question will be whether it is one calculated to mislead. If the date of the mortgage, the date of record, and the clerk's office be all correctly given, an error in the volume or page will not necessarily be fatal. The act does not require the volume and page to be stated.⁵⁷

The notice must specify the names of the mortgagor and mortgagee, "and of each assignee of the mortgage."⁵⁸ Under a similar statute, where a mortgage had been assigned as collateral security for a debt, and such debt had been paid before notice of sale, it was held that such assignee, having no longer any interest, it was not necessary to specify him.⁵⁹

Omitting to state the name of the mortgagee in the notice has been held not to constitute a fatal defect, where there is an accurate reference to the record of the mortgage in the clerk's office.⁶⁰ But a mistake in substituting the word mortgagee instead of mortgagor is material, because liable to mislead.⁶¹

A single notice cannot be made to cover two mortgages, especially if the descriptions of property are not identical.⁶²

§ 1179. Amount claimed.—The statute does not require that the amount claimed to be due at the time of the first publication of the notice should be set down in dollars and cents, though that is doubtless the readiest manner of complying with its direction; and a statement that a particular amount was claimed to be due at a certain prior day, and that the mortgagee claimed that sum with interest from that time, would probably be sufficient.⁶³ Indeed, if more be claimed by the mortgagee than is really due, under an honest mistake, the sale will still be valid.⁶⁴

If only a part of the debt secured by the mortgage is due at the time of the first publication of the notice, the notice of sale should state the sum claimed to be due and also the amount to become due.⁶⁵ The sale, though for an instalment only, will pass

⁵⁷ Judd v. O'Brien, 21 N. Y. 186, 188.

⁵⁸ Code of Civ. Pro. § 2391.

⁵⁹ White v. McClellan, 62 Md. 347.

⁶⁰ Candee v. Burke, 4 T. & C. 143; s. c. 1 Hun, 546.

⁶¹ Abbott v. Banfield, 43 N. H. 152.

⁶² Morse v. Byam, 55 Mich. 594.

⁶³ Judd v. O'Brien, 21 N. Y. 186, 189.

⁶⁴ Bunce v. Reed, 16 Barb. 347; Klock v. Cronkhite, 1 Hill, 108; Jencks v. Alexander, 11 Paige, 619; Mowry v. Sanborn, 62 Barb. 223; White v. McClellan, 62 Md. 347.

⁶⁵ Code of Civ. Pro. § 2391. See rule under earlier statute. Jencks v. Alexander, 11 Paige, 619, 626.

the entire title of the mortgaged property,⁶⁶ and will exhaust the lien of the mortgage,⁶⁷ and the mortgagee may retain out of the proceeds of the sale the amount due and to become due.⁶⁸

§ 1180. **The description of the mortgaged premises** contained in the notice of sale, must conform substantially to that contained in the mortgage, or the sale will be void.⁶⁹

§ 1181. **Incumbrances.**—The statute does not require any reference in the notice of sale to incumbrances. The insertion, therefore, in the notice of matters not required, does not render the notice defective, as to the matters stated in it that the statute requires to be stated. If matters, not called for by the statute, are stated, which are calculated to mislead the public, and thereby prevent persons from bidding, the sale would be void; but if the statement inserted in the notice, although calculated to mislead, is inserted by mistake merely, and is corrected before it could be presumed to influence persons desiring to bid, the mistake will not vitiate the proceedings.⁷⁰

It is lawful to sell the premises free and clear of all incumbrances, and it is not essential that such terms of sale should be included in the published notice of foreclosure.⁷¹

•§ 1182. **Time and place of sale.**—The notice should specify a definite time and place when and where the sale will be made, in such a way that purchasers would not be likely to be deceived;⁷² but if there be by common usage, an established place for such sales, as in the rotunda of the city hall, a notice that the sale would be made in the city hall would be sufficient.⁷³

SALE.

§ 1183. **Postponing the sale.**—Section 2392 of the Code of Civil Procedure provides that the sale may be postponed from time to

⁶⁶ Poweshiek Co. v. Dennison, 36 Iowa, 244; 14 Am. R. 524.

⁶⁷ Fowler v. Johnson, 26 Minn. 338; Minor v. Hill, Adm'r, 58 Ind. 176; 26 Am. R. 71. But see Hill v. Minor, 79 Ind. 48.

⁶⁸ Code of Civ. Pro. § 2404.

⁶⁹ Rathbone v. Clark, 9 Abb. 68, n.

⁷⁰ Per MULLIN, J., in Hubbell v. Sibley, 5 Lans. 51; Klock v. Cronk-

hite, 1 Hill, 107; Jencks v. Alexander, 11 Paige, 619; Burnet v. Denniston, 5 Johns. Ch. 35, 42.

⁷¹ Story v. Hamilton, 86 N. Y. 428, aff'g 20 Hun, 133.

⁷² Burnet v. Denniston, 5 Johns. Ch. 35, 42.

⁷³ Hornby v. Cramer, 12 How. Pr. 490.

time. In that case a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued at least once in each week until the time to which the sale is finally postponed.

There is no direction providing for personal notice to any person; the ordinary practice is to attend at the time and place appointed for the sale, and to give public notice to such persons as may be in attendance, and this should be done when practicable, since a departure from the custom might be treated as evidence of bad faith. If it be announced, it should be announced correctly, as a variance between the adjournment as announced and the adjournment as published, will be fatal to the validity of the sale.⁷⁴

Where the sale was originally noticed for Sunday, an adjournment to a later day, with personal notice to parties interested, was held to be sufficient.⁷⁵ After a public notice of a postponement by the mortgagee, he cannot proceed to sell, disregarding wholly the postponement. A sale so made would be void.⁷⁶

§ 1184. Manner of conducting the sale.—The sale must be at public auction, in the daytime, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the capitol if the property consists of two or more distinct farms, tracts, or lots, they must be sold separately, and as many only of the distinct farms, tracts, or lots shall be sold as it is necessary to sell in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.⁷⁷

§ 1185. Rules as to sale.—The sale must be made by the mortgagee, in a fair and just manner and in good faith, the mortgagee being regarded and treated as a trustee executing a power in trust.⁷⁸ Substantially the same rules prevail as control a sale

⁷⁴ *Miller v. Hull*, 4 Den. 104.

⁷⁵ *Westgate v. Handlin*, 7 How. Pr. 372; *Sayles v. Smith*, 12 Wend. 57.

⁷⁶ *Jackson v. Clark*, 7 Johns. 217,
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⁷⁷ Code of Civ. Pro. § 2393.

⁷⁸ *Jencks v. Alexander*, 11 Paige, 624; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Soule v. Ludlow*, 3 Hun, 503; s. c. 6 N. Y. Sup. (T. & C.) 24.

under the direction of a referee in a foreclosure by action.⁷⁹

The sale must be by auction, and it must be public. It has been said, that where only the mortgagee and his attorney are present, the one bidding off the property to the other, this cannot be said to be a "public sale";⁸⁰ but when it is shown that all the world was invited to be present, and there is no deceit used or mistake occasioned, the absence of competition would not, of itself, be fatal.⁸¹

A sale advertised for eleven o'clock is duly made at any time between eleven and twelve.⁸²

The fact that the person selling the property as auctioneer was not licensed as such, will not affect the title of the purchaser.⁸³

§ 1186. Mortgagee may purchase.—The mortgagee or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.⁸⁴

The mortgagee does not stand in a confidential relation to the mortgagor, which renders him incompetent to purchase. The relation between mortgagor and mortgagee in such case, is not strictly that of trustee and *cestui que trust*, but is, at most, only that of principal and agent; and although the purchase by an agent, of the property of his principal, must be scrutinized closely, yet it is not void, but is only voidable where there has been undue influence, and advantage or imposition upon the principal. The statute allows the mortgagee to purchase, but he would have the right to do so, independent of the statute.⁸⁵

§ 1187. Sale in parcels.—The direction of the statute is peremptory that, if the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and the only exception to this rule is where two or more buildings are situated upon the same city lot, and access to one is obtained through the other.⁸⁶

⁷⁹ Soule v. Ludlow, 3 Hun, 503; s. c. 6 N. Y. Sup. (T. & C.) 24.

⁸⁰ Campbell v. Swan, 48 Barb. 109.

⁸¹ Learned v. Greer, 139 Mass. 31.

⁸² McGovern v. Life Ins. Co., 109 Ill. 151.

⁸³ Learned v. Greer, 139 Mass. 31.

⁸⁴ Code of Civ. Pro. § 2394.

⁸⁵ Elliott v. Wood, 53 Barb. 285; s. c. aff'd 45 N. Y. 71; Lewis v. Duane, 23 N. Y. Supp. 433; 52 St. Rep. 818; 69 Hun, 28, aff'd 141 N. Y. 302; 57 St. Rep. 410. See Cox v. Wheeler, 7 Paige, 248.

⁸⁶ Code of Civ. Pro. § 2393; Lam-

This is a general rule for judicial sales: if the land be in separate parcels, marked for distinct and separate use, they should be sold separately.⁸⁷ But this rule is founded on the presumption that such a mode of sale will produce the largest amount of money, and it will not apply where the whole together will produce more than the aggregate of the respective parcels. Except for the present statute, if two or more parcels of land, which have previously been held and used together, be included in one mortgage, they may be sold together, unless some good reason is shown for adopting a different method of sale.⁸⁸

In making the sale in cases where the security is sufficient, it is the duty of the mortgagee to consult the wishes of those interested in the surplus; and he has no right to sell the whole of the mortgaged premises together, when a person claiming an interest in the property subsequent to the mortgage, offers to bid enough to satisfy the mortgage and costs, for a portion of it, and requests that portion to be first sold.⁸⁹

A mortgagee is not obliged to sell in parcels without request, where the division into parcels was made after the execution of the mortgage.⁹⁰

In selling under a power, the rules which govern in equitable actions should be followed. These are fully set forth in another part of this work.⁹¹

The mortgagee may not only sell in separate parcels, but he may also reserve certain rights for the benefit of the owner of the equity of redemption—as, for instance, he may sell the land and reserve a growing crop, the land being sufficient to pay his debt.⁹²

If the mortgage be payable in instalments, and it is proper to sell the whole of the mortgaged premises together, the mortgagee is entitled to retain the whole amount of his debt, whether due or not, out of the proceeds. The statute does not contemplate a sale subject to future instalments.⁹³

merson v. Marvin, 8 Barb. 9; Hubbell v. Sibley, 5 Lans. 51, aff'd 50 N. Y. 468.

⁸⁷ Wells v. Wells, 47 Barb. 416.

⁸⁸ Anderson v. Austin, 34 Barb. 319.

⁸⁹ Ellsworth v. Lockwood, 42 N. Y. 89.

⁹⁰ Ellsworth v. Lockwood, 9 Hun, 548.

⁹¹ See *ante*, § 943 *et seq.*

⁹² Sherman v. Willett, 42 N. Y. 146.

⁹³ Code of Civ. Pro. § 2404; Cox v. Wheeler, 7 Paige, 248; Grosvenor v. Day, Clarke, 109; Jencks v. Alexander, 11 Paige, 619; Bunce v. Reed, 16 Barb. 347; Barber v. Cary, 11 Barb. 549.

§ 1188. **Terms of the sale.**—The statute does not require that the terms upon which the sale is to be made should be contained in the published notice. The practice is to conform the terms of sale to those used in sales in equitable actions by framing written conditions upon which the purchaser is to pay for and receive his title, thus fixing the rights of the parties and avoiding any question as to the statute of frauds. This practice has been commended by the Court of Appeals.⁹⁴

Where there is a prior lien on the property, it is competent for the mortgagee to make the sale subject to such prior lien, or, if it is due, to require the purchaser to pay and discharge it out of his purchase money.⁹⁵

The fact that a usual and reasonable deposit is required on the day of sale will not render the sale void, notwithstanding the advertisement did not state the terms of sale, or that they would be stated at the sale.⁹⁶

A sale for cash is satisfied by the giving of a check which would be paid if presented;⁹⁷ and if the mortgagee consents that the purchaser shall pay by discharging a debt due from him to such purchaser, this is a matter in which the mortgagor is in no way concerned.⁹⁸

It is in the power of the mortgagee to allow to the purchaser a credit or postponed period of payment, as to the whole of the money which he is entitled to receive, or any portion of it; and where he chooses to do so, he may determine for himself what security he will exact for the eventual payment of the money. The rights of the mortgagor would not be impaired, but would generally be promoted by such a concession on the part of the mortgagee.¹

§ 1189. **Sales under invalid mortgages.**—The power of sale is extinguished by payment, and the lien of the mortgage is discharged by a tender of the amount due upon it, and therefore a mortgage which has been paid,² or the amount of the debt secured

⁹⁴ Story v. Hamilton, 86 N. Y. 428, 432.

⁹⁵ Story v. Hamilton, 86 N. Y. 428, aff'g 20 Hun, 133.

⁹⁶ Pope v. Burrage, 115 Mass. 282.

⁹⁷ McConneaughey v. Bogardus, 106 Ill. 321.

⁹⁸ Cooper v. Hornsby, 71 Ala. 62; Tartt v. Clayton, 109 Ill. 579.

¹ Cox v. Wheeler, 7 Paige, 248, 251; Whitfield v. Riddle, 78 Ala. 99.

² Cameron v. Irwin, 5 Hill, 272, 276; Jackson v. Crafts, 18 Johns. 110.

by which has been tendered,³ cannot be foreclosed by sale under the power, and no title will pass to the purchaser. On the same principle, when enough has been sold to pay the debt, the power is exhausted and the remainder cannot be sold.⁴ It has even been said that the foreclosure by sale under a power in a mortgage which has been satisfied, conveys no title, even to a *bona fide* purchaser;⁵ but the better opinion seems to be that, if the mortgage be undischarged upon the record, and if the proceedings be regular, a *bona fide* purchaser, having no notice of any fraud or defense, will be protected.⁶

Even if part of the property sold has been released by an instrument not recorded, a *bona fide* purchaser will take title to the whole, notwithstanding the release.⁷

So far as a purchaser in good faith is concerned, the title is equivalent to that acquired under a sale pursuant to a judgment in an action to foreclose the mortgage,⁸ and all questions determinable by the court in such an action are settled by the sale on the one condition that all of the formalities prescribed by the statute are observed.⁹

A power of sale contained in a usurious mortgage is void, and a purchaser under it having actual notice of the usury acquires no title;¹⁰ but the sale could not be defeated to the prejudice of a *bona fide* purchaser.¹¹

If there is any defense to the mortgage, or if there is any reason why the sale should not take place under it, the mortgagor may always protect himself, either by commencing an action to

3 Burnet v. Denniston, 5 Johns. Ch. 35.

4 Charter v. Stevens, 3 Den. 33.

5 Cameron v. Irwin, 5 Hill, 272; Wood v. Colvin, 2 Hill, 566; Jackson v. Morse, 18 Johns. 441; Redmond v. Packenham, 66 Ill. 434; Lycoming Ins. Co. v. Jackson, 83 Ill. 307; Temple v. Whittier (Ill.), 34 Alb. L. J. 156.

6 Warner v. Blakeman, 36 Barb. 501; s. c. aff'd 4 Keyes, 487; s. c. 4 Abb. Ct. of App. Dec. 530; Elliott v. Wood, 53 Barb. 285; Brown v. Cherry, 38 How. Pr. 352; s. c. 56 Barb. 635.

7 Palmer v. Bates, 22 Minn. 532.

8 Code of Civ. Pro. § 2395; Slee v. Manhattan Co., 1 Paige, 48, 69; Doolittle v. Lewis, 7 Johns. Ch. 45, 50; Decker v. Boice, 19 Hun, 152, aff'd 83 N. Y. 215. See Bonaker v. Weyrick, 48 Misc. R. 189; 96 N. Y. Supp. 775.

9 Warner v. Blakeman, *supra*.

10 Hyland v. Stafford, 10 Barb. 558; Jackson v. Dominick, 14 Johns. 435.

11 Jackson v. Henry, 10 Johns. 185.

restrain the sale, or by attending the sale and there giving notice of the facts.¹²

RESTRAINING THE SALE BY INJUNCTION.

§ 1190. **When injunction is proper.**—If there is any reason why it is inequitable that the mortgagee should proceed to a sale under the power, the mortgagor or other person interested in stopping the sale may do so by commencing an action and procuring an injunction. If the mortgagee claims a larger amount in his notice than is actually due, it has been said that this is a ground for enjoining the sale;¹³ but the sale will not be enjoined unless the mortgagor or person bringing the action offers to pay the amount really due, since he would have a perfect remedy at law to compel the mortgagee to account for the proceeds of the sale, if it is necessary to have one.¹⁴

When the mortgage is attempted to be foreclosed after the owner of a junior lien has offered to pay the amount due, the mortgagee may be restrained by injunction from assigning his mortgage, or from selling under it until the hearing of the case on a complaint to redeem.¹⁵

Injunctions have in some cases been granted to delay sales under powers until the amount due under the mortgage has been judicially determined;¹⁶ but the differences between the parties must relate to the transaction out of which the mortgage debt arose, and the mortgagee will not be delayed in his sale until alleged offsets arising out of other transactions are adjusted.¹⁷

The mortgagor may bring an action to restrain the sale and to set aside the mortgage as usurious and void.¹⁸ So, also, in an action to set aside as void a mortgage made in the name of a corporation, to the directors, an injunction restraining a sale under it may be granted.¹⁹

¹² Hyland v. Stafford, 10 Barb. 558; Burnet v. Denniston, 5 Johns. Ch. 35, 41.

¹³ Cole v. Savage, Clarke, 361.

¹⁴ Vechte v. Brownell, 8 Paige, 212.

¹⁵ Rhodes v. Buckland, 16 Beav. 212.

¹⁶ Gooch v. Vaughan, 92 N. C. 610; Purnell v. Vaughan, 77 N. C.

268; Capehart v. Biggs, 77 N. C. 261; Kornegay v. Spicer, 76 N. C. 95.

¹⁷ Frieze v. Chapin, 2 R. I. 429; Knight v. Drane, 77 Ala. 371.

¹⁸ Cole v. Savage, Clarke, 482; Hyland v. Stafford, 10 Barb. 558; Burnet v. Denniston, 5 Johns. Ch. 35, 41.

¹⁹ Southampton Boat Co. v. Muntz, 12 W. R. 330.

§ 1191. **When injunction will be refused.**—The right of the mortgagee to his summary remedy by a sale under the power of sale contained in the mortgage is secured to him by his contract, and will not be lightly disturbed by the courts. If the mortgage is valid and is due, and the mortgagee is proceeding to a sale according to the forms prescribed by law and without fraud, the motives which impel him to the enforcement of his security will not be inquired into.²⁰ The holder of a mortgage has a right to make his own election as to the mode in which he will enforce it, and he cannot be restrained from proceeding in his own way merely because a subsequent incumbrancer prefers a different remedy, or even offers to collect his mortgage for him. He cannot be restrained by injunction unless there is some good legal reason for interference. It is not a reason for interfering that the time advertised for the sale is at a season of the year when the property may not sell to the best advantage, or that the sale take place at a time inconvenient to junior incumbrancers. The mortgagee has a right to fix his own time, and to have as early a day as the statute allows.²¹

When the amount due on the mortgage has been once judicially determined, further delay in the sale will not be granted to enable an appeal to be had, if the rights of the parties can be otherwise fully protected, as, for instance, if the money received from the sale is to be in the hands of an officer of the court.²²

The proceedings of a mortgagee under a power to sell, will not be suspended or delayed while the several owners of the equity of redemption shall settle among themselves the proportion which each is to contribute toward the payment of the mortgage debt; but if a sufficient sum is paid into court to secure the mortgagee against loss, a reasonable time may be allowed to them.²³

A sale of land under a power contained in a mortgage will not be restrained as a cloud upon title on the ground that the statute of limitations has run against the mortgage, in the absence of any allegation or finding that the bond and mortgage have been paid.²⁴

²⁰ Jones v. Matthie, 11 Jur. 504; Whiteworth v. Rhodes, 20 L. R. N. S. 105.

²¹ Bedell v. McClellan, 11 How. Pr. 163.

²² Outtrin v. Graves, 1 Barb. Ch. 49.

²³ Brinckerhoff v. Lansing, 4 Johns. Ch. 65.

²⁴ House v. Carr, 185 N. Y. 453, rev'g 105 App. Div. 625.

§ 1192. **Damages from injunction.**—If the mortgagee be wrongfully enjoined, he is entitled as a part of his damages sustained by the injunction, where the sale does not yield payment of his debt, to the value of the emblements removed by the mortgagor while the sale was suspended, and also to necessary counsel fees and taxable costs incurred in consequence of the injunction, and interests on the whole sum the collection of which was suspended.²⁵

§ 1193. **Lands without the State.**—The summary mode of foreclosing mortgages of property within this State, and selling the same, as regulated by our statute, has no extraterritorial application or reference to lands without the State, and a court of equity of this State has no authority to enjoin a mortgagee of lands situate without the State, from selling the mortgaged lands at public sale within this State, according to the terms of the mortgage security, upon the mere allegation that such power is void, when no statute of the State or territory where the lands are situated, nor any other invalidity in the power is stated or made apparent.²⁶ A sale in this State of property in Colorado will not be restrained if authorized by a power contained in the mortgage, such sale not being in violation of any law of Colorado.²⁷

§ 1194. **Appointing referee to make sale.**—If it appears likely to the court that the mortgagee will exercise his power to sell in a harsh, oppressive, or improper manner, a referee may be associated with him, to the end that the sale shall be fairly conducted, and that no more of the premises shall be sold than shall be sufficient to satisfy the debt,²⁸ or the court may restrain a sale for a limited time, so as to give the mortgagor an opportunity to pay.²⁹

SETTING ASIDE SALE.

§ 1195. **When the sale will be set aside.**—Relief will be given by action, to set aside foreclosure proceedings by advertisement, whenever, by any fraud, mistake, deceit, or unfair contrivance, or

²⁵ Aldrich v. Reynolds, 1 Barb. Ch 613.

²⁶ Per ROBINSON, J., in The Central Gold Mining Co. v. Platt, 3 Daly, 263; Elliott v. Wood, 45 N. Y. 71.

²⁷ Carpenter v. Black Hawk Gold Mining Co., 65 N. Y. 43.

²⁸ Van Bergen v. Demarest, 4 Johns. Ch. 37.

²⁹ Manning v. Elliott, 92 N. C. 48.

practice, or bad faith, in conducting the proceedings of foreclosure or sale, the rights of the mortgagor or of subsequent incumbrancers have been injuriously affected, upon pretty much the same grounds which the court would recognize as sufficient for opening the sale if the foreclosure had been by action.³⁰

§ 1196. *Bona fide purchasers*.—Any person whose rights are affected by the foreclosure may commence an action to set it aside, but subsequent *bona fide* purchasers will be protected by the court.³¹ In order to be entitled to claim such protection, the purchaser must show that he made his purchase in good faith, and paid the consideration before notice of defects in the title or irregularities in the sale.³²

§ 1197. *An action to set aside a sale* under a power as irregular or fraudulent can be maintained without redeeming, or offering to redeem, from the mortgage lien, since even an insolvent debtor has at least a right to have his property sold away from him according to law and with common honesty.³³

Inadequacy of price is not, of itself, sufficient to set aside a sale made pursuant to a power,³⁴ unless it is so gross as to amount to evidence of fraud upon the debtor's rights.³⁵

A junior lienor having other and primary security for his debt will be required to proceed against such other security before attacking a sale which conforms to the statute, on the ground of special deception practiced against him.³⁶

Application to set aside the sale upon grounds of discretion should be made promptly, and laches will be a reason for denying relief.³⁷

The purchaser at the foreclosure sale is a necessary party to an action to have the sale declared void, as also are all persons claiming rights under him.³⁸

30 Soule v. Ludlow, 6 N. Y. Sup. (T. & C.) 24; s. c. 3 Hun, 503; Leet v. McMaster, 51 Barb. 236; Hubbell v. Sibley, 5 Lans. 51; Clevinger v. Ross, 109 Ill. 349. See *ante*, Chap. XXVIII.

31 Warner v. Blakeman, 36 Barb. 501; s. c. *aff'd* 4 Keyes, 487.

32 Grover v. Hall, 107 Ill. 638; Brown v. Welsh, 18 Ill. 343; Redden v. Miller, 95 Ill. 345.

33 Clevinger v. Ross, 109 Ill. 349.

34 Laclede Bank v. Keeler, 109 Ill. 385; Cleaver v. Green, 107 Ill. 67; Weld v. Rees, 48 Ill. 434. See *ante*, §§ 1029-1030.

35 Magnusson v. Williams, 111 Ill. 450.

36 Soule v. Ludlow, 3 Hun, 503; s. c. 6 T. & C. 24.

37 Depew v. Dewey, 46 How. Pr. 441.

38 Candee v. Burke, 4 N. Y. Sup. (T. & C.) 143; s. c. 1 Hun, 546.

If a sale be set aside as illegal and fraudulent, the lien of the mortgage will remain unimpaired by the foreclosure proceedings,³⁹ and the purchaser at the sale will then hold the rights of the mortgagee, and will stand as assignee of the mortgage.⁴⁰

§ 1198. **Receipt of surplus money.**—In analogy to the rule that the receipt of the surplus moneys, arising from a sale of land on execution, does not preclude the owners from questioning the validity of the sale, as they have done nothing to encourage the purchasers to bid,⁴¹ the receipt of surplus money by the mortgagor may not estop him;⁴² but it would seem to be evidence to be considered on passing on the question of the regularity of the proceedings. If the owner retains the surplus money, no court would set aside the foreclosure without requiring him to refund what he had received.⁴³

TITLE OF THE PURCHASER.

§ 1199. **Statute.**—Section 2395 of the Code of Civil Procedure provides that a sale, made and conducted as prescribed in the title relating to foreclosures by advertisement, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose a mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons:

1. The mortgagor, his heir, devisee, executor, or administrator.
2. Each person, claiming under any of them, by virtue of a title, or of lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this title.
3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the delivery of a copy of the notice of said sale to the clerk of

³⁹ Stackpole v. Robbins, 47 Barb. 212; Lash v. McCormick, 17 Minn. 403.

⁴⁰ Robinson v. Ryan, 25 N. Y. 320; Jackson v. Bowen, 7 Cow. 13; Vroom v. Ditmas, 4 Paige, 526.

⁴¹ Wood v. Jackson, 8 Wend. 10, 31.

⁴² But see *contra*, Sloan v. Frothingham, 72 Ala. 589; Merritt v. Horne, 5 Ohio St. 307.

⁴³ Candee v. Burke, 1 Hun, 546; s. c. 4 N. Y. Sup. (T. & C.) 143.

the county; and the executor, administrator, or assignee of such a person.

4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.

5. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower.

§ 1200. **Who are bound.**—The title acquired by the purchaser is, if the proceedings be regular, the same as under a strict foreclosure or under a judgment of foreclosure and sale.⁴⁴ The statute has no saving clause for persons laboring under disability, but it is peremptory that “every sale pursuant to a power,” and conducted as is therein prescribed, shall have a certain effect. Where the statute makes no exception, the court can make none on the ground of any inherent equity applicable to infants.⁴⁵

§ 1201. **Questions of priority.**—Where several mortgages were executed at the same time and a parol agreement was made between the mortgagor and all of the mortgagees that all should be of equal lien, and the mortgage first recorded was foreclosed by the assignee thereof by advertisement, proper notices being served on the other mortgagees, it was held that a purchaser in good faith and for value acquired a title free from the liens of all of the mortgages.⁴⁶ This case was affirmed in the Court of Appeals, but the decision was put upon the ground that the assignee of the mortgage foreclosed acquired a preference over the unrecorded mortgages, which thereupon became junior liens subject to be foreclosed and cut off by the sale.⁴⁷ The question as to whether the purchaser by force of the sale could acquire a title greater than the extent of the lien of the mortgage foreclosed, was not passed upon, and might admit of serious discussion. Controversies as to priority can be determined in actions to fore-

⁴⁴ Jackson v. Henry, 10 Johns. 185; Otis v. McMillan, 70 Ala. 46.

⁴⁵ Demarest v. Wynkoop, 3 Johns. Ch. 129, 147.

⁴⁶ Decker v. Boice, 19 Hun, 152, aff'd 83 N. Y. 215.

⁴⁷ Decker v. Boice, 83 N. Y. 215.

close mortgages, but it is a grave question as to whether a failure to take active steps to prevent or restrain a sale will operate to estop a person holding a lien from contesting the alleged priority of a mortgage attempted to be foreclosed by sale under a power contained in a junior mortgage.

§ 1202. **Defective foreclosure.**—If the foreclosure be regularly conducted so far as the advertising and posting of the notice, and the only irregularity be an omission to serve some one person with the notice, who was entitled to receive it, the foreclosure will be valid as against all of the persons who were served, and the purchaser will bear the same relation to the person who was not served, as a purchaser at a sale under a judgment would bear toward a party interested in the equity of redemption, who had not been joined as a defendant. He would become the assignee of the rights of the mortgagee in the premises, as security for the debt, and the proceedings to foreclose would be sufficient evidence of his right to occupy the position and claim the remedies of the mortgagee.⁴⁸ As to all persons who were properly served, their right of redemption would be gone, and their interests in the land would be owned by the purchaser; but the right of redemption would still remain in all persons who, being entitled to notice, did not receive it.⁴⁹

If the purchaser under the defective foreclosure obtains possession he may retain such possession until the amount due on the mortgage is paid to him.⁵⁰

If there are judgments subsequent to the mortgage, which remain a lien upon the property at the time of the sale under the statute, the purchaser takes the whole legal and equitable interest in the property as against the mortgagor and all persons claiming under him; subject, however, to the equitable right of the judgment creditors to redeem, in the same manner as if such foreclosure had not taken place. The amount which such judgment creditors are to pay upon the redemption of the premises, does not depend upon the sum bid at the sale, but is regulated by the amount actually due at the time of such sale, unless it has

⁴⁸ Robinson v. Ryan, 25 N. Y. 320; Jackson v. Bowen, 7 Cow. 13; Vroom v. Ditmas, 4 Paige, 526.

⁴⁹ Groff v. Morehouse, 51 N. Y.

503; Vanderkemp v. Shelton, 11 Paige, 28; Wetmore v. Roberts, 10 How. Pr. 51.

⁵⁰ Brown v. Smith, 116 Mass. 108.

been subsequently paid by the person who was equitably bound to pay the same.⁵¹

It has been said that, where the value of the mortgaged premises is less than the mortgage foreclosed, the purchaser in good faith may, by injunction, restrain a subsequent judgment creditor who is not barred from enforcing his rights,⁵² but it may be questioned as to whether the right of a creditor to redeem can be cut off in any other way than by one of the methods of foreclosure. Though irregularly made a sale will not be disturbed after eighteen years.⁵³

§ 1203. **Curing defective foreclosure.**—A strict foreclosure has been held to be the proper remedy to extinguish the rights of holders of subsequent incumbrances who have not been properly cut off by the proceedings under the statute,⁵⁴ but strict foreclosure is now believed to be abolished by our Code of Civil Procedure.⁵⁵

EVIDENCE OF THE FORECLOSURE.

§ 1204. **Affidavits.**—Section 2396 of the Code of Civil Procedure provides that an affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel, separately sold; the name of the purchaser of each distinct parcel; and the name of the person or persons, court officer or other officer, to whom the proceeds of the sale were paid, and the sums thereof must be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by his foreman or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by

51 Per Chancellor WALWORTH, in *Benedict v. Gilman*, 4 Paige, 58, 61; *Robinson v. Ryan*, 25 N. Y. 320.

52 *Root v. Wheeler*, 12 Abb. 294.

53 *Pitt v. Amend*, 84 Hun, 492; 65 St. Rep. 697; 32 N. Y. Supp. 423.

54 *Benedict v. Gilman*, 4 Paige, 58, 63.

55 Code of Civ. Pro. § 1626.

any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person, upon whom the notice must or may be served, may be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

The matters required to be contained in any or all of the affidavits specified in the above section, may be contained in one affidavit where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit, and a printed copy of each notice of postponement must be annexed to the affidavit of publication and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits,⁵⁶ where they all refer to it, and are annexed to each other and filed and recorded together.⁵⁷

§ 1205. Affidavits may be filed and recorded.—The affidavits specified in sections 2396 and 2397 of the Code of Civil Procedure, may be filed in the office for recording deeds and mortgages in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording mortgages. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect with respect to the property in that county, as if the originals were duly filed and recorded therein.⁵⁸

A clerk or a register who records any affidavits, or a certified copy thereof, filed with him, must make a note upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.⁵⁹

⁵⁶ *Mowry v. Sanborn*, 72 N. Y.

⁵⁸ Code of Civ. Pro. § 2398.

⁵³⁴.

⁵⁹ Code of Civ. Pro. § 2399.

⁵⁷ Code of Civ. Pro. § 2397.

§ 1206. **Deed not necessary.**—The purchaser of the mortgaged premises, upon a sale conducted as prescribed in this title, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title, in like manner, upon payment of the purchase money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed in section 2398 of the Code of Civil Procedure. But he is not bound to pay the purchase money, until the affidavits, specified in that section, with respect to the property purchased by him, are filed, or delivered, or tendered to him for filing.⁶⁰

§ 1207. **Effect of affidavits.**—It will be observed that the affidavits are *evidence* of the foreclosure,⁶¹ but they are not conclusive as to the facts, and where the terms of sale are not stated therein, oral evidence is admissible to prove them.⁶² The foreclosure is complete as soon as the sale is made, so far as to extinguish the equity of redemption of the mortgagor; the time given to the purchaser to complete his purchase is for his benefit, and not for the benefit of any person concerned in the equity of redemption, and the affidavits can be made and filed at any time after the sale has been made.⁶³ But, while the mortgagor has no right after the sale to redeem from the mortgage, his right to retain possession of the property continues until the affidavits have been made,⁶⁴ and in this respect his rights are similar to those of a mortgagor after a sale under a judgment of foreclosure, and before the delivery of the deed from the referee or sheriff.⁶⁵ The recording of the affidavits is not necessary in order to vest the title in the purchaser; if in fact the proceedings were all regular,⁶⁶ since the statute does not make recording essential,

⁶⁰ Code of Civ. Pro. § 2400.

⁶¹ *Mowry v. Sanborn*, 72 N. Y. 534; s. c. 68 N. Y. 153; 62 Barb. 223.

⁶² *Story v. Hamilton*, 86 N. Y. 428, aff'g 20 Hun, 133.

⁶³ *Tuthill v. Tracy*, 31 N. Y. 157.

⁶⁴ *Arnot v. McClure*, 4 Den. 41; *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 Barb. 503; *Howard v. Hatch*, 29 Barb. 297; *Tuthill v. Tracy*, 31 N. Y. 157.

⁶⁵ *Mitchell v. Bartlett*, 51 N. Y. 447.

⁶⁶ *Matter of Lawson*, 42 App. Div. 377; 59 N. Y. Supp. 152; *Howard v. Hatch*, 29 Barb. 298; *Frink v. Thompson*, 4 Lans. 489. But see *Cohoes Company v. Goss*, 13 Barb. 137; *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 Barb. 503; *Tuthill v. Tracy*, 31 N. Y. 157.

and the affidavits themselves are, by the statute, as good evidence of the facts as the record.

The affidavits must be made by the persons named in the statute, and the fact that the statute reads that the affidavits "may" be made by the persons designated does not entitle other persons to make them.⁶⁷

§ 1208. Conveyance.—Prior to 1838, when the property had been purchased by any person other than the mortgagee, or his legal representatives, or his or their assigns, it was necessary that the owner of the mortgage should, as attorney for the mortgagor, and by virtue of the power of sale under which the foreclosure had been made, execute a conveyance to the purchaser; but if the owner of the mortgage were himself the purchaser, it was held that no deed was necessary to make his title to the premises perfect.⁶⁸ As the statute now stands, no deed is necessary in any case to perfect the title in the purchaser.⁶⁹

§ 1209. Sufficiency of affidavits.—The foreclosure of a mortgage by advertisement is not a proceeding in court, so as to authorize courts to remedy a defect,⁷⁰ and the affidavits must contain enough to show that the statute was complied with. It is not enough to state that the notice was posted "in a proper manner," or that it was served on "certain persons named therein," or that it was "properly folded and directed," and that a "proper postage stamp was placed on each of said letters," without stating the places of residence of the persons served, and the mode of folding and directing.⁷¹ So, also, it will not be sufficient to state in the affidavit that the notices were sent to or left at places which the person sending or serving them is informed and believes to be the places where the parties to be served reside. The fact of residence is important, and should be stated positively and with accuracy.⁷²

An affidavit of the publishing of the notice of sale was as

67 Deutch v. Haab, 135 App. Div. 756.

68 Arnot v. McClure, 4 Den. 41; Demarest v. Wynkoop, 3 Johns. Ch. 129, 146; Jackson v. Colden, 4 Cow. 266; Slee v. Manhattan Co., 1 Paige, 48, 79.

69 Code Civ. Pro. § 2400; Slee v. Manhattan Co., 1 Paige, 48.

70 Dwight v. Phillips, 48 Barb. 116.

71 Chalmers v. Wright, 5 Robt. 713.

72 Mowry v. Sanborn, 7 Hun, 380. See s. c. 62 Barb. 223.

follows: "A. B., being sworn, says that he is foreman of the printer of the newspaper called the *People's Journal*, a public newspaper printed and published in the county of Washington, where the premises described in the annexed notice of sale, or a part thereof, are situated, and that the notice of the mortgage sale, of which a printed copy is annexed, was published for twelve weeks successively, at least once in each week prior to the time specified in said notice for the sale of said premises, said publication having been commenced on the 23d day of April, 1868, and continued for twelve weeks at least, successively, at least once in each week." This was held sufficient, though it was not specifically stated that such publication was in said newspaper. The court stated that the presumption is in favor of the *bona fides* of the affidavit and the regularity of the proceedings, and that the affidavit was presumptive evidence of the due publication of the notice and conclusive evidence until controverted and disproved.⁷³

§ 1210. **Contradicting affidavits.**—As the affidavits are an *ex parte* proceeding, and are only made presumptive evidence of the facts therein contained, there can be no doubt that they may be controverted by the mortgagor and those claiming under him. All or any of the facts stated in the affidavits may be disproved by any person, unless it be the mortgagee and those claiming under him,⁷⁴ and a purchaser may show facts necessary to correct errors.⁷⁵ It has been said that the mortgagee and those claiming under him must, in an action to recover possession of the premises, stand on the affidavits as they existed at the time of the commencement of the action, and cannot supply defects, for that would be to create a cause of action during the pendency of the suit,⁷⁶ but since the affidavits may be made at any time after the sale, there would seem to be no reason why they should not be corrected, if such correction were made prior to the

⁷³ Mowry v. Sanborn, 72 N. Y. 534, rev'g s. c. 11 Hun, 545; Gunnell v. Cockerill, 79 Ill. 79; Burke v. Adair, 23 W. Va. 139; Demarest v. Wynkoop, 3 Johns. Ch. 129; 8 Am. Dec. 467.

⁷⁴ Per BRONSON, J., in Arnot v. McClure, 4 Den. 41; Sherman v. Willett, 42 N. Y. 146; Mowry v. San-

born, 62 Barb. 223. See s. c. 7 Hun, 380.

⁷⁵ Story v. Hamilton, 86 N. Y. 428.

⁷⁶ Dwight v. Phillips, 48 Barb. 116; Mowry v. Sanborn, 7 Hun, 380. See s. c. 62 Barb. 223, where a contrary doctrine was maintained; Bryan v. Butts, 27 Barb. 503.

commencement of an action, to the maintenance of which it is material,⁷⁷ if not even after the commencement of the action.⁷⁸

COSTS.

§ 1211. **Costs allowed.**—The following costs, in addition to the expenses specified in section 2402 of the Code of Civil Procedure, are allowed in proceedings taken as prescribed in the title of the Code of Civil Procedure regulating foreclosure by advertisements:

1. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio thirteen cents.

2. For serving each copy of the notice of sale required or expressly permitted to be served by this title and for affixing each copy thereof required to be affixed upon the court house, as prescribed in this title, one dollar.

3. For superintending the sale, and attending the execution of the necessary papers, ten dollars.⁷⁹

The sums actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings taken as prescribed in this title:

1. For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks.

2. For the services specified in section 2390 of the Code.

3. For recording the affidavits and also where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof.

4. For necessary postage, and searches.⁸⁰

§ 1212. **Taxation.**—The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place,⁸¹ upon the request and at the expense of any person interested in the payment thereof. Each provision of the Code of Civil Procedure relating to the taxation of costs in the Supreme Court, and the review thereof, applies to such a taxation.⁸²

⁷⁷ *Bunce v. Reed*, 16 Barb. 347.

⁷⁸ *Story v. Hamilton*, 86 N. Y.

428; *Mowry v. Sanborn*, 68 N. Y.

153; s. c. 72 N. Y. 534.

⁷⁹ Code of Civ. Pro. § 2401.

⁸⁰ Code of Civ. Pro. § 2403.

⁸¹ *People v. Colborne*, 20 How. Pr. 378.

⁸² Code of Civ. Pro. § 2403; *People v. Colborne*, 20 How. Pr. 378.

The statute contemplates a taxation where the party can be heard, and not an *ex parte* taxation. The person who is authorized to require such taxation to be made is any party liable to pay the costs; this will include the person entitled to the surplus as well as one who is bound for a deficiency, and such person may not only insist that the costs be taxed, but he is also entitled to notice of the taxation, so that he may have an opportunity of contesting it.⁸³

A bill of costs which were properly allowable before the enactment of our present Code of Civil Procedure, may be found in the opinion of HARRIS, J., in *Collins v. Standish* (6 How. Pr. 493).

Costs cannot be taxed for matter contained in the notice of sale, but not legally required to be inserted; nor for serving persons not required by the statute to be served, although it may be prudent to serve them.⁸⁴

DISTRIBUTION OF SURPLUS.

§ 1213. **Prior to 1867.**—Prior to the passage of the acts of 1867, 1868, and 1870, the mortgagee who had received more than enough to satisfy his claims, from a sale of the mortgaged property, was liable to account for the surplus to the mortgagor, as for money had and received.⁸⁵ The mortgagee was, however, not liable until he received the money.⁸⁶ The mortgagee was, as to the surplus moneys in his hands, a trustee or *quasi* trustee for the benefit of those interested therein. If there were rival claimants, he was not obliged to pay either; but it was his duty to retain the fund until an action could be brought by himself or by one or more of the claimants, in which the rights of the parties could be determined.⁸⁷

Where two or more persons claimed the fund, it was not safe for the mortgagee to pay it over to either, and, at the same time, he was liable to be punished with costs for refusing.⁸⁸

An action might be brought against the mortgagee by any per-

⁸³ Matter of Moss, 6 How. Pr. 263.

⁸⁴ Ferguson v. Wooley, 9 Civ. Pro. Rep. 236.

⁸⁵ Cope v. Wheeler, 41 N. Y. 303.

⁸⁶ Russell v. Dufon, 4 Lans. 399.

⁸⁷ The People v. Ulster Common

Pleas, 18 Wend. 628; Bleecker v. Graham, 2 Edw. 647; Fielder v. Varner, 45 Ala. 429.

⁸⁸ Bevier v. Schoonmaker, 29 How. Pr. 411.

son having a claim to the surplus.⁸⁹ In *Bevier v. Schoonmaker* (29 How. Pr. 411), such an action was brought by the owner of the equity of redemption under a sheriff's sale, who was also the owner of the lien on the mortgaged premises next in order to the mortgagee. In *Matthews v. Duryee* (45 Barb. 69), the action was held to lie in favor of the widow of the mortgagor.⁹⁰

In *Kirby v. Fitzgerald* (31 N. Y. 417), two actions were commenced against the mortgagee, who deposited the money in court, under an agreement between the parties, and the court held that the peculiar form of the litigation enabled it to apply the rules applicable to surplus proceedings in an action to foreclose a mortgage.

§ 1214. **Distribution of surplus by Supreme Court.**—Provisions were made for the distribution of surplus moneys arising from the sale of lands in proceedings to foreclose mortgages by advertisement by chapters 658 of the Laws of 1867, as amended by chapter 170 of the Laws of 1870, and by chapter 804 of the Laws of 1868, as amended by chapter 706 of the Laws of 1870. Both of these enactments were repealed in 1880,⁹¹ and the following sections were inserted in the Code of Civil Procedure in lieu thereof:

§ 2404. An attorney or other person who receives any money, arising upon a sale, made as prescribed in this title (foreclosure by advertisement) must, within ten days after he receives it, pay into the Supreme Court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action, brought in the Supreme Court, and triable in the county where the sale took place.

§ 2405. A person, who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed in the next section but one, file in the office of the clerk of the county, where the sale took place, a petition, stating the nature and extent of his claim, and praying for an order, directing the payment to him of the surplus money, or a part thereof.

⁸⁹ See *Costigan v. Newland*, 12 Barb. 456.

⁹⁰ s. c. aff'd 4 Keyes, 525; 3 Abb. App. Dec. 220; 17 Abb. 256.

⁹¹ Laws of 1880, ch. 245.

§ 2406. A person filing a petition, as prescribed in the last section, may, after the expiration of twenty days from the day of sale, apply to the Supreme Court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed in this act, for the service of a paper upon an attorney in an action, upon each person, who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs.

§ 2407. Upon the presentation of the petition, with due proof of notice of application, the court must make an order referring it to a suitable person to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires.

§ 1215. **Distribution of surplus by surrogate.**—Sections 2104, 2405, 2406, and 2407 of the Code of Civil Procedure do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized, where letters testamentary or letters of administration upon the decedent's estate were, within four years before the sale, issued from a surrogate's court within the State, having jurisdiction to issue them.

§ 2798. Where real property, or an interest in real property, liable to be disposed of as prescribed in this title (surrogate's courts), is sold, in an action or a special proceeding, specified in the last section, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime; and letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a surrogate's court of the State, having jurisdiction to grant them; the surplus money must be paid into the surrogate's court from which the letters issued, pursuant to the provisions of section 2437

of this Code, and the receipt of the county treasurer shall be a sufficient discharge to the person paying such money. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money.

§ 1216. **Object of statutes.**—The statute which grants to the surrogates, and that which vests in the Supreme Court, jurisdiction to distribute the surplus which remains after the sale of real estate under a power contained in a mortgage, regulate the remedies of the parties merely, and do not affect their substantial rights. The object of both enactments was to afford a means by which those rights might be determined, to the end that the persons entitled to the surplus might get it. If a mortgage be foreclosed after the death of the mortgagor, the surplus stands in the place of the land, and belongs to the heir, and the fact that a surrogate is called upon to adjudge upon the claims of the parties will not make it belong to the administrator. Neither will a clause in the mortgage which provides that the surplus shall be paid to the mortgagor, his "executors or administrators" convert that which the law declares to be real estate into personal property, and thus change the rules of law which control the rights of the claimants to an estate of a deceased person. The true construction of those words is, that the promise is to pay the executors or administrators whenever the surplus might have been collected by the mortgagor, as, for example, when the land was sold in his lifetime.⁹²

Obtaining Possession.

§ 1217. **By summary proceeding.**—Prior to the enactment of Laws of 1874, c. 208, the purchaser was compelled to sue in ejectment, in order to acquire possession of the mortgaged premises. By that statute, however, the summary remedy of landlords to

⁹² *Dunning v. Ocean National Bank*, 61 N. Y. 497.

recover possession of land is made to apply when any person shall hold over and continue in possession of any real estate, which shall have been sold pursuant to the foreclosure of a mortgage thereon, or by virtue of an execution against such person, after a title under such sale shall have been perfected. This statute was repealed in 1880, but, so far as it applied to the remedies of persons holding title under the foreclosure of a mortgage by advertisement, it was re-enacted in the Code.⁹³

This remedy is confined to purchasers in foreclosure by advertisement. The remedy of a purchaser in a foreclosure by action is by an application for an order in the nature of a writ of assistance.⁹⁴

If the foreclosure be void it cannot give a right of entry, and the fact that the mortgagee and those under whom he claims, held the land for fourteen years, does not render his possession lawful, where it appears that the mortgagor did not acquiesce therein and there is no evidence that he knew of it.⁹⁵

§ 1218. What may be litigated.—In *People ex rel. Bridenbecker v. Prescott* (3 Hun, 419, 424), it was questioned as to how far the proceedings in the foreclosure of mortgages by advertisement are open to review before officers authorized to entertain these summary proceedings. It was said that “if they can be reviewed, it follows that they may be annulled, and thus the action of the highest court in the State pronounced illegal and void by a justice of the peace. This cannot be so. It must be enough to produce before the officer the record of the proceedings on foreclosure. Whether they are in strict accordance with the statute is not a subject with which the officer has anything to do.” These remarks were not necessary to the decision, which may safely rest upon the fact that the proceedings attacked were regular, neither are they fully sustained by the authority cited in their support.⁹⁶ That case was a summary proceeding to obtain possession of land sold under execution, and the court held that it was not competent to attack the regularity or validity of the judgment, nor to inquire as to whether the purchase was *bona fide*. If the judgment and execution are regular upon the face of them;

⁹³ Code Civ. Pro. §§ 2232 *et sequi*.

⁹⁵ Deutch v. Haab, 135 App. Div.

⁹⁴ Greene v. Geiger, 46 App. Div. 756.
210; 61 N. Y. Supp. 524.

⁹⁶ Brown v. Betts, 13 Wend. 32.

and the applicant shows a title under them, that is sufficient. So, if the proceeding upon which an applicant for possession of land bases his claim is the foreclosure of a mortgage by advertisement, the validity of the mortgage or the honesty of his motives cannot be litigated in the summary proceeding, but it is the duty of the magistrate, however inferior his jurisdiction, to examine the evidences of the foreclosure and to ascertain whether, upon their face, they confer a right to the possession which his mandate will enforce.⁹⁷

97 See *Getting v. Mohr*, 34 Hun, 340.

APPENDIX OF FORMS.

TABLE OF FORMS.

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2. Mortgage.
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26. The Same. Whole Amount Due. Infants or Absentees.
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63. Order to Sell Balance of Mortgaged Premises.
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APPENDIX OF FORMS.

NO. 1.

BOND.

KNOW ALL MEN BY THESE PRESENTS, That I, C. D., hereinafter designated as the obligor, do hereby acknowledge myself to be justly indebted to A. B., hereinafter designated as the obligee, in the sum of ——— dollars, lawful money of the United States, which sum, I, the said obligor, do hereby covenant to pay to said obligee, his executors, administrators or assigns, on the ——— day of ———, 191—, at the rate of ——— per centum per annum, and to be paid on the ——— day of ——— next ensuing the date hereof, and semi-annually thereafter.

AND IT IS HEREBY EXPRESSLY AGREED THAT the whole of the said principal sum shall become due at the option of said obligee after default in the payment of interest for thirty days, or after default in the payment of any tax or assessment upon the premises described in the mortgage collateral hereto for thirty days after notice and demand. All of the covenants and agreements made by the said obligor in the mortgage covering premises therein described and collateral hereto, are hereby made part of this instrument.

Signed and sealed this ——— day of ———, 191—.

In the presence of ———.

[Acknowledgment in usual form.]

NO. 2.

* MORTGAGE.

THIS INDENTURE, made the ——— day of ——— in the year nineteen hundred and ———, between C. D., residing at ——— hereinafter described as party of the first part, and A. B., residing at ———, hereinafter described as party of the second part.

WHEREAS, the said C. D. by virtue of a certain bond or obligation bearing even date herewith, is justly indebted to the said party of the

*The statutory forms of mort- Property Law are not included in
gages, etc., provided for in the Real this Appendix.

second part in the sum of ——— dollars, lawful money of the United States, secured to be paid, together with the interest thereon, at the time and in the manner expressed in said bond or obligation, to wit;

[*Insert terms.*]

IT BEING THEREBY EXPRESSLY AGREED, that the whole of the principal sum shall become due after default in the payment of interest, taxes, or assessments, as hereinafter provided.

NOW THIS INDENTURE WITNESSETH, that the party of the first part, for the better securing the payment of the sum of money mentioned in the said bond or obligation, with the interest thereon, and also for and in consideration of one dollar paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby grant and release unto the party of the second part, and to his heirs, and assigns forever, all [*Insert description.*]

TOGETHER with all fixtures and articles of personal property attached to, or used in connection with said premises, all of which it is declared are to be covered by this mortgage.

TOGETHER with the appurtenances, and all the estate and rights of the party of the first part, in and to said premises. TO HAVE AND TO HOLD the above granted premises unto the party of the second part, his heirs, and assigns forever. PROVIDED ALWAYS, that if the party of the first part, or the heirs, executors, or administrators of the party of the first part, shall pay unto the party of the second part, his executors, administrators, or assigns, the said sum of money mentioned in the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said bond or obligation, that then these presents and the estate hereby granted, shall cease, determine and be void.

AND the party of the first part covenants with the party of the second part as follows:

FIRST.—That the party of the first part will pay the indebtedness as provided in this mortgage and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises herein described, according to law. Said premises may be sold in one parcel, any provision of law to the contrary notwithstanding.

SECOND.—That the party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the party of the second part in at least the sum of ——— dollars, and by insurers approved by said party of the second part. Should the party of the second part by reason of such insurance against loss by fire, as aforesaid, receive any sum or sums of money, such amount may be

retained and applied by the party of the second part toward payment of the sum hereby secured, or the same may be paid over either wholly or in part to the party of the first part, his heirs, or assigns, to enable the party of the first part to repair said buildings or to erect new buildings in their place, or for any other purpose or object satisfactory to the party of the second part, without affecting the lien of this mortgage for the full amount secured thereby before such damage by fire, or such payment over, took place.

THIRD.—And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of the party of the second part after default in payment of interest for thirty days, or after default in the payment of any tax or assessment for thirty days after notice and demand, or after default for thirty days after notice and demand in the payment of any installment of any assessment for local improvement heretofore or hereafter laid which is or may become payable in annual installments, and which has affected, now affects or hereafter may affect the said premises, notwithstanding that such installment be not due and payable at the time of such notice and demand; and also, that the whole of the said principal sum shall become due at the option of the party of the second part upon any default in keeping the buildings on the premises insured against loss by fire as required by paragraph marked “second” above, or immediately upon the actual or threatened demolition or removal of any building erected or to be erected upon said premises, or if after application by any holder of this mortgage to two or more fire insurance companies lawfully doing business in the State of New York, and issuing policies upon real property situate in the place where the mortgage premises are situate, the companies to which such application has been made shall refuse to issue such policies (or after default for twenty days in the payment of any installment of principal or of interest on any mortgage which may be a prior lien on said premises).

FOURTH.—That the holder of this mortgage, in any action to foreclose it, shall be entitled, without notice and without regard to the adequacy of any security for the debt, to the appointment of a receiver of the rents and profits of said premises; and in the event of any default or defaults in paying said principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security for the payment of said indebtedness.

FIFTH.—That until the amount hereby secured is paid, the party of the first part will pay all taxes, assessments and water rates which may be assessed or become liens on said premises, and, in default thereof, the holder of this mortgage may pay the same, and the party

of the first part will repay the same with interest, and the same shall be liens on said premises and secured by this mortgage.

SIXTH.—In the event of the passage after the date of this mortgage of any law of the State of New York, deducting from the value of land for the purposes of taxation any lien thereon, or changing in any way the laws for the taxation of mortgages or debts secured by mortgage for State or local purposes, or the manner of the collection of any such taxes, so as to affect this mortgage, the holder of this mortgage and of the debt which it secures, shall have the right to give thirty days' written notice to the owner of said land requiring the payment of the mortgage debt, and it is hereby agreed that if such notice be given, the said debt shall become due, payable and collectible at the expiration of said thirty days.

SEVENTH.—That the mailing of a written notice or demand by prepaid envelope addressed to the owner of record of said mortgaged premises and directed to such owner at the last address actually furnished to the holder of this mortgage, or, if no such address has been furnished, then to such record owner at the mortgaged premises, shall be sufficient notice and demand in any case arising under this instrument.

EIGHTH.—That the party of the first part will execute any further necessary assurance of the title to said premises, and will forever warrant said title.

NINTH.—The party of the first part, and any subsequent owner of the premises described herein upon request, made either personally or by mail, shall certify, by a writing duly acknowledged, to the party of the second part or to any proposed assignee of this mortgage, the amount of principal and interest then owing on this mortgage and whether any offsets or defenses exist against the mortgage debt; upon failure to furnish such certificate after the expiration of six days in case the request is made personally, or after the expiration of thirty days after the mailing of such request in case the request is made by mail, this mortgage shall become due at the option of the holder thereof.

* TENTH.—If any action or proceeding be commenced by any person other than the holder of this mortgage (except an action to foreclose this mortgage or to collect the debt secured thereby), to which action or proceeding the holder of this mortgage is made a party, or in which it becomes necessary to defend or uphold the lien of this mortgage, all sums paid by the holder of this mortgage for the expense of any litigation to prosecute or defend the rights and lien created by

* Under this clause question has been raised as to the "amount secured" under the mortgage tax law. See Laws of 1913, ch. 666.

this mortgage (including reasonable counsel fees), shall be paid by the party of the first part, together with interest thereon at the rate of six per cent. per annum, and any such sum and the interest thereon shall be a lien on said premises, prior to any right, title to, interest in or claim upon said premises attaching or accruing subsequent to the lien of this mortgage, and shall be deemed to be secured by this mortgage and by the bond which it secures. In any action or proceeding to foreclose this mortgage, or to recover or collect the debt secured thereby, the provisions of law respecting the recovery of costs, disbursements and allowances shall prevail unaffected by this covenant.

* This mortgage is subject and subordinate to a mortgage given to secure the sum of ——— dollars and interest, now a prior lien on said premises.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the interest on said prior mortgage, and should such interest remain unpaid and in arrears for the space of ten days, or should any suit be commenced to foreclose said prior mortgage, then the amount secured by this mortgage and the accompanying bond shall become and be due and payable at any time thereafter at the option of the owner or holder of this mortgage.

AND IT IS HEREBY FURTHER EXPRESSLY AGREED, that should any default be made in the payment of the interest on said prior mortgage, the holder of this mortgage may pay such interest, and the amount so paid, with legal interest thereon from the time of such payment, may be added to the indebtedness secured by this mortgage and the accompanying bond, and shall be deemed to be secured by this mortgage and said bond, and may be collected thereunder.

IN WITNESS WHEREOF, the said party of the first part has signed and sealed this instrument the day and year first above written.

In the presence of ———.

NO. 3.

† CONSENT TO CORPORATE MORTGAGE.

We, the undersigned stockholders of ———, a stock corporation organized and existing under and by virtue of the laws of the State of New York, having a capital stock of ——— dollars (\$———), divided into ——— shares of the par value of ——— dollars (\$———) each, and being stockholders owning at least two-thirds of the stock of

* To be included in a second mortgage.

† It is no longer necessary to file the consent itself. A certificate of

such consent, as in Form 4, must be filed. The consent, as here given or in some similar form, should be preserved by the mortgagor.

said corporation, do hereby consent to the execution and delivery by the said corporation of a mortgage for _____ dollars to _____ upon [*insert description*]: said mortgage to be security for the payment of a certain bond or obligation of said corporation, of even date therewith which said bond is conditioned upon the payment of a like amount on the _____ day of _____ 19—.

IN WITNESS WHEREOF, we have hereunto set our hands and the number of shares of stock owned by us respectively in said corporation.

Dated this _____ day of _____ 19—.

STATE OF NEW YORK, }
COUNTY OF _____, } ss.:

C. D., being duly sworn, deposes and says that he is the _____ of the _____, the corporation referred to in the foregoing consent, that as said _____ he has charge of the stock book of said corporation: that the persons who have subscribed the said consent, and acknowledged the execution thereof, are the owners upon the said stock book, of the number of shares of stock therein set opposite their respective signatures to the said consent and that together they own at least two-thirds in amount of the capital stock of said corporation.

Sworn to before me this _____

day of _____ 19—.

NO. 4.

CERTIFICATE OF CONSENT TO CORPORATE MORTGAGE.

THIS IS TO CERTIFY, that the holders of not less than two-thirds of the capital stock of the _____, a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the _____ county of _____, State of New York, have given their consent to the mortgage made and executed by the _____ to _____, bearing date of the _____ day of _____ 19—, and that such consent was given by such stockholders in writing (or, by a vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required in the annual meetings of the corporation), pursuant to the provisions of section 6 of the Stock Corporation Law.

IN WITNESS WHEREOF, the _____ has caused this certificate to be subscribed and acknowledged by its president (or vice-president) and by its secretary (or assistant secretary), and its corporate seal to be hereunto affixed, attested by its secretary the _____ day of _____, 19—.

[*Signature of officers executing certificate.*]

[*Seal of the corporation attested.*]

STATE OF NEW YORK, }
COUNTY OF _____, } ss.:

On this _____ day of _____, in the year one thousand nine hundred and _____, before me personally came _____, and _____, to me known, who being by me duly severally sworn, did depose and say, each for himself, that the said _____ resides in the city of _____, and State of _____, and the said _____ resides in _____, State of _____: that the said _____ is the president of and the said _____ is the secretary of _____ Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[Signature of Notary.]

STATE OF NEW YORK, }
COUNTY OF _____, } ss.:

On this _____ day of _____, 19—, before me personally came [*insert names of officers executing certificate*] to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[Signature of Notary.]

NO. 5.

EXTENSION AGREEMENT.

AGREEMENT, made this _____ day of _____ one thousand nine hundred and _____, between A. B., residing at _____, party of the first part, and C. D., residing at _____, party of the second part.

WHEREAS, the party of the second part holds the bond of one E. F., bearing date the _____ day of _____ one thousand nine hundred and _____, conditioned for the payment of the principal sum of _____ dollars, on the _____ day of _____, one thousand nine hundred and _____, and interest thereon at the rate of _____ per centum per annum, together with a mortgage securing the payment thereof made and executed by the said E. F., bearing even date with said bond, and recorded in the office of the _____ of the _____ county of _____ in Liber _____ of Mortgages, at page _____, on the _____ day of _____, in the year one thousand nine hundred and _____; and

WHEREAS, the said party of the first part is now the owner of the premises described in the said mortgage and has requested that the

time of payment of the said principal sum of _____ dollars, secured to be paid thereby, be extended for _____ years from the _____ day of _____ one thousand nine hundred and _____.

NOW THIS AGREEMENT WITNESSETH that the parties hereto, in consideration of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, do hereby mutually covenant, promise, and agree to and with each other, and their respective heirs, executors, administrators, and assigns, as follows, viz:

That the time for the payment of said principal sum be and the same is hereby extended to the _____ day of _____, which will be in the year one thousand nine hundred and _____, and that interest thereon shall be computed from and after the _____ day of _____ one thousand nine hundred and _____, at the rate of _____ per centum per annum, and be payable semi-annually on the _____ days of _____ and _____ in each year, until the said principal sum shall be fully paid and satisfied.

And the said party of the first part, for and in consideration of the premises, does for himself, his heirs, executors, and administrators, hereby covenant to and with the said party of the second part, his legal representatives and assigns, that he will pay the said principal sum of _____ dollars secured by said bond and mortgage, on the said _____ day of _____ in the year one thousand nine hundred and _____, and the interest thereon at the time and in the manner provided for in this agreement, and that he will, during all the time until the money secured by said bond and mortgage shall be fully paid and satisfied, pay all taxes, assessments and charges that may from time to time be lawfully levied or imposed upon said mortgaged premises.

And it is further mutually agreed that should the interest on said principal indebtedness, or any part thereof remain due and unpaid for the space of _____ days after the same shall have become due and payable, or should any tax, assessment or charge remain unpaid for a period of _____ days after the same shall have become a lien against the said mortgaged premises, then the whole principal sum shall, at the option of the said party of the second part, or of his legal representatives, become due and payable immediately thereafter, anything hereinbefore stated to the contrary notwithstanding.

This agreement is executed by the party of the second part on the proviso that nothing herein contained shall in any wise impair the security now held for the said debt, and on the representation of the party of the first part that he is the absolute owner of the premises described in said mortgage and fully authorized to execute this agreement so as to bind said mortgaged premises. Should said representa-

tions be in any respect incorrect, it is expressly agreed that the said party of the second part may at his option, declare this agreement wholly void, and as if the same had not been made.

IN WITNESS WHEREOF the parties hereto have hereunto set their respective hands and seals the day and year first above written.

Sealed and Delivered in the presence of ———.

NO. 6.

ASSIGNMENT OF BOND AND MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS, That I, E. F., residing at ———, party of the first part, in consideration of the sum of ——— dollars lawful money of the United States, to me in hand paid by A. B., residing at ———, party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, unto the said party of the second part a certain Indenture of Mortgage, bearing date the ——— day of ——— in the year one thousand nine hundred and ———, made by one, C. D., of ——— and which said mortgage was duly recorded in the office of the ——— of the ——— County of ——— on the ——— day of ——— 19—— in Block Series (Mortgages) section ——— Liber ——— page ——— and indexed under Block Number ——— on the Land Map of the ——— of ———.

* This assignment is made by the party of the first part, without recourse to the said party of the first part by the party of the second part, or his legal representatives, in the event of the breach of any of the terms; covenants or conditions in said bond or mortgage contained.

* This assignment is made by me as collateral security for the payment of a note given by me to the said A. B., in the sum of ——— dollars, dated the ——— day of ———, 19——, payable ——— after date, with interest at the rate of ——— per cent. per annum, payable ———, ———. And I do for myself, my heirs, executors, administrators and assigns covenant and agree to and with the said A. B., his heirs, executors, administrators and assigns, that all payments or charges by the said mortgage covenanted or agreed to be paid or met, shall be paid or met, according to the terms and conditions of the said mortgage, by the mortgagor, or in the event of his default, by me.

* This clause may be inserted, if such is the agreement.

And the said A. B., or his legal representatives, holders of the said mortgage, shall have full right, before any default on the part of me, the said E. F., to foreclose said mortgage, according to law, in case of any breach of its conditions.

TOGETHER with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To HAVE AND TO HOLD the same unto the said party of the second part, his heirs, and assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned:

AND I do hereby make, constitute and appoint the said party of the second part my true and lawful attorney, irrevocable in my name or otherwise, but at his proper costs and charges, to have, use and take, all lawful ways and means for the recovery of the said money and interest: and in case of payment to discharge the same as fully as I might or could do if these presents were not made.

IN WITNESS WHEREOF I have hereunto set my hand and seal the _____ day of _____ in the year one thousand nine hundred _____.

Sealed and delivered in the presence of _____.

NO. 7.

CERTIFICATE OF SATISFACTION.

COUNTY OF _____, }
STATE OF NEW YORK, } ss.:

I, A. B., residing at _____, do hereby certify, that a certain Indenture of Mortgage, bearing date the _____ day of _____, one thousand nine hundred and _____, made and executed by C. B., residing at _____, to one E. F., and recorded in the office of the _____ of the _____ County of _____ in block series section _____ Liber _____ of Mortgages, at page _____ on the _____ day of _____ in the year _____ at _____ o'clock _____ minutes in the _____ noon, and indexed in block index of Mortgages, in sections _____ block _____ on the Land Map of the _____, which said mortgage, together with the bond accompanying the same was assigned to me, A. B., by the said E. F., by his instrument of assignment under seal, which said instrument of assignment was duly recorded in the office of the _____ of the _____ County of _____, on the _____ day of _____, 19—, in section _____, Liber _____, of Mortgages, at page _____, Block _____, is paid. And I do hereby consent that the said mortgage be discharged of record.

Dated, the _____ of _____, 19—, in presence of _____.

[Acknowledgment in usual form.]

NO. 8.

*** RELEASE OF PART OF MORTGAGED PREMISES BY QUIT-CLAIM DEED.**

This indenture, made the ——— day of ———, 19—, between A. B., residing at ———, party of the first part, and C. D., residing at ———, party of the second part, witnesseth, that whereas, the party of the second part, by indenture of mortgage bearing date the ——— day of ———, 19—, and recorded in the office of the Clerk of the County of ———, in Liber ——— of Mortgages, at page ———, on the ——— day of ———, 19—, for the consideration named therein and to secure the payment of that certain bond or obligation therein specified, did convey certain premises of which the lands hereinafter conveyed are part, unto the party of the first part, and, whereas, the said party of the first part, at the request of the said party of the second part, has agreed to give up and to release unto the said party of the second part that portion thereof hereinafter described, holding and retaining the residue of the said premises as security for the payment of the said bond, now therefore, the said party of the first part, in pursuance of the said agreement and in consideration of one dollar, lawful money of the United States, paid by the party of the second part, does hereby remise, release and quit claim unto the said party of the second part, his heirs and assigns forever all [*Insert description of part released*]. Together with all the appurtenances and all the estate and rights of the party of the first part in and to said premises, to the end that the premises hereby conveyed may be discharged from the lien of the said mortgage, and that the residue of the lands covered by the said mortgage may remain to the party of the first part as heretofore.

TO HAVE AND TO HOLD, the above described and released premises unto the said party of the second part, his heirs and assigns forever, free, clear and discharged from all lien and claim under and by virtue of the said indenture of mortgage.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of A. B.

[*Acknowledgment in usual form.*]

* See *ante*, § 443.

NO. 9.

NOTICE OF THE PENDENCY OF THE ACTION TO FORECLOSE.

[*Title of the action, giving the names of all the parties thereto.*]

Notice is hereby given that an action has been commenced and is pending in this court, upon a complaint of the above named plaintiff, against the above named defendants, for the foreclosure of a mortgage executed by the defendants C. D. and M., his wife, to the defendant E. F., dated the —— day of ——, 19—, and recorded in the office of the clerk of the county of ——, on the —— day of ——, 19—, in Liber —— of Mortgages, page ——, at —— o'clock in the —— noon (and which said mortgage has been duly assigned by said defendant E. F. to the above named A. B., the plaintiff herein).

That the mortgaged premises affected by the said foreclosure, were, at the time of the commencement of this action, and at the time of filing this notice are, situated in the town of ——, and county of ——, and that they are described in the said mortgage as follows, to wit:

[*Insert description of the mortgaged property as contained in the mortgage.*]

Dated the —— day of ——, 19—.

X. Y.,
Plaintiff's Attorney.

The clerk of the county of —— will please index against the defendants C. D., M. D. and E. F.*

X. Y.,
Plaintiff's Attorney.

NO. 10.

NOTICE OF NO PERSONAL CLAIM.

[*Title of the action.*]

To all of the defendants except the defendants C. D., E. F. and I. K.:

The object of the action, a copy of the summons in which is herewith served upon you, is to foreclose a mortgage executed by C. D. and wife to E. F., dated ——, 19—, and recorded in the office of

* See *ante*, § 812.

the clerk of the county of ———, on the ——— day of ———, 19—, in Liber ———.of Mortgages, page ———, and which mortgage has been duly assigned to the plaintiff.

The amount due and owing on said mortgage, is the sum of ——— dollars, and interest from ———, 19—.

The following is a description of the mortgaged premises: [*Insert a brief description.*]

And no personal claim is made against you.

X. Y.,
Plaintiff's Attorney.

NO. 11.

COMPLAINT IN ACTION TO FORECLOSE.

[*Title of the actions, giving
the names of all the parties
thereto.*]

The plaintiff above named, by X. Y., his attorney, complaining of the defendants herein, avers and alleges, upon information and belief:

I. That on or about the ——— day of ——— 19—, the defendant, C. D., for the purpose of securing the payment to the defendant E. F., of the sum of ——— dollars, with interest thereon, executed and delivered to the said E. F., a bond bearing date on that day, sealed with his seal, whereby he bound himself in the penalty of ——— dollars, upon condition that the same should be void if the said defendant C. D., should pay to the said defendant E. F., the sum of ——— dollars, on the ——— day of ——— 19—, and the interest thereon, at and after the rate of ——— per centum, per annum, and to be paid semi-annually on ——— the days of ——— and ——— in each year.

II. That, as collateral security for the payment of the indebtedness above recited, the said defendant C. D., and M, his wife, on or about the said ——— day of ——— duly executed, acknowledged and delivered to the said E. F., a certain indenture of mortgage, bearing date on that day, whereby they granted and released unto the said E. F., his heirs and assigns forever, the following described premises, that is to say: [*Insert description of property as contained in the mortgage.*]

III. That said mortgage contained a proviso in substance the same as the condition of said bond; and also contained an express covenant that the mortgagee, in case of default in the payment of the said indebtedness or interest that might grow due thereon, or any part thereof, should have power to sell said mortgaged premises ac-

ording to law; and was duly recorded in the office of the _____ of the county of _____ in Liber _____ of Mortgages at page _____, on the _____ day of _____ 19—.

IV. That in and by the above-described bond and mortgage it was covenanted and agreed, among other things, that the whole of the said principal sum should become due at the option of the mortgagee after default in the payment of interest for thirty (30) days, anything therein contained to the contrary notwithstanding.

V. That in and by the above described bond and mortgage, it was covenanted and agreed, among other things, that if default should be made in the payment of the said principal sum or of the interest which should accrue thereon, or of any part of either, at the respective times therein specified for the payment thereof, the mortgagee should be at liberty, immediately after any such default, upon proceedings being commenced for the foreclosure of said mortgage, to apply for the appointment of a receiver of the rents and profits of the mortgaged premises without notice, and that the mortgagee should be entitled to the appointment of such receiver as a matter of right, without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee or the solvency of any person or persons liable for the payment of such amounts; and that the rents and profits of the said mortgaged premises were, in the event of any such default, thereby assigned to the mortgagee.

VI. That in and by the above described bond and mortgage, it was covenanted and agreed, among other things, that the said mortgagors would keep the building erected or to be erected upon the mortgaged premises insured against loss or damage by fire, in at least the sum of _____ dollars, and by insurers approved by the said mortgagee, and assign the policy and certificates thereof to the said mortgagee as a collateral and further security for the payment thereof. And in default of so doing it was thereby made lawful for the said mortgagee to make such insurance and pay the premium and premiums therefor, which premiums thus paid and interest thereon the mortgagors agreed to pay, and the same was declared to be deemed to be secured by said mortgage, and collectible thereby.

VII. That thereafter the said C. D. and M., his wife, by their deed of conveyance under their hands and seals, dated the _____ day of _____ 19—, duly conveyed the said mortgaged premises to the defendant, L. K., subject to the said mortgage, and the said defendant, L. K., in and by said deed of conveyance, and by accepting the same, assumed said mortgage, and covenanted and agreed to pay off and discharge the same, as part of the consideration in said deed of conveyance expressed: [*Using language of the recital in the conveyance.*]

That said deed of conveyance was duly recorded in the office of the _____ of the _____ county of _____ in section _____, Liber _____ page _____, block _____, on the _____ day of _____, 19—.

VIII. That thereafter and on or about the _____ day of _____, 19—, said defendant, E. F., for a valuable consideration therein expressed, duly executed, acknowledged and delivered to the plaintiff herein a certain instrument of assignment, bearing date on said day, whereby he assigned unto said plaintiff the said indenture of mortgage, together with the bond or obligation therein described, and the moneys due and to grow due thereon, with the interest, and also therein guaranteed to the plaintiff that the same would be paid when due, with interest; (or) which said assignment also contained a covenant in the following words, to wit; [*setting it forth*] and that the plaintiff has since remained and now is the lawful owner and holder of said bond and mortgage. That said instrument of assignment was duly recorded in the office of the _____ of the _____ county of _____ in section _____, Liber _____ page _____ block _____ of mortgages on the _____ day of _____, 19—.

IX. That the said mortgagors failed to keep the buildings erected upon the said premises insured as aforesaid, and made default therein, and that on or about the _____ day of _____ 19—, the plaintiff paid the sum of _____ dollars to the _____ Fire Insurance Company in procuring such insurance in the sum of _____ dollars, for the term of one year from and after said date; no part of which has been repaid to him.

X. That the defendants have failed to comply with the conditions of said bond and mortgage by omitting to pay the installment of interest which became due and payable on the _____ day of _____ 19—, and no part thereof has been paid; and the plaintiff, pursuant to the provisions of said bond and mortgage, has elected and does elect that the whole principal sum thereby secured be immediately due and payable, and there is now justly due and payable to the plaintiff upon said bond and mortgage the principal sum of _____ dollars, and interest thereon at the rate of _____ per centum per annum from the _____ day of _____, 19—, together with the further sum of _____ dollars, paid by the plaintiff in procuring insurance as aforesaid, with interest thereon, from the _____ day of _____ 19—, the date of such payment.

XI. That no other proceedings have been had at law or otherwise, for the recovery of the said sum secured by the said bond and mortgage, or any part thereof. [*If this is not true, state what proceedings have been taken.*]

XII. That the above named defendants and each of them have, or claim to have, some interest in or lien upon the said mortgaged premises or some part thereof, which interest or lien, if any, either accrued subsequently to the lien of said mortgage or is subject or subordinate thereto.

XIII. That the defendant, The People of the State of New York is made a party defendant herein [*for example*] by reason of a lien under the Transfer Tax Act upon the said mortgaged premises for the amount of an unpaid transfer tax upon the estate of one ——— deceased, who was at the time of his death a resident of the county of ——— and left him surviving as his heirs at law and next of kin ——— and ———, and left a last Will and Testament, which has been duly admitted to probate by the Surrogate's Court of the County of ———; and that the said The People of the State of New York is made a party defendant herein for no other reason than the lien of the said transfer tax, [*or*] by reason of the lien of a judgment entered in the ——— Court of ——— for the sum of ——— and docketed in the office of the clerk of the county of ——— by the said people against the defendant, L. K., who, as the plaintiff is informed and believes, is the record owner of a part of the premises hereinabove described; and that by reason of the said judgment, the People of the State of New York may have or claim to have a lien in or upon the said premises.

WHEREFORE, the plaintiff demands judgment,

1. That the defendants herein, and all persons claiming under them, or any of them, subsequent to the filing of the notice of the pendency of this action, in the office of the clerk of the county of ———, may be barred and forever foreclosed of and from all right, title, interest, claim, lien and equity of redemption in and to the said mortgaged premises.

2. That the said premises may be decreed to be sold according to law; that the moneys arising from the sale may be brought into court; that the plaintiff may be paid the amount due on the said bond and mortgage, with interest to the time of such payment, and the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same.

3. That the defendants, C. D., E. F., and L. K., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable, thereto.

4. That a receiver may be appointed to take possession of said mortgaged premises, and to collect the rents, issues and profits thereof, pursuant to the covenant contained in said mortgage.

5. That the plaintiff may have such other or further relief, or both, in the premises, as may be just and equitable.

X. Y.,

Plaintiff's Attorney.

[*Verification in the ordinary form.*]

NO. 12.

NOTICE OF APPEARANCE AND WAIVER.

[*Title of the action.*]

Sir: Please take notice that I have been retained by C. D., a defendant in the above entitled action, and that I hereby appear for the said C. D., and waive service of all papers herein except notice of sale and of proceedings to obtain surplus moneys.

Yours, etc.,

Z. W.

Attorney for Def'd, C. D.

[*Office and Postoffice
Address.*]

To X. Y., Esq.,

Atty. for the Plaintiff.

NO. 13.

ANSWER IN ACTION TO FORECLOSE.

[*Title of the action.*]

The defendant, L. K., by Z. W., his attorney, answering the complaint of the plaintiff herein, denies that he has knowledge or information sufficient to form a belief as to whether the defendant, C. D., ever executed the bond and mortgage described in the complaint, or whether the defendant, E. F., ever assigned said alleged bond and mortgage to the plaintiff, or whether the plaintiff is now the lawful owner or holder thereof.

L. K.

[*Verification in usual form.*]

NO. 14.

ANSWER. DENIAL OF HAVING ASSUMED MORTGAGE.

I. That on or about the —— day of ——, 19——, the defendant, C. D., was indebted to this defendant in the sum of —— dollars. That on or about the said date the said defendant, C. D., and M., his

wife, executed a deed to the premises described in the complaint herein to this defendant and procured the same to be recorded.

II. That the said deed was so executed and so recorded without the knowledge or consent of this defendant, and that the said deed, or any copy thereof, was never delivered to this defendant, nor was it ever accepted by him, nor did he ever execute it, or agree or assent to it in any manner whatsoever.

III. That this defendant never has, by said deed or otherwise, assumed or agreed to pay the incumbrances on the said premises, or any of them. That the terms and contents of said deed were unknown to this defendant until on or about the ——— day of ——— 19—, and that he then rejected and refused to accept said deed.

IV. That this defendant is informed and believes that said deed was executed by the defendant [*mortgagor*] to this defendant, for the purpose of securing the payment of the indebtedness in paragraph "I" hereof set forth. That there was no consideration for the insertion in said deed providing for the assumption by this defendant of the incumbrances on the said property, or his alleged agreement to pay the same or any of them.

NO. 15.

ANSWER, WHERE THE OWNER OF THE EQUITY OF REDEMPTION IS NOT IMPLEADED.

* 1. That subsequent to the execution of the mortgage in the complaint herein set forth, and prior to the commencement of this action, the defendant, C. D., being then seized of the said premises, by his deed under his hand and seal, dated on the ——— day of ———, 19—, duly conveyed the said premises to one K. L., subject to said mortgage.

II. That the said K. L., is not joined as a party defendant in this action, that he is still living at ———, and that he is now the owner of the equity of redemption in said premises.

NO. 16.

GENERAL ANSWER OF INFANT DEFENDANT.

[*Title of the action.*]

The defendant, K. L., by M. N., his guardian *ad litem*, answering the complaint of the plaintiff above named, says that he is a stranger to all and singular the matters and things in said complaint set forth,

* See *Hall v. Nelson*, 23 Barb. 88.

and that he is an infant under the age of twenty-one years, and claims such interest in the premises as he is entitled to; and he submits his rights and interests in the matters in question in this action to the protection of the court.

Dated, the ——— day of ——— 19—.

O. P.

*Attorney for Guardian
ad litem of Infant Defendant.
[Office and Postoffice
Address.]*

NO. 17.

AFFIDAVIT FOR ORDER OF DISCONTINUANCE.

[*Title of the action.*]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

X. Y., being duly sworn deposes and says:

I. That he is the attorney for the plaintiff in the above entitled action.

II. That this action was instituted to foreclose a mortgage for ——— dollars, on certain premises known as ———, and more fully described in the complaint herein. That the summons and duly verified complaint with a notice of *lis pendens* were duly filed in the office of the clerk of the county of ——— on the ——— day of ———, 19—, and that the action was commenced on that day by the service of the summons and complaint on the defendant ———.

III. That none of the defendants have appeared herein (except the defendant C. D., who has appeared by his attorney Z. W., and whose consent to the entry of an order of discontinuance is hereto annexed).

IV. That the plaintiff has received from the holder of a second mortgage on said premises the amount of the delinquent interest on the bond and mortgage described in the complaint, and the costs and expenses of this action to date.

WHEREFORE AN ORDER IS REQUESTED discontinuing this action without further costs to any part herein as against any other, and cancelling of record the said notice of *lis pendens* and directing the clerk of the county of ——— to enter on the margin of the record of the same a note of cancellation referring to such order.

No other or previous application has been made for this or a similar order.

X. Y.

Sworn to, etc.

NO. 18.

ORDER OF DISCONTINUANCE.

At a Special Term, *etc.*

[*Title of the action.*]

Upon the summons and duly verified complaint herein, filed in the office of the clerk of the county of ——— on the ——— day of ———, 19—, and on reading and filing the hereto annexed affidavit of X. Y., sworn to the ——— day of ——— 19—.

Now, on motion of X. Y., attorney for the plaintiff, it is

ORDERED that this action be, and the same hereby is, discontinued without further costs to any party herein as against any other, and it is further

ORDERED that the notice of the pendency of this action, filed by the plaintiff herein in the office of the clerk of the county of ———, on the ——— day of ——— 19—, be cancelled of record, and that said clerk be, and he hereby is, directed to enter on the margin of the record of the same a note of cancellation, referring to this order.

Enter,

NO. 19.

AFFIDAVIT ON APPLICATION FOR JUDGMENT.

[*Title of the action.*]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

X. Y., being duly sworn, says that he is the attorney for the plaintiff in the above entitled action.

That this action was brought to foreclose a mortgage on certain real estate situate in the county of ———, the whole amount of which said mortgage is due and payable [*or*, That an installment of ——— dollars of the principal of said mortgage, and interest thereon from the ——— day of ———, 19—, is now due and payable, and that the residue thereof, being the sum of ——— dollars, and interest thereon from the ——— day of ———, 19—, will become due and payable on the ——— day of ———, 19—].

That all of the defendants have been duly served with the summons, or have duly appeared herein by the respective attorneys [and waived the services of all papers herein except notice of sale and of proceedings to obtain surplus moneys], as will more fully appear by the affidavits of service and notices of appearance which are hereunto annexed.

That none of the defendants are infants or absentees [*or*, That

none of the defendants are infants except the defendant ———, who has appeared by his guardian *ad litem*, and that none of the defendants are absentees, except the defendant ———, who has duly been served with the summons by publication thereof, under an order of this court, proof of which is hereunto annexed].

That the time to answer has expired as to all of the defendants, and that no answer or demurrer has been received [except the usual general answer of the said infant defendant ———, who answers by his guardian, and who does not controvert any of the allegations of the complaint, and except also the answer of the defendant ———, the issues raised by which have been duly tried and disposed of by Hon. ———, a justice of this court, whose findings are hereunto annexed].

That on the ——— day of ———, 19—, and more than twenty days since, a notice of the pendency of this action, containing the names of the parties thereto, the object of the action, and a description of the property affected thereby, the date of the mortgage and the parties thereto, and the time and place of recording the same, was duly filed in the office of the clerk of the said county of ———, that being the county where the mortgaged premises are situated, at or immediately after the time of the filing of the complaint therein as required by law; and that, since the filing of said notice, the complaint in this action has not been amended by making new parties to the action, or so as to affect other property not described in the original complaint, or so as to extend the claims of the plaintiff as against the mortgaged premises.

WHEREFORE deponent requests an order referring it to some suitable person to ascertain and compute the amount due to the plaintiff [*continue as in notice of application for judgment*].

That no previous application has been made for this or any similar relief.

Sworn, etc.

X. Y.

NO. 20.

NOTICE OF APPLICATION FOR JUDGMENT.

[*Title of the action.*]

Sir: Take notice that on all of the papers and proceedings in this action, the plaintiff will apply to this court at a special term thereof, to be held at chambers, at the courthouse, in the city of ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon of that day, or as soon thereafter as counsel can be heard, for the relief demanded in the complaint, and for an order referring it to some suitable person to ascertain and compute the amount due to the plain-

tiff for principal and interest on the bond and mortgage set forth in the complaint, (and also to ascertain and compute the amount due to such of the defendants as are prior incumbrancers of the mortgaged premises),* and also for a provision to be contained in such order of reference directing that the hearing before the referee therein named proceed forthwith, and that, immediately upon the incoming of the report of said referee, and without further notice, the plaintiff have judgment of foreclosure and sale, and for the relief demanded in the complaint, besides costs and an extra allowance of two and one-half per cent. on the amount due to him, and for such other or further relief as may be just.

Dated, *etc.*

X. Y.,
Plaintiff's Attorney.

To M. N.,
Attorney for Defendant, C. D.

NO. 21.

ORDER OF REFERENCE, PRELIMINARY TO JUDGMENT.

At a Special Term, *etc.*

[*Title of the action.*]

Upon the summons and duly verified complaint herein filed in the office of the clerk of the county of ——— on the ——— day of ———, 19—, upon reading and filing the affidavits of service and notices of appearance herein, and the affidavit of X. Y., attorney for the plaintiff, sworn to the ——— day of ———, 19—, by which it appears to the satisfaction of this court, that this is an action to foreclose a mortgage on certain premises in ——— county, that the whole amount secured by the mortgage described in the complaint, has become due, that all of the defendants herein have been duly served with the summons and complaint, or with a summons and a notice of the object of the action, pursuant to section 423 of the Code of Civil Procedure, personally within this State; that none of the defendants are infants, or absentees; that all of the defendants have made default in pleading, that a notice of the pendency of this action was duly filed in the office of the clerk of the county of ———, which is the county within which the mortgaged premises are situated, more than twenty days since and at or after the time of filing the complaint as required by law, and that

* If the whole amount secured by the mortgage has not become due, or if any of the defendants are infants or absentees, the order of reference will be something more

than to compute. See Form No. 21 for provisions in the order of reference. These provisions should be anticipated in the notice of application for judgment.

since the filing of the said notice the summons and complaint herein have not been amended by impleading new parties in the action or so as to effect premises not described in said notice, or so as to extend the claims of the plaintiff as against the mortgaged premises, and on due notice of this motion, with due proof of the service thereof, after hearing X. Y., attorney for the plaintiff, and on his motion, and M. N., counsel for the defendant C. D., in opposition thereto: It is

ORDERED, that it be referred to ———, Esq., of the city of ———, counselor at law, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint (and also to ascertain and compute the amount due to such of the defendants as are prior incumbrancers of the mortgaged premises).

[*Where the whole amount secured by the mortgage has not become due, the reference should be:*] To ascertain and compute the amount due and yet to become due to the plaintiff on the bond and mortgage set forth in the complaint, including interest thereon to the date of his report, and also to ascertain the situation of the mortgaged premises, and whether the same can be sold in parcels without prejudice to the interests of the parties; and if he shall be of opinion that a sale of the said premises in one parcel will be most beneficial to the parties, then that he report his reasons for such opinion.

[*If one of the defendants is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the reference should be:*] To take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint. It is further

ORDERED, that the hearing before said referee proceed forthwith, and that, immediately upon the incoming of the report of said referee, and without further notice, the plaintiff have judgment of foreclosure and sale and for the relief demanded in the complaint, besides costs and an extra allowance of ——— dollars.

NO. 22.

SUMMONS TO ATTEND BEFORE REFEREE.*

[*Title of the action.*]

By virtue of an order made and entered in the above entitled action, on the ——— day ———, 19—, I, ———, the referee appointed

* This is the form used in Chan- for a mere notice, it is commonly
cery, and, though the Code provides used. See *ante*, § 855.

herein, do hereby summon you to appear at my office, number ——— street, in the city of ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon, to attend a hearing of the matters in the said action, in reference before me, as such referee, pursuant to said order.

And hereof fail not at your peril.

Dated the ——— day of ———, 19—.

[Signature of Referee.]

UNDERWRITING.

[Insert substance of the order of reference following its language, thus:] To ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint.

[Signature of Referee.]

NO. 23.

OATH OF REFEREE.

[Title of the action.]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

I, K. G., the referee named in the order of this court, made in this action at special term, and dated on the ——— day of ———, 19—, wherein and whereby it was referred to me to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint [*reciting purpose of reference*], being duly sworn, do depose and say:

That I will faithfully and fairly determine the questions referred to me, as the case requires, and that I will make a just and true report, according to the best of my understanding.

Sworn, etc.

[Signed]

K. G.

NO. 24.

REPORT OF REFEREE, PRELIMINARY TO JUDGMENT.

Whole amount due. No infants or absentees.

[Title of the action.]

To the Supreme Court of the State of New York:

In pursuance of an order of this court, made and entered in the above entitled action and dated on the ——— day of ———, 19—, by which it was referred to the undersigned referee, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint [*using the language of the order*].

I, J. K., the referee in the said order named, do report that before proceeding to hear the testimony I was first duly sworn faithfully and fairly to determine the questions referred to me and to make a just and true report thereon, according to the best of my understanding, that I have ascertained and computed the amount due to the plaintiff upon and by virtue of the said bond and mortgage, and that I find and accordingly report, that there is due to the plaintiff for principal and interest on the said bond and mortgage, at the date of this my report, the sum of ——— dollars, and for taxes, assessments and insurance due and unpaid the sum of ——— dollars.

Schedule, "A," hereunto annexed, contains a schedule of the documentary evidence, introduced before me, and shows the amounts due for principal and interest respectively, the period of computation of the interest and its rate.

Dated ———, 19—.

J. K.

Referee.

SCHEDULE "A."

Exhibit No. 1. Bond executed by ——— to ———, dated the ——— day of ———, 19—, to secure the sum of ——— dollars and interest.

Exhibit No. 2. Mortgage executed by ——— and ——— his wife, to ———, to secure the payment of said bond; same date; recorded the ——— day of ———, 19—, in the office of the clerk of the county of ———, in Liber ——— of Mortgages, page ———.

Exhibit No. 3. Assignment of said bond and mortgage from ——— to ———; dated the ——— day of ———, 19—, and recorded in the office of the said clerk of the county of ———, in Liber ——— of Mortgages, page ———, on the ——— day of ———, 19—.

Exhibit No. 4. Policy of insurance in the ——— Fire Insurance Company.

STATEMENT.

Principal sum\$
 Interest thereon from ——— to ———, being ———
 years, ——— months and ——— days, at six per cent.
 per annum
 Amount paid by plaintiff for insurance
 Interest thereon from ——— to this date, at six per cent.

Amount due\$

Dated the ——— day of ———, 19—.

J. K.

Referee.

NO. 25.

THE SAME.

Whole amount not due. No infants or absentees.

[*Title of the action.*]

To the Supreme Court of the State of New York:

In pursuance of an order of this court, made and entered in the above entitled action on the ——— day of ———, 19—, by which it was referred to the undersigned referee, to ascertain and compute the amount due, and yet to become due, to the plaintiff on the bond and mortgage set forth in the complaint, including interest thereon to the date of this report, and also to ascertain the situation of the mortgaged premises, and whether the same can be sold in parcels without prejudice to the interests of the parties,

I, J. K., the referee in the said order named, do report, that before proceeding to hear the testimony, I was first duly sworn faithfully and fairly to determine the questions referred to me and to make a just and true report thereon according to the best of my understanding; that I have ascertained and computed the amount due to the plaintiff upon and by virtue of the said bond and mortgage, and that the amount so due, with interest to the date of this report, is the sum of ——— dollars.

That I have also ascertained and computed the amount yet to become due to the plaintiff upon the said bond and mortgage, and that the amount which is not yet due, but which will hereafter become due thereon, including interest to the date of this report, is the sum of ——— dollars.

That the whole amount secured by the said bond and mortgage and still remaining unpaid, including interest thereon to the date of this report, is the sum of ——— dollars.

Schedule "A," hereunto annexed, contains a schedule of the documentary evidence introduced before me, and shows a statement of the amounts of principal due and to become due respectively, the amounts of interest thereon, the periods of computation of interest, and its rate.

I do further report that I have ascertained the situation of the said mortgaged premises, and am of opinion that the same cannot be sold in parcels without injury to the interests of the parties. My reasons for such opinion are as follows: [*Here state the reasons of the referee; or, if the opinion of the referee is that a sale in parcels is desirable, the reasons for such opinion should be given.*]

The testimony upon which I have formed said opinion is hereunto annexed.*

Dated the _____ day of _____, 19—.

J. K.

Referee.

SCHEDULE "A."

[Set out the bond and mortgage and other papers used as exhibits on the reference, as in the preceding form, and continue as follows:]

STATEMENT.

Principal sum now due\$
Interest thereon from _____ to _____, being _____
years, _____ months and _____ days, at six per cent.
per annum

Amount due\$

Principal sum secured by said bond and mortgage, but
not yet due\$
Interest thereon from _____ to _____, being _____
years, _____ months and _____ days, at six per cent.
per annum\$

Amount to become due\$

Amount due, as above\$
Amount to become due, as above\$

Whole amount of the plaintiff's lien at this date\$

Dated the _____ day of _____, 19—.

J. K.

Referee.

NO. 26.

THE SAME.

Whole amount due. Infants or absentees.

[Title of the action.]

In pursuance of an order of this court, made and entered in the above entitled action on the _____ day of _____, 19—, by which it

* The testimony of witnesses should be reduced to writing, and should be signed by them, though the signing is not absolutely essential if the reference is merely to compute amount due. Rule 30.

was referred to the undersigned referee, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint,

I, ———, the referee in said order named, do report that before proceeding to hear the testimony, I was first duly sworn faithfully and fairly to determine the questions referred to me and to make a just and true report thereon, according to the best of my understanding.

That I have taken proof of the facts and circumstances stated in the complaint, and have examined the plaintiff [*or*, and have examined ———, the agent of the plaintiff] on oath as to any payments which have been made, and that I am of opinion and accordingly report, that the facts and circumstances stated in said complaint are true, and that no payments have been made, except such as are duly credited in the said complaint.

The said examination of the plaintiff [*or*, of ———, the said agent of the plaintiff], and the proofs taken by me of the facts and circumstances stated in the complaint, except such of said proofs as were documentary, are annexed to this report.

And I do further report, that I have ascertained and computed the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, and that I find and accordingly report, that there is due to the plaintiff for principal and interest on the said bond and mortgage, at the date of this my report, the sum of ——— dollars.

Schedule "A," hereunto annexed contains a schedule of the documentary evidence introduced before me, and shows a statement of the amounts due for principal and interest respectively, the period of the computation of the interest, and its rate.

Dated the ——— day of ———, 19—.

J. K.

Referee.

SCHEDULE "A."

[Insert Schedule "A" as in the preceding form.]

NO. 27.

**UNDERTAKING ON APPEAL FROM JUDGMENT OF FORE-
CLOSURE TO STAY PROCEEDINGS.***

NEW YORK SUPREME COURT.

COUNTY OF _____.

A. B.,	<i>Respondent,</i>
	<i>against</i>
C. D. impleaded with others,	}
<i>Appellant.</i>	

WHEREAS, on the _____ day of _____, 19—, in the Supreme Court, county of _____, A. B., the above named respondent, recovered a judgment against C. D., the above named appellant, and others, for the foreclosure of a mortgage and the sale of certain real estate in the county of _____, to satisfy the sum of \$_____, adjudged to be due thereon, together with the further sum of \$_____ for costs of this action, as by the said judgment, dated at Special Term, on the _____ day of _____, 19—, and entered in the office of the clerk of the county of _____ on the _____ day of _____, 19—, will more fully and at large appear; and the said appellant feeling aggrieved thereby, intends to appeal therefrom to the Appellate Division of this court in and for the _____ Department.

NOW, THEREFORE, we J. K., residing at _____, and L. M., residing at _____, do jointly and severally, pursuant to the statute in such case made and provided, undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said appeal, not exceeding the sum of five hundred dollars, and do also undertake, that if the judgment so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment or the part thereof as to which said judgment shall be affirmed.

† And do also undertake that the appellant will not, while in possession of the said property commit, or suffer to be committed any waste thereon.

And do also undertake that if the judgment is affirmed or the appeal is dismissed, and there is a deficiency upon a sale, that the appellant will pay the value of the use and occupation of such property, or the part thereof as to which the judgment is affirmed, from the time

* See *ante*, § 891.

† If the property is in the pos-

session or under the control of the appellant.

of taking the appeal until the delivery of the possession thereof, pursuant to the judgment not exceeding the sum of ——— dollars.*

† And do also undertake that if the said judgment is affirmed or the appeal is dismissed, the appellant will pay any deficiency which may occur upon the sale, with interest and costs, and all expenses chargeable against the proceeds of the sale, not exceeding the sum of ——— dollars.‡

[Signed]

J. K.

“

L. M.

[Add affidavits of sureties as to their sufficiency, and certificate as to their acknowledgment of execution, in the usual form.]

NO. 28.

NOTICE OF MOTION FOR JUDGMENT OF FORECLOSURE AND SALE.

[Title of the action.]

Sirs: PLEASE TAKE NOTICE that upon the order appointing L. K., Esq., referee to compute the amount due upon the bond and mortgage set forth in the complaint herein, and filed in the office of the clerk of the county of ——— on the ——— day of ———, 19—, and upon all the proceedings heretofore had herein, I shall move this court at a special term, to be held at ——— in ——— on the ——— day of ———, 19—, at ——— o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for the usual judgment of foreclosure and sale, for judgment against the defendants E. P. and E. F. for any deficiency which may occur, for an extra allowance to the plaintiff in addition to his taxable costs, and for such other and further relief as to the court shall seem just and equitable.

Yours, etc.,

Dated, ———.

X. Y.

Attorney for the Plaintiff.

[Office and Postoffice
Address.]

To:

* This amount must be fixed by an order of a judge of the court below, which should be obtained on a notice of not less than two days to the plaintiff's attorney.

† If the appeal is taken by a party against whom payment of a deficiency is awarded.

‡ This amount must be fixed by a judge of the court below, as above.

NO. 29.

JUDGMENT OF FORECLOSURE AND SALE.

Whole amount being due.

At a Special Term, etc.

*[Title of the action, giving the
names of all of the parties
thereto.]*

On reading and filing affidavits of service and notices of appearance, proving the due service of the summons on all of the defendants in this action; and the affidavit of X. Y., attorney for the plaintiff, showing that none of the defendants are infants or absentees [*or, that none of the defendants are infants except the defendant ———, and that none of the defendants are absentees except the defendant ———, who has duly been served with the summons by publication thereof*]; that the time to answer has expired as to all of the defendants, and that no answer or demurrer has been put in to the complaint in this action [*except the answer of the defendant ———, who is an infant, and whose answer by his guardian does not deny any of the allegations of the complaint, and except also the answer of the defendant ———, the issues raised by which have been duly tried at a special term of this court, before Hon. ———, one of the justices thereof, and a decision therein having been rendered for the plaintiff and duly filed*], and that due notice of the pendency of this action was duly filed in the office of the clerk of the county of ———, on the ——— day of ——— 19—, [*if computation is by the court on the trial of an issue, and the court on such trial having ascertained and computed the amount due to the plaintiff, for principal and interest, on the bond and mortgage set forth in the complaint, to be the sum of ——— dollars, and interest thereon from the ——— day of ———, 19—, the date when said computation was made*], and on reading and filing the report of ———, Esq., the referee to whom it was referred by an order of this court, (*) to ascertain and compute the amount due to the plaintiff, for principal and interest on the bond and mortgage set forth in the complaint [*if any of the defendants are infants or absentees, continue in the language of the order of reference: and to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made*], by which report, bearing date the ——— day of ———, 19—, it appears [*in the case of infants or absentees: that the facts and circumstances stated in said complaint are true, and that no payments*

have been made except such as are duly credited in the said complaint and] that the sum of ——— dollars was due thereon at the date of said report; and on motion of X. Y., attorney for the plaintiff, it is

ORDERED AND DECREED, that the said report of the said referee be, and the same hereby is, in all respects ratified and confirmed; and it is further

ORDERED, ADJUDGED AND DECREED, that the mortgaged premises described in the complaint herein, as hereinafter described, or such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of this action, as provided by Sections 1626 and 1676 of the Code of Civil Procedure, and which may be sold separately without material injury to the parties interested, be sold at public auction in ——— County, at ———, by or under the direction of ———, Esq., who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale according to law and the course and practice of this court; that the plaintiff or any other party to this action may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; that said referee, at the time of the delivery of such deed, may allow to the purchaser or pay from the proceeds of sale as hereinafter provided the taxes, assessments and water rates, with interest and penalties thereon, which are liens on said premises at the time of sale, and all sums necessary to redeem said premises from any sales for taxes, assessments or water rates which have not apparently become absolute; that said referee forthwith deposit all moneys received by him at the time he receives the same in his own name as referee in ——— and shall thereafter make the following payments, and his checks drawn for that purpose shall be paid by the said depository:

FIRST: To himself the amount of his fees as provided by law, not exceeding Fifty Dollars (\$50);

SECOND: Advertising expenses and other disbursements, as shown on the bills presented and certified by the referee to be correct, and duplicate copies of which shall be left with said depository;

THIRD: The amount of any lien or liens upon said mortgaged premises so sold at the time of such sale for taxes, assessments and water rates, and for interest and penalties upon the same, and sums necessary for redemption as above provided, the bills for which shall be presented to the said depository and certified as proper by the said referee, unless the same shall have been allowed to the purchaser as aforesaid;

FOURTH: Said referee shall also pay to the plaintiff the sum of ——— dollars (\$——) adjudged to the plaintiff for costs and dis-

bursements in this action, with an additional allowance of \$—— hereby awarded to the plaintiff in addition to costs, with interest thereon from the date hereof; and also pay to the plaintiff the sum of \$——, the said amount so reported due as aforesaid, together with legal interest thereon from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same.

FIFTH: Said referee shall deposit the surplus money, if any, within five (5) days after the same shall be received and be ascertainable, with the —— of the ——, subject to the further order of the court, and take a receipt therefor and file the same with his report of sale; and it is further

ORDERED, ADJUDGED AND DECREED that if the plaintiff, or any assignee of the plaintiff's claim hereunder, shall determine to leave on purchase money bond and mortgage as a loan to the purchaser at such sale, any part of the amount adjudged due to the plaintiff as aforesaid, said purchaser, after paying or providing for the expenses of the sale and the costs of the action, as specified in Sections 1626 and 1676 of the Code of Civil Procedure, may offset the amount of such loan against the amount of his bid, and the referee shall only be required to take the receipt of the plaintiff or of such assignee for the amount of such loan; and further that, in the event that the plaintiff or any assignee of the plaintiff's claim hereunder shall become the purchaser on such sale, said plaintiff or said assignee shall be entitled, after paying or providing for the expenses of the sale and the costs of the action as aforesaid, to offset the said amount adjudged due to the plaintiff as aforesaid against the purchase price of the premises so sold; and it is further

ORDERED, ADJUDGED AND DECREED that said referee make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so adjudged due with interest and costs as aforesaid, the said referee specify the amount of any such deficiency in his report of sale; that the defendant —— pay the same to the person or persons entitled thereto, and that execution issue therefor, and that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deeds; and it is further

ORDERED, ADJUDGED AND DECREED that each and all of the defendants in this action, and all persons claiming under them or any of them after the filing of such notice of *lis pendens* be, and they hereby are, forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in and to the aforesaid premises and each and every part thereof.

The following is a description of the mortgaged premises: [*Insert description*].

NO. 30.

THE SAME. KINGS COUNTY FORM.

[Recitals.]

ORDERED, ADJUDGED AND DECREED, that the said report of said referee be, and the same hereby is, in all respects ratified and confirmed; and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff is entitled to have herein the sum of ———, the sum so reported due as aforesaid, with interest thereon from the date of said report, besides the sum of ——— dollars (\$——) as taxed by the clerk of the court, and hereby adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of ——— dollars (\$——) hereby awarded to the plaintiff in addition to the costs, with interest from the date hereof; and it is further

ORDERED, ADJUDGED AND DECREED that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which may be sold separately and without material injury to the parties interested, be sold as provided in Sections 1626 and 1678 of the Code of Civil Procedure, at public auction, at the Brooklyn Real Estate Exchange, No. 189 Montague Street, Borough of Brooklyn, City of New York, by or under the direction of ———, Esq., who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale, according to law and the course and practice of this court; that the plaintiff, or any other party to this action, may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; that said referee pay from the proceeds of the sale, as provided in Section 1676 of the Code of Civil Procedure the taxes, assessments, water rates and other charges which are or may become liens on the premises at the time of the sale, payment of which is necessary to perfect or pass a clear title to said premises under the terms hereof and of said sale, or he may allow the same to the purchaser at the time of delivery of said deed upon the production and delivery by said purchaser to said referee of proper vouchers showing the payment thereof; that if the plaintiff or any assignee of the plaintiff's claim hereunder shall determine to leave on purchase money bond and mortgage as a loan to the purchaser at such sale any part of the amount adjudged due to the plaintiff as aforesaid, said purchaser, after paying or pro-

viding for the expenses of the sale and costs of the action as specified in Sections 1626 and 1676 of the Code of Civil Procedure, may offset the amount of such loan against the amount of his bid and the referee shall only be required to take the receipt of the plaintiff, or of such assignee, for the amount of such loan, and further, that in the event that the plaintiff, or any assignee of the plaintiff's claim hereunder, shall become the purchaser on such sale said plaintiff, or said assignee, shall be entitled after paying or providing for the expenses of the sale and the costs of the action as aforesaid, to offset the said amount adjudged due to the plaintiff as aforesaid against the purchase price of the premises so sold; and that said referee forthwith upon receipt of the proceeds of sale, or any part thereof, deposit the same in his own name as referee as provided in Rule LXXIX of the General Rules of Practice, in the ——— and the plaintiff may, after the delivery of said deed, apply at the foot hereof, *ex parte*, for an order in accordance with said Rule LXXIX authorizing and directing said referee to pay from the moneys so deposited the referee's legal fees and the lawful advertising expenses, and then to pay to the plaintiff or the plaintiff's attorneys the aforesaid costs, disbursements and allowances, with interest, and also the said amount hereinbefore adjudged due the plaintiff, with interest, or so much thereof as said moneys will pay, and to dispose of the surplus, if any, as provided in Rule LXI of the General Rules of Practice, taking receipts for all such payments and filing the same with his report of sale; and it is further

ORDERED, ADJUDGED AND DECREED that said referee shall make a report of such sale and file it with the Clerk of Kings County, as required by Section 1633 of said Code of Civil Procedure, and if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff with interest and costs as aforesaid, that said referee specify the amount of such deficiency in his report of sale and that the defendant ——— pay the same to the plaintiff, and that the plaintiff have execution therefor; but if there be a surplus, then that said referee shall deposit the same, within five days after its ascertainment, with the Chamberlain of the City of New York to the credit of this action, but subject to the further order of the court herein; and that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deeds; and it is further

ORDERED, ADJUDGED AND DECREED that each and all of the defendants in this action and all persons claiming under them or any or either of them after the filing of the notice of pendency of this action, be, and they hereby are, forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises, and each and every part thereof.

The following is a description of the said mortgaged premises hereinbefore mentioned: [*Insert description.*]

NO. 31.

THE SAME. SHORT FORM.*

[*Title of the action.*]

An application for judgment for the relief demanded in the complaint in this action having been made to this court on ———, in due form and upon due and satisfactory proof as to all the facts and proceedings requisite to be shown in order to entitle the plaintiff to such judgment; and the court having thereupon as a preliminary to the granting of such judgment made an order referring it to ———, Esq., Counsellor at Law, ——— to ascertain and compute the amount due for principal and interest on the bond and mortgage set forth in the complaint.

And said referee having made his report dated ——— by which it appears that there was due to the plaintiff at the date of said report the sum of ——— dollars; now upon reading and filing said report and on motion of X. Y., attorney for plaintiff, it is

ADJUDGED AND DECREED that such report be and the same hereby is in all respects confirmed, and further that the mortgaged premises, described in the complaint in this action as hereinafter set forth, be sold at public auction in the county of ———, by or under the direction of ———, Esq., who is hereby appointed referee for that purpose; that such referee give public notice of the time and place of such sale according to law and the practice of this court; that either or any of the parties to this action may purchase at such sale; that said referee execute to the purchaser or purchasers a deed of the premises sold; that out of the proceeds of the sale he receive from such purchaser or purchasers and pay the expenses of the sale, as provided in Sections 1676 and 3297 of the Code of Civil Procedure, and that the purchaser or purchasers pay ——— to the plaintiff or the plaintiff's attorney, after deducting said expenses of sale, the sum of ——— dollars, adjudged to the plaintiff for costs and disbursements in this action, together with an additional allowance of ——— dollars, with interest upon said costs, disbursements and allowance from the date hereof, and also the said amount so reported due as aforesaid, together with the legal interest thereon from the date of said report or so much thereof as the pur-

* See Rule 79 as to depository. This form is acceptable in the county court of Kings county and in various other courts. It will not be accepted in the Supreme Court of New York or Kings county.

chase money of the mortgaged premises will pay of the same, and pay over to said referee all surplus moneys; that said referee deposit the surplus money, if any, with the ——— of the ——— within five days after he receives the same to the credit of this action; that he make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendant ——— pay the same to the plaintiff, and that the purchaser or purchasers at such sale be let into possession on production of the referee's deed, and it is further

ADJUDGED that the defendants and all persons claiming under them after the filing of the notice of pendency of this action be forever barred and foreclosed of all right, title, interest, lien and equity of redemption in said mortgaged premises so sold or any part thereof.

The following is a description of the mortgaged premises hereinbefore mentioned: [*Insert description.*]

NO. 32.

THE SAME.

Part only being due. Premises to be sold in one parcel.

[*As in form No. 29 to (*)*.]

To ascertain and compute the amount due and yet to become due to the plaintiff on the bond and mortgage set forth in the complaint, including interest thereon to the date of his report, and also to ascertain the situation of the mortgaged premises, and whether the same can be sold without prejudice to the interests of the parties; by which report, bearing date the ——— day of ———, 19—, it appears that the amount due to the plaintiff, with interest to the date of said report, is the sum of ——— dollars, and that the amount which is not yet due to the plaintiff, but which will hereafter become due to him, including interest to the date of said report, is the sum of ——— dollars, and that the whole amount secured by the said bond and mortgage, and still remaining unpaid, including interest thereon to the date of said report, is the sum of ——— dollars, and that the said mortgaged premises cannot be sold in parcels without injury to the interests of the parties, for the reason that [*insert reason as contained in the referee's report*]. Now, on motion of X. Y., attorney for the plaintiff,

IT IS ORDERED [*Continue as in form No. 29, except that the direction to pay the "amount due" should be changed to a similar direction*

to] pay to the plaintiff or his attorney the whole amount so reported to be secured by the said bond and mortgage, and still remaining unpaid, together with legal interest, etc.

[Follow form No. 29, but before adding the description of the property, insert the following:]

And it is further adjudged that, in case the amount reported as actually due to the plaintiff, with interest, and the costs of this action, shall be paid before such sale, the plaintiff shall be at liberty, at any time hereafter when any principal sum or interest secured by said bond and mortgage shall become due, to apply to the aforesaid referee, who is hereby continued referee for that purpose, under and in pursuance of this judgment, and obtain a report of the amount which shall then be due; to the end that, upon the coming in and confirmation of such report, a judgment may be made for a sale of the said premises to satisfy the amount which shall then be due, with interest, and the costs of such report and sale.

And it is further adjudged that, in case the said premises shall be sold under this judgment, and shall not produce sufficient to satisfy the amount so reported as being secured by the said bond and mortgage and still remaining unpaid, with interest and the costs of this action and of such sale, the plaintiff may, at any time thereafter, when any future instalment of principal or interest on said bond and mortgage shall become due, apply to this court for an execution against the said defendant ———, who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest and the costs of such application.

The following is a description of the mortgaged premises hereinbefore mentioned: [*Insert description.*]

NO. 33.

THE SAME.

Part only being due. Premises to be sold in separate parcels.

[As in preceding, Form No. 32 to the recital of the whole amount secured by the mortgage and remaining unpaid], and that the said mortgaged premises can be sold in parcels without injury to the interests of the parties for the reason that [*insert reason as contained in the referee's report*]. Now on motion of X. Y., attorney for the plaintiff, it is

ORDERED [*continue as in Form No. 29, except that the direction to sell the mortgaged premises should read*] that the mortgaged premises described in the complaint herein, as hereinafter described, or such

part thereof as is sufficient to discharge the amount due to the plaintiff, the expenses of the sale and the costs of this action, etc.

[*Continue as in Form No. 29, except that the direction to pay the "amount due" should be changed to a similar direction to*] pay to the plaintiff or his attorney the balance of the proceeds of such sale not exceeding the whole amount so reported to be secured by the said bond and mortgage and still remaining unpaid, together with legal interest, etc.

[*The addition to Form No. 29 immediately before the description, should be as follows:*]

And it is further adjudged, that the plaintiffs be at liberty at any time hereafter, as any instalment of principal or interest secured by said bond and mortgage shall become due, to apply to the aforesaid referee, who is hereby continued referee for that purpose, under and in pursuance of this judgment, and obtain a report as to the amount which shall then be due, to the end that, upon the coming in and confirmation of such report, a judgment may be made for a sale of the residue of said premises not sold under this judgment, to satisfy the amount which shall then be due, with interest, and the costs of such report and sale.

And it is further adjudged, that in case the said premises shall all be sold under this judgment, and shall not produce sufficient to satisfy the amount so reported as being secured by the said bond and mortgage and still remaining unpaid, with interest and the costs of this action and of such sale, the plaintiff may, at any time thereafter, when any future instalment of principal or interest on said bond and mortgage shall become due, apply to this court for an execution against the said defendant ———, who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest and the costs of such application.

The following is a description of the mortgaged premises hereinbefore mentioned, and specifies the order in which the said several parcels are to be separately sold, to wit:

I. The lot or parcel to be sold first is the lot or parcel bounded as follows: [*Insert description.*]

II. The lot or parcel to be sold next or second is the lot or parcel bounded as follows: [*Insert description.*]

NO. 34.

**PROVISION TO BE INSERTED IN JUDGMENT FOR A SALE IN
SEPARATE PARCELS IN THE INVERSE ORDER OF
ALIENATION.***

[Insert at the end of the judgment immediately before the description of the property:]

And it is further adjudged, that the said referee summon before him all of the parties who have appeared in this action, and that he then take proof of the order and manner of alienation of the mortgaged premises, and that if it shall appear to the said referee that separate parcels of the said mortgaged premises have been conveyed or incumbered by the mortgagor or by those claiming under him subsequent to the lien of the plaintiff's mortgage, the said referee shall sell the said mortgaged premises in parcels in the inverse order of alienation according to the equitable rights of the parties, who are subsequent grantees or incumbrancers, as such rights shall be made to appear to such referee.

NO. 35.

**JUDGMENT FOR DEFICIENCY, WHERE ONE OF THE DEFEND-
ANTS HOLDS THE POSITION OF A SURETY.**

And it is further adjudged, that if after applying all moneys properly applicable thereto, there shall remain a deficiency of the amount due to the plaintiff for principal, interest, and costs, for which under the foregoing provisions the defendant [*the principal debtor*] shall be personally liable, and if upon the issuing of an execution against the property of the said defendant to the sheriff of the county in which he resides, or of the county where he last resided in this State, said execution be returned unsatisfied in whole or in part, the defendant [*the surety*], upon the return of such execution, pay so much of said deficiency and of the interest thereon, as shall not have been collected from the said [*principal debtor*], and that the plaintiff have execution therefor.

And it is further adjudged, that if the said [*surety*] shall pay the amount thus adjudged against him personally, or if the same is collected out of his property, he shall have the benefit of this judgment against the said [*principal debtor*], for the purpose of enabling him to obtain remuneration to the same extent, with interest, but no further; either by a new execution against the property of the said [*prin-*

* See § 1019.

cipal debtor], or by bringing an action thereon as he may think proper.

NO. 36.

NOTICE OF SALE UNDER THE JUDGMENT.

[*Title of the action.*]

In pursuance of a judgment of foreclosure and sale, made and entered in the above entitled action, bearing date the —— day of ——, 19—, I, the undersigned, the referee in said judgment named [*or, the sheriff of the county of ——*], will sell at public auction, at ——, in the city of ——, on the —— day of ——, 19—, at —— o'clock in the —— noon, by ——, auctioneer, the premises directed by said judgment to be sold, and therein described as follows: [*Insert description.*]

[*Signature of Referee or Sheriff.*]

X. Y.,

Attorney for Plaintiff.

[*Office and Postoffice Address.*]

* The following is a diagram of the property to be sold, its street number being ——.

[*Diagram*]

The approximate amount of the lien or charge to satisfy which the above described property is to be sold is —— dollars, with interest thereon from the —— day of ——, 19—, together with the costs and allowances of the action amounting to —— dollars, with interest thereon from the —— day of —— 19—, together with the expenses of the sale. The approximate amount of taxes, assessments and water rates or other liens which are to be allowed to the purchaser out of the purchase money, or paid by the referee, is —— dollars and interest.

Said property will be sold subject to a first mortgage for —— dollars, now a lien thereon with interest from the —— day of ——, 19—, at —— per centum per annum; subject also to any state of facts that an accurate survey would show, and also to any covenants and restrictions, if any, affecting said premises.

Dated ——, ——, 19—.

[*Signature of Referee or Sheriff.*]

* See Rule XV, Special Term, First District.

NO. 37.

TERMS OF SALE.

[*Title of the action.*]

The premises described in the annexed advertisement of sale will be sold under the direction of ———, referee [*or the sheriff of* ——— county], upon the following terms:

Dated ———, the ——— day of ———, 19—.

- 1st. Ten per cent. of the purchase money of said premises will be required to be paid to the said referee [*or sheriff*] at the time and place of sale, and for which the referee's [*or sheriff's*] receipt will be given.
- 2d. The residue of said purchase money will be required to be paid to the said referee [*or sheriff*] at his office, No. ——— street, in the city of ———, on the ——— day of ———, 19—, when the said referee's [*or sheriff's*] deed will be ready for delivery.
- 3d. The referee [*or sheriff*] is not required to send any notice to the purchaser; and if he neglects to call at the time and place above specified, to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the referee [*or sheriff*] shall deem it proper to extend the time for the completion of said purchase.
- 4th. All taxes, assessments, and other incumbrances, which at the time of sale are liens or incumbrances upon said premises, will be allowed by the referee [*or sheriff*] out of the purchase money; provided the purchaser shall, previously to the delivery of the deed, produce to the referee [*or sheriff*] proof of such liens and duplicate receipts for the payment thereof.
- 5th. The purchaser of said premises, or any portion thereof, will at the time and place of sale, sign a memorandum of his purchase, and pay, in addition to the purchase money, the auctioneer's fee of ——— dollars, for each parcel separately sold.
- 6th. The biddings will be kept open after the property is struck down, and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale under the direction of said referee [*or sheriff*] under these same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application; and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale, and that for which they

may be purchased on the resale, and also any costs or expenses occurring on such resale.

7th. [*Where there is a prior incumbrance.*] The said premises will be sold subject, however, to a mortgage for ——— dollars, and interest thereon from ———.

[*Signature of Referee or Sheriff.*]

MEMORANDUM OF SALE.

I have this ——— day of ———, 19—, purchased the premises described in the above annexed printed advertisement of sale, for the sum of ——— dollars, and hereby promise and agree to comply with the terms and conditions of sale of said premises, as above mentioned and set forth.

Dated the ——— day of ———, 19—.

M. N. [*purchaser.*]

Received from M. N., the sum of ——— dollars, being ten per cent. on the amount bid by him for property sold by me under the judgment in the above entitled action.

\$———.

Dated the ——— day of ———, 19—.

[*Signature of Referee or Sheriff.*]

NO. 38.

REFEREE'S REPORT OF SALE. SURPLUS.

[*Title of the action.*]

To the ——— court of ———:

I, J. K., the referee appointed by the judgment made and entered in this action and bearing date the ——— day of ——— 19—, to make sale of the mortgaged lands and premises therein particularly described, do respectfully report as follows:

1. I caused due notice of the sale of said lands and premises on the ——— day of ———, 19—, at ——— to be given and published according to law and the rules and practice of this court, as will more fully appear by the affidavits hereto annexed.

* 2. At the time and place for which said sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said mortgaged lands and premises for sale and sold the same to M. N. for the sum of ———, that being the highest sum bid for the

* If the premises were sold in separate parcels, set out the manner of the sale, the order in which the parcels were sold and the amount produced by each.

same, and received from the said purchaser in cash, ten per cent. of said sum.

3. The title to said premises was closed on the ——— day of ———, 19—, at which time I made, executed and delivered to said M. N., a good and sufficient deed of conveyance of the premises so sold.

4. At the time of the delivery of said deed I allowed said purchaser, M. N., out of the purchase price in accordance with the directions of said judgment the sum of ———, being the amount of taxes, assessments and water rates paid by said purchaser which were liens on said premises at the time of sale and for which receipted bills are hereto annexed.

5. At the time of the delivery of said deed I received from the said purchaser the balance of the said purchase price, to wit, the sum of ———, and have disposed of the same as follows:

a. I have retained for my fees the sum of ———, for which my receipt is hereto annexed.

b. I have retained the sum of ———, necessarily disbursed by me in advertising the legal notices of said sale, for which the receipted bill is hereto annexed.

c. As directed by said judgment I have paid to the attorney for the plaintiff the sum of ——— for the costs, disbursements and additional allowance herein, with interest thereon from the ——— day of ——— 19—, to the date of the closing of title, amounting in all to the sum of ———, for which a receipt is hereto annexed.

d. As directed by the said judgment, I have paid to the attorney for the plaintiff for the sum due on the bond and mortgage upon which this action was brought, and directed to be paid by said judgment, the sum of ———, together with interest thereon from the ——— day of ——— 19—, to the date of the closing of title, amounting in all to the sum of ———, for which a receipt is hereto annexed.

e. I have deposited the surplus of said money remaining after the foregoing deductions and payments, being the sum of ———, with the ——— of the ———, to the credit of this action, for which he has given his receipt, which is hereto annexed.

Annexed hereto, and made a part of this my report, is a statement showing the several items aforesaid and the mode of computation.

All of which is respectfully submitted.

Dated the ——— day of ———, 19—.

[Signature of Referee.]

STATEMENT.

Amount realized upon the sale	\$.....
Amount due on bond and mortgage as per judgment	\$.....
Interest thereon until date of closing	
Plaintiff's costs and allowances	
Interest thereon	
Allowed for taxes	
Referee's fees	
Referee's disbursements	\$..... \$.....
Surplus deposited with	

NO. 39.

THE SAME. DEFICIENCY, AFTER SALE TO PLAINTIFF.

Continue as in preceding form until

2. At the time and place for which said sale was noticed as aforesaid, I attended in person and, agreeably to such notice, offered the said mortgaged lands and premises for sale, and sold the same to A. B., the plaintiff in this action, for the sum of \$—— that being the highest sum bid for the same.

3. The title to said premises was closed on the —— day of —— 19——, at which time I made, executed and delivered to said A. B., a good and sufficient deed of conveyance of the premises so sold.

4. At the time of the delivery of said deed I allowed said purchaser, A. B., out of the purchase money in accordance with the directions of said judgment the sum of —— being the amount of taxes, assessments and water rates paid by said purchaser which were liens on said premises at the time of sale and for which receipted bills are hereto annexed.

5. I further allowed to said purchaser the sum of ——, paid by him on my behalf for the expenses of advertising the legal notices of sale, for which the receipted bill is hereto annexed.

6. I further allowed to said purchaser the sum of ——, paid by him on my behalf to O. P., the auctioneer, who under my directions, conducted the sale.

7. I further allowed the said purchaser the sum of —— paid to me for my fees herein, for which my receipt is hereto annexed.

8. I further allowed the said purchaser the sum of —— paid by him on my behalf to S. T., the duly appointed guardian *ad litem* of

infant defendants in this action, being the costs allowed to him by the said judgment.

9. After making such allowances, there remained due from said purchaser the sum of _____. I was directed by said judgment to pay to the plaintiff the sum of _____, being the sum due upon the bond and mortgage upon which this action was brought, with interest thereon from the _____ day of _____ 19—, or so much thereof as the proceeds of sale would suffice to pay, together with the sum of _____ for his costs, disbursements and additional allowance herein, with interest as aforesaid. I find and report that the said sums with legal interest thereon to the said date of closing title amount to _____. Pursuant to said judgment I have allowed said A. B., the plaintiff herein and the purchaser of the said premises, to offset said sum of _____ so due to him as aforesaid against the above mentioned balance of _____ due from him on his bid.

10. I accordingly find and report that there exists a deficiency in favor of said A. B., in the sum of _____.

11. The following is a statement showing the several items aforesaid, and the mode of computation of such deficiency:

Amount due on bond and mortgage as per judgment.....	\$.....
Interest thereon at 6% to	
Costs, disbursements and additional allowance	
Interest thereon at 6% to	
	\$.....

Amount of purchase price	\$.....
Allowed for taxes	\$.....
Referee's fee	
Legal advertising	
Auctioneer's fee	
Guardian's costs	
Balance due from A. B. on his bid ..	\$.....
Deficiency due to A. B.	\$.....

All of which is respectfully submitted.

Dated, _____, the _____ day of _____, 19—.

[Signature of Referee.]

STATE OF NEW YORK, }
COUNTY OF _____, } ss.:

J. K., being duly sworn, deposes and says:

That he is the referee duly appointed herein to make the sale in the above entitled action, and the officer who made such sale.

That the above report of sale signed by him is in all respects true

and correct, and said report and statement annexed thereto contain a true, accurate and complete report of the disposition of the proceeds of such sale.

Sworn to, *etc.*

NO. 40.

ORDER CONFIRMING REPORT OF SALE.

At a Special Term, *etc.*

PRESENT:—The Hon. ———.

[*Title of the action.*]

Upon all the proceedings heretofore had herein, upon the Report of Sale of J. K., Esq., referee, made in this action, dated on the ——— day of ———, 19—, and filed in the office of the clerk of this court on the ——— day of ——— 19—, and upon proof that due notice of filing of said report has been given to the respective parties entitled thereto, and that no exceptions to said report have been filed, and that the time for so doing has expired, now, on motion of X. Y., attorney for the plaintiff, it is

ORDERED AND ADJUDGED, that the said report of the said J. K., referee, be absolute, and that it be and the same hereby is in all respects confirmed. And it is further

ORDERED AND ADJUDGED, that the plaintiff recover of the defendant, C. D., the sum of ——— dollars, the deficiency shown by the said report, with interest thereon, from the ——— day of ———, 19—, and that the clerk of this court docket judgment therefor against said defendant and in favor of the plaintiff, and that the plaintiff have execution therefor.

[*Enter.*]

NO. 41.

REFEREE'S DEED.

THIS INDENTURE, made the ——— day of ——— in the year one thousand nine hundred and ———, between J. K., residing at ———, a referee duly appointed as hereinafter mentioned, of the first part, and M. N., residing at ———, of the second part.

WHEREAS, at a ——— term of the ——— court, held in and for the county of ——— at ——— on the ——— day of ——— one thousand nine hundred and ———, it was among other things ordered and adjudged by the said court, in a certain action then pending in the said court between [*Give full title of action, naming all parties*] defendants.

That all and singular the mortgaged premises mentioned in the complaint in said action, and in the judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at auction according to the course and practice of said court, by or under the direction of said party of the first part as referee thereby duly appointed for that purpose; that the said sale be made in the county of ———, at ———; that the said referee give public notice of the time and place of such sale, according to the course and practice of said court, and that any of the parties to said action might become a purchaser or purchasers on such sale; that the referee execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as should be sold, a good and sufficient deed or deeds of conveyance for the same:

AND WHEREAS, the said referee, in pursuance of the said judgment of the said court, did on the ——— day of ——— one thousand nine hundred and ———, sell at public auction in ——— County, at ———, the premises in the said judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said judgment: at which sale the premises hereinafter described were struck off to the said M. N., party of the second part, ——— for the sum of ——— dollars, that being the highest sum bidden for the same.

NOW THIS INDENTURE WITNESSETH, That the said referee, the party of the first part to these presents in order to carry into effect the sale so made by him as aforesaid, in pursuance of the judgment of the said court, and in conformity to the statute in such cases made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part, all [*Insert description.*]

TO HAVE AND TO HOLD all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the second part ——— and assigns, to ——— their own proper use, benefit and behoof forever ———.

IN WITNESS WHEREOF, the said ——— referee as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in the presence of ———.

NO. 42.

REQUEST TO DOCKET JUDGMENT FOR DEFICIENCY.

[*Title of the action.*]

SIR: Please docket a judgment in your office in favor of A. B., the above named plaintiff, and against the defendants C. D., E. F., and I. K., for the sum of ——— dollars and ——— cents, and interest thereon from the ——— day of ———, 19—, for deficiency.

Judgment of foreclosure and sale filed in your office on the ——— day of ———, 19—.

Report of sale of ———, Esq., the referee named in said judgment filed in your office on the ——— day of ———, 19—.

Order confirming the said report entered in your office on the ——— day of ———, 19—.

Dated, *etc.*

X. Y.,
Plaintiff's Attorney.

T. R. S., Esq., Clerk of ——— County.

NO. 43.

EXECUTION FOR DEFICIENCY.

The People of the State of New York to the Sheriff of the County of ———, Greeting:

WHEREAS, by a certain judgment made in the ——— court, and entered in the office of the clerk of the county of ———, dated on the ——— day of ———, 19—, in a certain action where A. B. is plaintiff, and C. D., E. F., I. K., and others are defendants, it was among other things ordered and adjudged that the mortgaged premises described in said judgment should be sold by and under the direction of ———, Esq., as referee [*or*, the sheriff of the county of ———], that said referee [*or* sheriff] should, out of the proceeds of said sale, retain the costs and expenses of said sale, and pay the costs and allowances of the plaintiff and the amount reported due to the plaintiff for principal and interest, or so much thereof as the purchase money of the mortgaged premises would pay of the same; and that if the moneys arising from said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, the said referee [*or* sheriff] should specify the amount of such deficiency in his report of sale, and that the defendants C. D., E. F., and I. K., should pay the same to the plaintiff.

AND WHEREAS, the said referee has duly filed his report of sale in the office of the clerk of ——— county, from which it appears that the money arising from said sale was insufficient to pay the amount so reported due to the plaintiff, with interest and costs as aforesaid, and that the amount of such deficiency is the sum of ——— dollars, and interest thereon from the ——— day of ———, 19—, and the report of said referee having been duly confirmed.

AND WHEREAS, a judgment for said deficiency in favor of A. B., the said plaintiff, and against the said defendants C. D., E. F., and I. K., for the sum of ——— dollars and ——— cents, and interest thereon from the ——— day of ———, 19—, was on the ——— day of ———, 19—, duly docketed in the office of the clerk of the county of ———, and the said sum of ——— dollars and ——— cents, and interest thereon from the ——— day of ———, 19—, is now actually due thereon.

THEREFORE we command you, that you satisfy the said judgment out of the personal property of the said judgment debtors within your county; or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtors on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you, to the clerk of the county of ———.

WITNESS, the Hon. ———, a justice of said ——— court, at the court house in the city of ———, the ——— day of ———, 19—.

X. Y.,

Plaintiff's Attorney.

Office and P. O. Address,

.....
.....

NO. 44.

AFFIDAVIT ON WHICH TO APPLY FOR A RECEIVER OF RENTS.

[*Title of the action.*]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

A. B., being duly sworn deposes and says:

I. That he is the plaintiff in this action.

II. That this action is brought to foreclose a mortgage dated the ——— day of ———, 19—, made and executed by C. D. to E. F., to secure a bond made and executed by the said C. D. to the said E. F., conditioned for the payment of ——— dollars on the ——— day of

——— 19—, with interest at the rate of ——— per centum per annum, payable semi-annually on the ——— days of ——— and ———, in each year.

III. A copy of the complaint herein, to which reference is hereby prayed for a full statement of the plaintiff's cause of action, is hereto annexed, marked Exhibit "A."

IV. That the said mortgage is a second mortgage, and is inferior as a lien to a mortgage for ——— dollars upon the same premises, held by ———, upon which there is now unpaid and owing, interest from ———.

V. That there are unpaid taxes and assessments on said premises, amounting at this date to the sum of about ——— dollars, as nearly as can be ascertained by deponent, being as follows: tax for the year 19—, ——— dollars, and interest thereon, and an assessment for paving ——— street, ——— dollars, and interest thereon.

VI. That the whole amount of the incumbrances on said property, including the plaintiff's claims and the said prior mortgage and the costs and expenses of this action and of a sale, will amount to the sum of about ——— dollars.

VII. That the said mortgaged premises are an inadequate and insufficient security for the plaintiff's demand, and that they are not worth more than the sum of ——— dollars, as deponent believes. That the grounds of deponent's belief are [*set out fully the reasons for fixing the value of the property at the sum named*].

VIII. That the defendant, ———, is the only person who is personally obligated for the payment to the plaintiff of the said mortgage debt, and that the said defendant is entirely irresponsible and insolvent. [*State reason for believing this to be so, thus:*] That there are judgments against said defendant which are unsatisfied of record, and that the defendants ——— and ——— are holders and owners of such judgments, and were made parties to this action for that reason.

IX. That said mortgaged premises are rented to the defendant ——— [*or to one* ———] at the price, as deponent is informed and believes, of ——— dollars per month, and that the said defendant [*mortgagor*] is collecting and receiving such rents.

X. On information and belief that the rents of the said mortgaged premises are being collected by or on behalf of the defendant ———, and that said rents are not being applied to the reduction of the charges against the mortgaged premises.

XI. As more fully appears from said complaint hereto annexed marked Exhibit "A," the mortgage held by the deponent assigns the rents and profits of the mortgaged premises to the mortgagee in the event of default being made in the payment of the principal sum

thereby secured, or the interest accruing thereon at the respective times therein specified for the payment thereof, and further provides that in the event of any such default the mortgagee shall be at liberty, upon proceedings being commenced for the foreclosure of said mortgage, to apply for the appointment of a receiver of the rents and profits without notice, and shall be entitled to the appointment of such receiver without consideration of the value of the mortgaged premises or the solvency of any person or persons liable for the payment of such amount.

AN ORDER IS THEREFORE REQUESTED by reason of the circumstances aforesaid, appointing a receiver of the rents and profits of the mortgaged premises pending this action, with the usual powers and duties of receivers in such cases.

That no other or previous application has been made for this or any similar relief.

Sworn, *etc.*

A. B.

NO. 45.

ORDER APPOINTING A RECEIVER OF RENTS.

At a Special Term, *etc.*

[*Title of the action.*]

On the summons and duly verified complaint herein filed in the office of the clerk of the county of ———, on the ——— day of ———, 19—, and on reading and filing the annexed affidavits of A. B., sworn to the ——— day of ———, 19—, together with the notice of this motion with due proof of service thereof, after hearing X. Y., attorney for the plaintiff in support of the motion, and Z. W., attorney for the defendant ———, in opposition thereto, and upon motion of X. Y., it is

ORDERED, that M. N., Esq., of ———, be and he hereby is appointed with the usual powers and directions, receiver for the benefit of the plaintiff of all the rents and profits now due and unpaid, or to become due during the pendency of this action, and issuing out of the mortgaged premises mentioned in the complaint and known as ——— in ——— and bounded and described as follows: [*Insert description*] with the appurtenances and all the estate and rights of the mortgagor in and to the said premises; and it is further

ORDERED, that before entering upon his duties, said receiver execute to the People of this State, and file with the clerk of this court, a bond with sufficient sureties, to be approved by a judge of this court, in the penal sum of ——— dollars conditioned for the faithful performance of his duties as such receiver; and it is further

ORDERED, that said receiver be and hereby is directed to demand, collect and receive from the tenant or tenants in possession of said premises, or other persons liable therefor, all the rents thereof now due and unpaid or hereafter to become due; and that said receiver be and hereby is authorized to institute and carry on all legal proceedings necessary for the protection of said premises or to recover possession of the whole, or any part thereof, and to institute and prosecute suits for the collection of rents now due or hereafter to become due, and summary proceedings for the removal of any tenant or tenants, or other persons therefrom; and it is further

ORDERED, that said receiver be and hereby is authorized, from time to time, to rent or lease, for terms not exceeding one year, any part of said premises; to keep said premises insured against loss or damage by fire, and in repair; to pay the taxes, assessments and water rates thereon; [to comply with all requirements of any Municipal Department or other authority of the City of New York;] and to employ an agent to rent and collect the rents of said premises and to pay the reasonable value of such agent's services out of the rents received; and it is further

ORDERED, that the tenants, or other persons in possession of said premises, attorn to said receiver, and pay over to said receiver all rents of such premises now due and unpaid, or that may hereafter become due; and that the defendants be enjoined and restrained from collecting the rents of said premises, and from interfering in any manner with the property or its possession; and that all tenants of the premises, and other persons liable for the rents, be and hereby are enjoined and restrained from paying any rent for such premises to the defendants, their agents, servants or attorneys; and it is further

ORDERED, that all persons now or hereafter in possession of said premises, or any part thereof, and not holding such possession under valid and existing leases or tenancies do forthwith surrender such possession to said receiver; and it is further

ORDERED, that said receiver after paying the expenses of the management and care of the said premises as above provided, retain the balance of the moneys which may come into his hands until the sale of the said premises under the judgment to be entered in this action; and that he then, after deducting his proper fees and disbursements therefrom, apply the said moneys to the payment of any deficiency there may be in the amount directed to be paid to the plaintiff by said judgment; and in case there is no such deficiency, that he retain the said moneys in his hands until the further order of this court; and it is further

ORDERED, that the said receiver, or any party hereto, may at any

time, on proper notice to all parties who may have appeared in this action, apply to this court for further or other instructions or powers necessary to enable said receiver properly to fulfill his duties.

Enter,

NO. 46.

BOND OF RECEIVER.

[*Title of the action.*]

Know all men by these presents, that we, M. N., of the city of ———, and P. R. and R. S., of the same place, are held and firmly bound unto the people of the State of New York, in the sum of ——— dollars to be paid to the said people of the State of New York; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals; dated the ——— day of ———, 19—.

WHEREAS, by an order of the court, entered in the above entitled action, on the ——— day of ———, 19—, the above bounden M. N. was appointed receiver of the rents and profits of the mortgaged premises described in the complaint.

Now the condition of this obligation is such, that if the above bounden M. N. shall, according to the rules and practice of the court, duly file his inventory, and annually, or oftener if thereunto required, duly account for what he shall receive or be in charge as receiver in the said action, and apply what he shall receive or have in charge, as he may from time to time be directed by the court; and if he shall faithfully perform his duties as such receiver, in all things according to the true intent and meaning of the aforesaid order, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered

[*Signatures and seals.*]

in the presence of

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

P. R. and R. S. being severally and duly sworn, each for himself says, that he is a householder [*or freeholder*] in this State, and is worth ——— dollars [*double the amount of the penalty of the bond*] over and above his debts and liabilities, and property exempt by law from execution.

Sworn, *etc.*

[*Signatures.*]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

On the ——— day of ———, 19—, before me personally came M. N., P. R., and R. S., to me known to be the individuals described in, and who executed the foregoing instrument and severally acknowledged to me that they executed the same.

[Signature of officer.]

Indorsed. Approved.

[Signature of Justice.]

NO. 47.

NOTICE OF MOTION TO DISCHARGE RECEIVER.

[Title of the action.]

SIR: PLEASE TAKE NOTICE that upon the petition of M. N., duly verified the ——— day of ———, 19—, and the account and vouchers of M. N., receiver herein, both hereto annexed, to be submitted herewith, the judgment roll filed herein on the ——— day of ———, 19—, and the referee's report of sale filed herein on the ——— day of ———, 19—, and upon all the proceedings heretofore had herein, I shall move this court at a Special Term, ———, to be held at ——— in ———, on the ——— day of ———, 19—, at ——— o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order approving, settling and allowing the account ——— filed herein, cancelling the bond of said receiver, and directing the clerk of the said court to so mark the same, and directing that the said receiver retain the sum of ——— dollars as his commissions herein and pay the balance of moneys in his hands to A. B., the plaintiff herein, or his attorney on account of the deficiency judgment to be entered herein and for such other and further relief as may be just and equitable.

Dated, ———, the ——— day of ———, 19—.

Yours, etc.

O. P.,

Attorney for Petitioner,
Office and P. O. Address,

To

.....
Attorney for Plaintiff.

.....
Owner of the Equity.

.....
Attorney for Surety.

NO. 48.

PETITION OF RECEIVER TO ACCOUNT AND BE DISCHARGED.

[*Title of the action.*]

TO THE ——— COURT OF THE ——— :

The petition of M. N. respectfully shows to the court:

I. That on or about the ——— day of ———, 19—, an order was duly made and entered herein appointing your petitioner receiver of the rents, issues and profits of the mortgaged premises described in the complaint herein, with the usual powers of such receiver.

II. That on or about the said ——— day of ———, 19—, your petitioner together with P. R. and R. S. as his sureties, entered into a bond to the People of the State of New York in the penal sum of ——— dollars conditioned for the faithful discharge of his duties as such receiver, which bond was duly approved by the court and filed in the office of the clerk of the county of ———, on said ——— day of ———, 19—; and your petitioner thereupon entered upon the performance of his duties as such receiver.

III. That your petitioner has since then performed the duties of his office and executed all the trusts of the same so far as he has been able so to do, and has collected all the rents from the tenants of said premises, so far as possible up to the ——— day of ———, 19—, when he surrendered possession of the said premises to A. B., the purchaser of the premises on the foreclosure sale.

IV. That annexed hereto is a statement of the accounts of your petitioner as such receiver, together with the vouchers for all disbursements made by him, showing a balance on hand of ——— dollars.

V. That no suits or legal proceedings in respect to this receivership are now pending to the knowledge of your petitioner, nor does any duty remain to be performed by him, except to have his accounts herein finally settled.

VI. Upon information and belief that the owner of the equity in the mortgaged premises was E. F., who resides at ——— in ———.

VII. Upon information and belief that none of the defendants have appeared herein.

VIII. Upon information and belief that on or about the ——— day of ———, 19—, the mortgaged premises herein were sold at public auction to A. B., the plaintiff herein, and that on or about the ——— day of ———, 191—, the referee's report of sale was filed herein showing a deficiency of ——— dollars.

WHEREFORE, your petitioner prays that this court may approve, settle and allow his account as such receiver, as set forth in said state-

ment hereto annexed, and that an order may be granted allowing your petitioner the sum of ——— dollars as his commissions for the performance of said duties, and directing that any moneys then remaining in his hands be paid to A. B., the plaintiff herein or to his attorney on account of the deficiency herein, and further directing that your petitioner be relieved and discharged as such receiver, and ordering his bond to be cancelled, and for such other and further order as may be just and equitable.

Dated, ———, the ——— day of ———, 19—.

M. N.,

O. R.,

Petitioner.

Attorney for Petitioner,

Office and P. O. Address,

.....

.....

[*Verification in usual form.*]

NO. 49.

ACCOUNT OF RECEIVER.

[*Title of the action.*]

TO THE ——— COURT OF ———:

I, M. N., of ———, do hereby render the following account of my proceedings as receiver of the rents, issues and profits of the premises described in the complaint herein, which are known and designated as No. ———.

I was duly appointed as such receiver with the usual powers by an order made and entered herein on the ——— day of ———, 19—.

I filed my bond, duly approved, with R. P. and R. S., sureties, in the office of the clerk of the county of ———, on the ——— day of ———, 19—, and thereupon entered upon the performance of my duties as such receiver.

On the ——— day of ———, 19—, I took possession of the mortgaged premises, which I found to be [*Insert character and condition of premises.*]

I appointed an agent for the collection of the rents of said premises under the power vested in me by the said order of appointment, and in the following statement of my account I have credited myself with the reasonable value of the service of the said agent.

One J. K., a tenant on the said premises refused to attorn to me (or having attorned to me, refused to pay the sum of ——— dollars rent), and I was forced to dispossess the said tenant.

I found a certain portion of the said premises, to wit, ———, in a neglected condition and in exceedingly bad repair and before it was possible for me to procure a tenant for the said premises, I was forced to and did make certain expenditures for repairs, which are herein-after set forth.

On the ——— day of ———, 19—, the final judgment of foreclosure and sale was duly made and entered herein, and pursuant thereto the mortgaged premises were duly sold at auction on the ——— day of ———, 19—, and a deed of the referee to A. B., the purchaser, at said auction sale, was dated on the ——— day of ———, 19—, and the referee's report of sale was filed in the office of the clerk of the county of ———, on the ——— day of ———, 19—.

I surrendered possession of said premises to said A. B., on the ——— day of ———, 19—, and the active duties of my receivership thereupon terminated.

In his report of sale herein filed as aforesaid, the referee reports a deficiency of ——— dollars.

Schedule A hereto annexed contains a full, correct, and true statement of all moneys received and collected by me or my agent.

Schedule B, hereto annexed, contains a full, correct, and true statement of all moneys expended by me for my bond, filing fees, etc.

All the receipts, statements and vouchers hereto annexed, form a part of this account.

I charge myself as follows:

Gross receipts as shown by Schedule A.....\$

I credit myself as follows:

Total expenditures as shown by Schedules B and C....\$

Leaving a balance of\$

which consists of cash in the ——— Bank, to be distributed, subject, however, to the deduction of the amount of my commissions.

The said schedules which are signed by me are part of this account.

———— Receiver.

[Insert schedules.]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

M. N., of ———, the receiver of the rents, issues and profits of the mortgaged premises described in the complaint in this action, being duly sworn, says:

I. That the foregoing account contains, according to the best of this deponent's knowledge and belief, a full and true account of all his proceedings as receiver of the rents, issues, and profits of said premises from the ——— day of ———, 19—, to the ——— day of ———, 19—, at the time his receivership ceased; that it contains a true and full account of all moneys which have been received by this deponent or any other person by his order or for his use; that he has been charged therein for all moneys received by him for which he is legally accountable; and that the moneys stated in said account as collected were all that were collectible, according to the best of his knowledge, information and belief.

II. That the several sums mentioned in the said foregoing account to have been paid or allowed were actually paid or allowed by this deponent for, or on account of his receivership, and for the several purposes therein mentioned, according to the best of his knowledge and belief.

III. That the sums charged in the said account for which no vouchers or other evidence of payment have been produced, or for which he may not be able to produce vouchers or other evidence of payment, have been disbursed by him as charged.

IV. That deponent does not know of any error or omission in the said foregoing account to the prejudice of any of the parties or other persons interested in the funds or in the cause.

Sworn to before me this ———

day of ———, 19—.

NO. 50.

ORDER DISCHARGING RECEIVER.

At a Special Term, *etc.*

[*Title of the action.*]

Upon reading and filing the petition of Q. R., duly verified the ——— day of ———, 19—, and the account and vouchers of the said Q. R., as receiver, submitted therewith, and upon the judgment roll in this action filed in the office of the clerk of the county of ———, on the ——— day of ———, 19—, and upon the referee's report of sale duly filed in the office of the said clerk on the ——— day of ———, 19—, and upon due notice of motion with proof of due service thereof,

Now, on motion of S. T., attorney for the petitioner, it is

ORDERED, that the accounts of the receiver submitted herewith be,

and they hereby are, in all respects approved, settled and allowed as filed, and it is further

ORDERED, that said receiver retain the sum of _____ dollars as his commissions herein, and pay the balance, to wit: the sum of _____ dollars, to the plaintiff herein, or to his attorney, on account of the deficiency judgment to be entered herein, as shown by the referee's report.

Enter,

NO. 51.

AFFIDAVIT ON APPLICATION FOR ORDER FOR POSSESSION.*

[*Title of the action.*]

STATE OF NEW YORK, }
COUNTY OF _____, } ss.:

M. N., being duly sworn, says that this action was brought for the foreclosure of a mortgage on certain real estate in the county of _____; that judgment of foreclosure and sale was entered herein on the _____ day of _____, 19—, _____, Esq., of the city of _____, counselor at law, being therein appointed the referee to sell, and said judgment containing the usual provision that the purchaser be let into possession on the production of the referee's deed; that due notice of said sale was given by said referee, and that, on the _____ day of _____, 19—, the mortgaged premises were duly sold at public auction by said referee to this deponent for the sum of _____ dollars, that being the highest sum bidden for the same; that this deponent has duly paid the said purchase money, and that the said referee has also executed, acknowledged, and delivered to deponent a deed of conveyance of said mortgaged premises; [that the report of sale of said referee was duly filed in the office of the clerk of this court on the _____ day of _____, 19—, and that said report has been duly confirmed];† that on the _____ day of _____, 19—, deponent went to the said mortgaged premises and found C. D., who is one of the defendants in this action, in possession thereof; that he then produced and showed to said C. D. the said deed of said referee, and demanded to be let into possession by virtue thereof, but the said C. D. then re-

* An order requiring the sheriff to put the purchaser into possession is a substitute for the writ of assistance previously used. *Ante*, § 1088 *et seq.* Code of Civ. Pro. § 1675.

† The clause in brackets is proper,

but it is not believed to be indispensable. Rule 61 provides that the judgment shall be "that the purchaser at such sale be let into possession of the premises on production of the deed"

fused and still refuses to surrender the said premises, or any part thereof, and still withholds possession thereof from deponent.

WHEREFORE, deponent requests an order directing and requiring the sheriff of the county of —— to put the deponent into possession of the said premises.

That no other or previous application has been made for this or any similar relief.

Sworn, *etc.*

M. N.

[*Verification in usual form.*]

NO. 52.

ORDER FOR POSSESSION.

At a Special Term, *etc.*

[*Title of the action.*]

On reading and filing the affidavit of M. N., the purchaser at the sale of the mortgaged premises in this action, sworn to the —— day of ——, 19—, and on all of the papers and proceedings herein, including the judgment of foreclosure and sale entered herein in the office of the clerk of the county of ——, on the —— day of ——, 19—, and the report of sale of ——, Esq., the referee to sell, filed in said office on the —— day of ——, 19—, [and the order confirming said report entered herein on the —— day of ——, 19—], and on the deed from said referee to said M. N., which said deed bears date on the —— day of ——, 19—, and on the notice of this motion, with due proof of the service thereof on C. D., who is now in possession of the said premises; after hearing ——, Esq., attorney for the said M. N., the purchaser aforesaid, and ——, Esq., attorney for said C. D., in opposition it is [*The application may also be made ex parte. See ante, § 1090.*]

ORDERED, that the sheriff of the county of —— be and he hereby is required forthwith to put the said M. N. into possession of the said premises, and that this order be executed as if it was an execution for the delivery of the possession thereof.

The said premises are described as follows: [*Take in description.*]

NO. 53.

NOTICE OF CLAIM TO SURPLUS.

[*Title of the action.*]

Sir: Take notice that R. S., who resides at ——, in the city of ——, is entitled to the surplus moneys, or some part thereof,

arising from the sale of the mortgaged premises under the judgment of foreclosure and sale entered in this action. The nature and extent of the claim of the said R. S. is as follows: [*state briefly, for example,*] that the said R. S. is the owner of a judgment for ——— dollars, and interest from ———, obtained by him in the county court of ——— county, against the defendant C. D., on the ——— day of ———, 19—, while said defendant was the owner of the equity of redemption of said mortgaged premises, no part of which has been paid; and the said R. S. claims that the said judgment is a first lien upon said surplus moneys.

Dated the ——— day of ———, 19—.

R. S., *claimant*,
(By M. N., his attorney.)

To J. G., *clerk*.

NO. 54.

AFFIDAVIT ON APPLYING FOR REFERENCE AS TO CLAIMS FOR SURPLUS.

[*Title of the action.*]

STATE OF NEW YORK, } ss.:
COUNTY OF ———, }

M. N. being duly sworn says, that he is the attorney for R. S., who is a party to this action [*or who had a lien on the mortgaged premises at the time of the sale in this action*]; that the report of sale of ———, Esq., who was appointed a referee to sell in and by the judgment in this action, has been filed in the office of the clerk of this court; that by such report it appears that, after satisfying the claims of the plaintiff there remains a surplus of ——— dollars, which has been deposited with the treasurer of ——— county [*or in the city of New York, with the chamberlain of the city of New York*], to the credit of this action, and that the said R. S. has filed with the clerk of this court a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim.

That deponent has examined all of the official searches made in the process of this cause and filed with the judgment roll, and that the following are all of the unsatisfied liens which appear by such official searches, to wit: [*specify liens.*]

Deponent further says, that no other unsatisfied liens are known to him to exist, and that no previous application has been made for this or any similar relief.

WHEREFORE, an order is requested appointing a referee to ascertain and compute the amount due to the said R. S., or to any other person,

which is a lien upon the surplus money in this action, and to ascertain the priorities of the several liens thereon, and for such other or further relief as may be just.

Sworn, *etc.*

M. N.

NO. 55.

NOTICE OF MOTION FOR REFERENCE AS TO CLAIM FOR SURPLUS.

[*Title of the action.*]

Take notice, that on the annexed affidavit of M. N., sworn to the ——— day of ———, 19—, and on all of the papers and proceedings in this action, the claimant, R. S., will apply to this court, at a special term thereof, to be held in and for the county of ———, at ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon of that day, or as soon thereafter as counsel can be heard, for an order of reference, to ascertain and report the amount due to said R. S., or to any other person, which is a lien upon the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, and for such other and further relief as may be just.

Dated, *etc.*

M. N.,

Attorney for Claimant R. S.

[*Address to the owner of the equity of redemption and to every party who appeared in the cause, or who shall have filed a notice of claim with the clerk "previous to the entry of the order of reference." If such a notice is filed after the service of notice of application for the reference on the other parties, an adjournment of the motion may be necessary.*] *

NO. 56.

ORDER OF REFERENCE AS TO CLAIMS FOR SURPLUS.

At a Special Term, *etc.*

[*Title of the action.*]

On reading and filing the affidavit of M. N., sworn to the ——— day of ———, 19—, and notice of this motion, with due proof of the service thereof, after hearing M. N., attorney for the claimant R. S., and on his motion, and ———, counsel for ———, in opposition thereto [*or no one appearing in opposition thereto*], it is

ORDERED, that it be referred to W. S., Esq., of ———, to ascertain

* See Rule 64. *Ante*, § 1123.

and report the amount due to R. S., or to any other person, which is a lien upon the surplus moneys in this action; to the end that on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys, and as may be just. [*If unsatisfied liens appear from the searches on file, or are known to exist, the court should designate the manner of service of notice upon the holders of such liens; for example:.*] And it is further

ORDERED, that in addition to the other notices required by the rules of this court, notice of the proceedings on such reference be given to ——— and ——— either by service on them personally, or by leaving the same at their respective places of residence, not less than ——— days prior to the hearing.

Enter,

NO. 57.

SUMMONS TO ATTEND REFERENCE AS TO SURPLUS.

[*As in No. 27, with the following:.*]

UNDERWRITING.

To ascertain and report the amount due to R. S., or to any other person, which is a lien upon the surplus moneys in this action, and to ascertain the priorities of the several liens thereon.

[*Signature of Referee.*]

[*Address to every party who appeared in the cause, or who shall have filed a notice of claim with the clerk previous to the entry of the order of reference, and also to the owner of the equity of redemption and to all persons who are known to have unsatisfied liens.**]

NO. 58.

CERTIFICATE OF CLERK AS TO WHO HAVE APPEARED AND FILED CLAIMS.

[*Title of the action.*]

I certify that the following persons have appeared in the above entitled action by their respective attorneys: A. B. by X. Y., his attorney; C. D. by J. F., his attorney; and R. S. by M. N., his attorney.

I further certify that there are no notices of claim to surplus money

* See *ante*, § 1123.

on file in the above entitled action, except the claim of R. S., by M. N., his attorney.

Dated at ———, this ——— day of ———, 19—.

W. W., *Clerk.*

NO. 59.

REFEREE'S REPORT.

[*Title of the action.*]

TO THE ——— COURT OF ———:

I, J. K., the referee appointed by an order of this court, entered in the above entitled action, on the ——— day of ———, 19—, to ascertain and report the amount due to R. S., or to any other person, which is a lien upon the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, do respectfully report:

That I caused all parties who have appeared in this action, and all persons who have filed notices of claim upon said surplus moneys, and all persons who were known to have liens thereon, to be summoned to appear before me; as appears by the certificate of the clerk, which is hereunto annexed, showing who have appeared in the action and filed notices of claim, and the affidavit of M. N., attorney for the claimant R. S., showing what liens appear by the searches on file, and the summons and proof of service thereof, which is also hereunto annexed, and that on the hearing I was attended by M. N., attorney for the claimant R. S., and by ———, attorney for the claimant ———. The testimony of the witnesses upon such hearing was reduced to writing, and was signed by them; * and such testimony and all evidence, excepting such of it as was documentary, is annexed to this report. From such testimony and evidence I make the following

FINDINGS OF FACT.

I. That the amount of the surplus moneys in this action is ——— dollars, as appears by the certificate of the treasurer of ——— county [*or the chamberlain of the city of New York*], which is hereunto annexed.

II. [*Set forth the further findings of fact of the referee as in the trial of issues in an action.*]

And from the foregoing findings of fact, I further find the following

* Rule 30.

CONCLUSIONS OF LAW.

I. That there is due and owing to the said claimant R. S., the sum of ——— dollars, and interest thereon from ———, amounting at the date of this report to the sum of ——— dollars, upon and by virtue of the said judgment recovered by him against the said C. D., as aforesaid, and that the said amount is the first lien on the said surplus moneys in this action.

II. [*Continue in the order in which the liens are found until the whole fund is disposed of.*]

Dated, etc.

W. S., Referee.

Fees, \$——.

NO. 60.

NOTICE OF MOTION TO CONFIRM REPORT AND DISTRIBUTE THE SURPLUS.

[*Title of the action.*]

Sirs: Take notice that the report of ———, Esq., the referee appointed herein to ascertain and report the amount due to R. S., or to any other person, which amount is a lien on the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, was this day duly filed in the office of the clerk of the county of ———.

Take notice also that upon said referee's report, and upon all of the testimony and papers annexed thereto, the claimant R. S. will apply to this court at a special term thereof, to be held at ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon, or as soon thereafter as counsel can be heard [*more than eight days' notice should be given, so as to allow full eight days for the filing of exceptions, under Rule 30*], for an order confirming said report and directing the treasurer of ——— county [*or the chamberlain of the city of New York*] to pay to the claimant R. S., or his attorney, the sum of ——— dollars, and interest thereon from the ——— day of ———, 19—, the date of said report, out of said surplus moneys, together with an allowance by way of costs in these proceedings, and for such other or further relief as may be just.

Dated, etc.

[*Signature of Attorney.*]

NO. 61.

**ORDER CONFIRMING REPORT OF REFEREE AND DIRECTING
DISTRIBUTION OF SURPLUS MONEYS.**

At a Special Term, *etc.*

[*Title of the action.*]

On the report of ———, Esq., the referee appointed herein to ascertain and report the amount due to R. S., or to any other person, which amount is a lien on the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, which report was filed in the office of the clerk of this court, on the ——— day of ———, 19—, and on all of the testimony and papers annexed to said report and filed therewith; and on reading and filing the notice of filing said report and of this motion, with due proof of the service thereof, on all parties entitled to such notice, and on the exceptions of the claimants ——— and ———, which have been filed herein; after hearing M. N., attorney for the claimant R. S., in support of the motion, and ———, attorney for the claimant ———, and ———, attorney for the claimant ———, in opposition thereto, it is

ORDERED, that the said exceptions be overruled, and that the said report of the said referee be and the same hereby is in all things confirmed. It is further

ORDERED, that the treasurer of ——— county [*or the chamberlain of the city of New York*] pay out and distribute the moneys in his hands to the credit of this action, after deducting therefrom the fees and commissions allowed to him by law, as follows and in the following order of priority:

FIRST, That he pay to ———, Esq., referee in these proceedings, the sum of ——— dollars, for his fees as such referee.

SECOND, and next, That he pay to X. Y., the attorney for the claimant R. S., the sum of ——— dollars, as an allowance by way of costs in these proceedings.

THIRD, and next, That he pay to the claimant R. S., or to his attorney, X. Y., the sum of ——— dollars, and interest thereon from the ——— day of ———, 19—, the date of said referee's report.

FOURTH, and next, That he pay to ———, the attorney for the claimant ———, the sum of ——— dollars, as an allowance by way of costs in these proceedings.

FIFTH, and next, That he pay to the claimant ———, or to his attorney ———, the balance of said moneys.

NO. 62.

PETITION TO SELL BALANCE OF MORTGAGED PREMISES.

[*Title of the action.*]

To THE ——— COURT OF ———:

' The petition of A. B. respectfully shows to the court:

I. That a judgment of foreclosure and sale was entered in the office of the clerk of the county of ——— on the ——— day of ———, 19—, on the report of a referee herein, appointed by an order of this court, duly made and entered in the office of the said clerk on the ——— day of ———, 19—, whereby it appears that the sum of ——— dollars, was due on the bond and mortgage mentioned in the complaint on the ——— day of ——— 19—, and that the amount thereby secured but not then due was ——— dollars.

II. That thereafter proceedings were had under and by virtue of the said judgment, and pursuant thereto a portion of the premises described in the said complaint and judgment sufficient to pay and satisfy the said sum of ——— dollars so reported to be due on the said ——— day of ——— 19—, with interest thereon together with the costs and disbursements of this action as thus taxed and included in the said judgment, was sold, as in the said judgment provided, and brought the sum of ——— dollars.

III. That the said amount paid the costs and disbursements of this action as aforesaid, and a portion of the principal sum secured by the said mortgage leaving unpaid thereon the sum of ——— dollars with interest from the ——— day of ———, 19—.

IV. That the portion of the said premises so sold was that portion, as set forth in the said complaint, bounded and described as follows: [*Insert description.*]

V. That the portion of the said premises remaining unsold is that portion, as set forth in said complaint, bounded and described as follows: [*Insert description.*]

VI. That said portions so remaining unsold is not capable of division or of being sold in separate parcels by reason of the fact that it is [*Insert circumstances.*]

VII. That under and by virtue of the terms of the said bond and mortgage interest on that portion of the amount secured thereby which has not been paid or satisfied was due and payable on the ——— day of ———, 19—; but that said interest, and no part thereof, has been paid.

VIII. That none of the defendants herein are infants or absentees,

and that none have appeared except the defendant C. D., who has appeared by Z. W., his attorney.

WHEREFORE, your petitioner prays for an order in this action founded upon the said judgment and directing the sale of that portion of the said mortgaged premises remaining unsold, under and pursuant to the said judgment, and that the proceeds of the said sale be applied to the payments of the costs of this petition and proceeding and to the satisfaction of the amount remaining due and unpaid on the said mortgage with interest thereon.

No other or previous application has been made for this or similar relief.

Dated the _____ day of _____, 19—.

A. B.

[*Verification.*]

NO. 63.

ORDER TO SELL BALANCE OF MORTGAGED PREMISES.

[*Title of the action.*]

On the judgment roll in this action hitherto filed in the office of the clerk of the county of _____ on the _____ day of _____, 19—, and on reading and filing the petition of A. B., verified the _____ day of _____ 19—, together with the notice of motion herein with due proof of service thereof, from which it appears to the satisfaction of the court that the sum of _____ dollars remains due and unpaid on the judgment of foreclosure in this action with interest thereon from the _____ day of _____, 19—, after the application of all of the proceeds of the sale hitherto had herein pursuant to the said judgment, and that all of the premises described in the said judgment have been sold except a certain lot which could be sold more advantageously as one parcel and without division,

Now, on motion of X. Y., attorney for the petitioner, it is

ORDERED; that that portion of the mortgaged premises herein remaining unsold and which is, in the complaint and judgment herein, bounded and described as follows [*Insert description*] be sold under the direction of L. K., Esq., heretofore appointed referee herein, and that the proceeds of said sale be applied to the payment of the amount remaining due and unpaid on the judgment of foreclosure; to wit: the sum of _____ dollars, with interest from the _____ day of _____, 19—, together with the costs of these proceedings, which are hereby taxed at _____ dollars, and that the said sale be made, in all respects under and pursuant to the said judgment. And it is further

ORDERED, that the defendants herein, and all persons claiming un-

der them, or any of them, subsequent to the filing of the notice of the pendency of this action in the office of the clerk of the county of ——— be barred and forever foreclosed of and from all right, title, interest, claim, lien and equity of redemption in and to the said mortgaged premises so sold, or any part thereof.

NO. 64.

**PETITION IN SPECIAL PROCEEDING TO DISCHARGE ANCIENT
MORTGAGE OF RECORD.***

SUPREME COURT, ——— COUNTY.

In the Matter of the Petition of	}
A. B.	
To have a Mortgage Discharged of Record.	

To the Supreme Court of the State of New York, in the county of ———; [*or to the County Court of ——— County*].

The petition of A. B. respectfully shows to the court:

I. That heretofore C. D., and M., his wife, executed a mortgage to E. F., to secure the payment of the sum of ——— dollars, which said mortgage bears date on the ——— day of ———, 19—, and was on the ——— day of ———, 19—, recorded in the office of the clerk of the county of ———, in Liber ——— of Mortgages, page ———, and that the following is a description of the mortgaged premises: [*Insert description.*]

II. That more than twenty years have elapsed since the said mortgage was due and payable; that the same is now from lapse of time presumed to be paid, and that it has in fact been paid, but that the same still remains undischarged upon the record.

III. That your petitioner has an interest in the said mortgaged premises, and that he is the owner thereof in fee simple, by virtue of a grant or conveyance from A. B., the said mortgagor.

IV. That E. F., the said mortgagee, has been dead for more than five years; that he died at the city of ———, on or about the ——— day of ———, 19—, being at the time of his death a resident of the said city, and that letters of administration upon his personal estate were thereafter duly issued by the surrogate of the county of ———, to M. N., of the said city, who now resides at said city.

V. That the names and places of residence, as far as the same can be ascertained, of the heirs of E. F., the said mortgagee, are as fol-

* This, together with the four following forms, refers to the provisions of the Real Property Law, §§ 340 to 344. See *Ante*, §§ 428 to 430.

lows: J. F., the only son and heir of said E. F., resides at ———, in the State of ———.

VI. That said mortgage was never assigned by the said E. F., so far as your petitioner is informed, and that no assignment thereof appears of record in the office of the said clerk of ——— county. [*or*, That said mortgage was duly assigned by said E. F. to G. H., by assignment in writing, but not acknowledged, so as to entitle the same to be recorded, and that the said G. H. has been paid the amount due thereon.]

Your petitioner therefore prays that the said mortgage may be discharged of record.

A. B.

[*Verification in usual form.*]

NO. 65.

ORDER TO SHOW CAUSE.

At a Special Term, *etc.*

[*Title as in preceding form.*]

On reading and filing the petition of A. B., verified the ——— day of ———, 19—, praying that a mortgage executed by C. D., and M., his wife, to E. F., dated the ——— day of ———, 19—, and recorded in the office of the clerk of the county of ———, on the ——— day of ———, 19—, in Liber ——— of Mortgages, page ——— [and which mortgage was assigned by E. F. to G. H.], upon premises situate in the said city of ———, county of ———, may be discharged of record, on motion of X. Y., attorney for the said petitioner, it is

ORDERED, that all persons interested show cause at a special term of this court, to be held at chambers at the court house, in the city of ———, on the ——— day of ———, 19—, at ——— o'clock in the forenoon of that day, why the said mortgage should not be discharged of record. It is further

ORDERED, that this order be published in the ———, a newspaper published in the county of ———, once in each week for ——— weeks successively, and that a copy of this order be served personally on M. N., administrator, *etc.*, of E. F., deceased, on J. F. and on G. H., at least ——— days before the day hereinbefore appointed for showing cause.

NO. 66.**ORDER OF REFERENCE.**

At a Special Term, *etc.*

[*Title as in No. 64.*]

It appearing to the satisfaction of the court that the order to show cause made in this matter on the ——— day of ———, 19—, was duly published and served as was therein directed, on motion of X. Y., attorney for the petitioner, no one appearing in opposition thereto, it is

ORDERED, that it be referred to R. S., Esq., of the city of ———, counsellor at law, to take and report proofs of the facts stated in the said petition.

NO. 67.**REFEREE'S REPORT.**

[*Title as in No. 64.*]

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

I, the undersigned, appointed a referee in and by an order of this court made on the ——— day of ———, 19—, to take and report proofs of the facts stated in the petition in this matter, do hereby respectfully report:

That I caused a notice in writing of the hearing on said reference to be served upon M. N., administrator, *etc.*, of E. F., deceased, on J. F. and on G. H. [fourteen] days before the said hearing, which more fully appears by the notice of hearing which is hereunto annexed.

That on the day appointed in said notice, to wit, on the ——— day of ———, 19—, having been first duly sworn, I proceeded to execute said order in the presence of X. Y., attorney for the petitioner, no one appearing to represent any adverse interest, and that I have taken proofs of the facts stated in said petition, which said proofs were all reduced to writing and signed by the several witnesses, and which are annexed to this report.

Dated, *etc.*

R. S., *Referee.*

NO. 68.**ORDER DISCHARGING ANCIENT MORTGAGE OF RECORD.**

At a Special Term, *etc.*

[*Title as in No. 64.*]

On reading and filing the report of R. S., Esq., referee in this matter, to whom it was referred to take and report proofs of the facts

stated in the petition herein, and it appearing to the satisfaction of the court by the proofs taken by the said referee and annexed to his said report, that the matters alleged in the said petition are true, on motion of X. Y., attorney for the said petitioner, no one appearing in opposition thereto, it is

ORDERED, that the mortgage executed by C. D., and M., his wife, to E. F., dated the ——— day of ———, 19—, and recorded in the office of the clerk of the county of ———, on the ——— day of ———, 19—, in Liber ——— of Mortgages, page ———, upon premises situate in the said county, be discharged of record; and that the clerk of the county of ———, upon being furnished with a certified copy of this order, and paid the fees allowed by law for discharging mortgages, shall record this order and make the proper entries in his books showing such discharge.

NO. 69.

PETITION IN SPECIAL PROCEEDINGS TO DISCHARGE A MORTGAGE OF RECORD.*

[Enter.]

—— COURT, —— COUNTY.

In the Matter of the Petition of A. B. To have a Mortgage Discharged of Record.
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To the Supreme Court of the State of New York in the County of ———: [or to the County Court of ——— County]:

The petition of A. B. respectfully shows to the court,

I. That heretofore C. D., and M., his wife, execute a mortgage to E. F., to secure the payment of the sum of ——— dollars, which said mortgage bears date on the ——— day of ———, 19—, and was on the ——— day of ———, 19—, recorded in the office of the clerk of the county of ——— in Liber ——— of Mortgages, at page ———, and that the following is a description of the mortgaged premises: [*Insert description.*]

II. That thereafter the said C. D., and M., his wife, by their deed of conveyance under seal sold and conveyed the said mortgaged premises to the petitioner; that the said deed bears date the ——— day of ——— 19—, and was duly recorded in the office of the clerk of the

* This, and the three following forms, are drawn with reference to § 333 of the Real Property Law, which applies to cases where the

mortgagee, after due tender, refuses to satisfy a mortgage of record, and to cases where tender cannot be made within the State. See *ante*, § 364.

county of _____ on the _____ day of _____, 19—, in Liber _____ of Conveyances, at page _____. That in and by the said deed and by accepting the same, your petitioner became bound to pay the said mortgage indebtedness, and assumed and agreed to pay the same.

III. That on, or about the _____ day of _____, 19—, the said E. F., by his duly executed and acknowledged instrument of assignment under seal sold and conveyed the said mortgage to G. H.

IV. That your petitioner is now the owner and holder of the said mortgaged premises and that the said G. H. is now the holder of record of the said mortgage, and that, to the best knowledge, information and belief of your petitioner, the said G. H. is now the owner of the said mortgage and that he has not assigned the same by any instrument which remains unrecorded, and that he is the person by law entitled to enforce or satisfy said mortgage.

V. That the said mortgage, by the terms thereof, became due and payable on the _____ day of _____, 19—, and that there was on that day, due thereon the face amount of the said mortgage, to wit, the sum of _____ dollars, with interest thereon at the rate of _____ per centum per annum from the _____ day of _____, 19—. That the total amount of principal and interest due on the said mortgage on the said _____ day of _____, 19—, was _____ dollars.

* VI. That on the said date your petitioner sought out the said G. H. and his office at _____ in the _____ county of _____, and then and there duly tendered to the said G. H. the said total amount of principal and interest then due, to wit, the sum of _____ dollars, as aforesaid, together with the further sum of twenty-five cents, being the fees allowed by law for taking the acknowledgment of a deed. That at the same time and place your petitioner presented to the said G. H. a satisfaction piece of the said mortgage in the usual form certifying that the said mortgage had been paid and consenting that it be discharged of record, and that your petitioner then and there requested the said G. H. to execute and acknowledge the said satisfaction piece. That the said tender was made in lawful money of the United States and without condition or stipulation, other than the execution, acknowledgment and delivery of the said satisfaction piece, which is hereto annexed, marked Exhibit A.

VII. That the said G. H. then and there refused to accept the said tender and refused to execute or to acknowledge the said satisfaction piece so presented.

* If, with due diligence, an actual tender cannot be made within the State, this paragraph should be altered so as to set forth in detail

the efforts made to find the mortgagee and such knowledge or information as the petitioner has, concerning his whereabouts.

WHEREFORE, your petitioner prays for an order requiring the said G. H. to show cause why an order should not be made by the court cancelling and discharging the mortgage of record, and directing the clerk of the county of ——— to mark the same upon his records as cancelled and discharged, and further ordering that the bond secured by the said mortgage be cancelled, upon condition that the sums tendered, as hereinbefore set forth be paid into court, depositing them by ——— with the treasurer [*or chamberlain*] of the county [*or city*] of ———.

A. B.

[*Verification in usual form.*]

NO. 70.

ORDER TO SHOW CAUSE.

At a Special Term, *etc.*

[*Title as in preceding form.*]

On reading and filing the petition of A. B. verified the ——— day of ———, 19—, praying that a mortgage executed by C. D., and M., his wife, to E. F., to secure the payment of the sum of ——— dollars, which said mortgage bears date on the ——— day of ———, 19—, and was, on the ——— day of ———, 19—, recorded in the office of the clerk of the county of ———, in Liber ——— of Mortgages, at page ———, and is a lien on premises situated in the county of ———, that the said mortgage was assigned by E. F. to G. H., that A. B. is a person interested in the mortgaged premises within the meaning of the statute, and that A. B. has tendered to the said G. H. the full amount of principal and interest due on the said mortgage together with the fees allowed by law for taking the acknowledgment of a deed, and on motion of X. Y., attorney for the petitioner, it is

ORDERED, that all persons interested show cause at a special term of his court, to be held at ——— in the ——— county of ———, on the ——— day of ———, 19—, at ——— o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made by this court cancelling and discharging the said mortgage of record, and directing the clerk of the county of ———, in whose office the same is recorded to mark the same upon his records as cancelled and discharged, and further ordering and directing that the bond or obligation secured by the said mortgage be cancelled, upon condition that the sums tendered by the petitioner be paid to the treasurer of the county of ——— and deposited in court in the said county [*or, where the tender cannot be made, upon condition that the*

amount of principal due on the said mortgage with interest up to the date when the said order shall be entered, together with the fees allowed by law for taking the acknowledgment of a deed be paid, *etc.*] And it is further

ORDERED, that this order be published in the ———, a newspaper published in the county of ———, once in each week for ——— weeks successively, and that a copy of this order be served personally on G. H., at least eight * days before the day hereinbefore appointed for showing cause.

NO. 71.

ORDER OF REFERENCE.†

At a Special Term, *etc.*

[*Title as in form 69.*]

..

On the order to show cause herein, dated the ——— day of ———, 19—, upon the affidavit of ———, sworn to the ——— day of ———, 19—, showing due service of the said order as therein provided, upon the affidavit of ———, sworn to the ——— day of ———, 19—, by which it appears to the satisfaction of the court that the said G. H. is the mortgagee of the said premises and that A. B., the petitioner, is a person interested therein, within the meaning of the statute, and upon motion of X. Y., attorney for the said petitioner, Z. W. appearing for G. H., but not opposing, it is

ORDERED, that this matter be referred to R. S., Esq., of ———, counsellor at law, to take and report proofs of the facts stated in the said petition.

NO. 72.

ORDER DISCHARGING MORTGAGE OF RECORD AND DIRECTING DEPOSIT OF AMOUNT DUE IN COURT.

At a Special Term, *etc.*

[*Title as in form 69.*]

Upon reading and filing the report of R. S., Esq., referee in this matter, to whom it was referred to take and report proofs of the facts stated in the petition herein, and it appearing to the satisfaction

* If sufficient cause be shown the order may be made returnable in less than eight days.

† On the return day of the order

to show cause, the court shall inquire in such manner as it may deem advisable into the truth of the facts, set forth in the petition.

of the court, by the proofs taken by the said referee and annexed to his said report, that the matters alleged in the said petition are true, on the notice of motion herein, with due proof of service thereof, and on motion of X. Y., attorney for the petitioner, Z. W., appearing for G. H. and opposing, it is

ORDERED, that upon the payment of the sum of ——— dollars, such amount being the principal sum secured by the said mortgage, interest thereon at the rate specified in the said mortgage, to the ——— day of ———, 19—, which is the date tender thereof was made and refused, and the fees allowed by law for taking the acknowledgment of a deed, to the ——— of the county of ———, the bond secured by the said mortgage be cancelled, and it is further

ORDERED, that upon the delivery to the clerk of the county of ———, of a certified copy of this order, and the receipt of the ——— of the county of ———, showing that the said amount has been deposited with him to the credit of this proceeding, the said clerk of the county of ——— mark said mortgage cancelled and discharged of record, as provided by law, and that he record, file and index such receipt and such certified copy of this order in the same manner as the certificate of the discharge of a mortgage, and upon the payment of the same fees.

NO. 73.

PETITION IN SPECIAL PROCEEDINGS TO DISCHARGE A MORTGAGE OF RECORD WITHOUT PRODUCING MORTGAGE IN NEW YORK CITY.*

[As in Form 69 to the end of Paragraph II thereof.]

III. That on or about the ——— day of ——— 19—, the said E. F., by his instrument of assignment, duly executed and acknowledged, and recorded in the office of the ——— of the county of ———, in Liber ——— of Mortgages at page ——— sold and conveyed the said mortgage to G. H.

* This and the two following forms are drawn with reference to Sec. 322 of the Real Property Law, which applies to cases in New York City where the mortgage shall have been lost, mutilated or destroyed, or upon which the signature or signatures are wholly obliterated or removed, or where, for any reason, production of said mortgage is rendered impossible or is refused by the person having

the same in his possession. This proceeding should be used instead of that outlined in Forms No. 69, 70, 71 and 72, in all cases in cities of the first class where the inability to discharge the mortgage without court order is due not to a refusal of tender by the holder of the mortgage, but to inability to produce the mortgage. See Matter of Black, 150 App. Div. 532.

IV. That your petitioner is now the owner and holder of the said mortgaged premises, and resides at ——— and that the said G. H. is now the holder of record of the said mortgage, and resides at ——— and that to the best knowledge, information and belief of your petitioner, the said G. H. is now the owner of the said mortgage, and that he has not assigned the same by any instrument which remains unrecorded, and that he is the person by law entitled to enforce or satisfy said mortgage.

[*Paragraph V as in Form 69.*]

VI. [*Set forth the loss, mutilation or destruction of the mortgage, or obliteration or removal of the signature or signatures thereon or therefrom, or the impossibility of producing the mortgage, or the refusal to produce the mortgage by the person having it in his possession, for example:*] That your petitioner is unable to present to the recording officer for cancellation the original mortgage hereinabove referred to because the said mortgage was in the custody of R. S., an attorney and counsellor-at-law, whose place of business was at No. ——— Street; that the premises No. ——— ——— Street were destroyed by fire on the ——— day of ——— 19—, and that the entire contents of the office of the said R. S., including the aforesaid mortgage, were destroyed by said fire, as more fully appears by the affidavit of R. S. hereto annexed.

WHEREFORE, your petitioner prays for an order dispensing with the production of the said mortgage, and directing the discharge thereof.*

[*Verification in usual form.*]

NO. 74.

ORDER OF REFERENCE.†

At a Special Term, *etc.*

[*Title as in Form 69.*]

Upon the petition of A. B. herein, verified the ——— day of ——— 19—, upon the affidavit of ——— sworn to the ——— day of ———

* Eight days personal notice of the application for such order must be given, as set forth in Sec. 322 of the Real Property Law, unless cause is shown why the application should be returnable sooner, in which case the court may issue an order to show

case upon the petition returnable in less than eight days.

A. B.

† On the return day of such notice or order to show cause, the court shall inquire in such manner as it may deem advisable into the truth of the facts set forth in the petition.

19— showing due service of notice of the application herein upon G. H., upon the affidavit of ——— sworn to the ——— day of ———, 19—, by which it appears to the satisfaction of the court that the said G. H. is the mortgagee of the said premises; and that A. B., the petitioner, is a person interested therein within the meaning of the statute, and upon motion of X. Y., attorney for the said petitioner, Z. W. appearing for G. H. but not opposing, it is

ORDERED, that this matter be referred to R. S., Esq., of ——— counsellor-at-law, to take and report proofs of the facts stated in the said petition.

NO. 75.

ORDER DISPENSING WITH PRODUCTION OF MORTGAGE AND DIRECTING DISCHARGE THEREOF.

At a Special Term, *etc.*

[*Title as in Form 69.*]

Upon reading and filing the report of R. S., Esq., referee in this matter, to whom it was referred to take and report proofs of the facts stated in the petition herein, and it appearing to the satisfaction of the court by the proofs taken by the said referee and annexed to his said report that the matters alleged in the said petition are true, and it appearing by the affidavit of ——— sworn to ——— the ——— day of ———, 19—, that G. H., the owner and holder of the mortgage herein, refuses to give a certificate for the discharge of the mortgage herein, on the notice of motion herein, with due proof of service thereof, and on motion of X. Y., attorney for the petitioner, Z. W. appearing for G. H. and opposing, it is

ORDERED, that the production of the said mortgage to the ——— of the county of ——— upon the discharge thereof shall be, and the same hereby is dispensed with; and it is further

ORDERED [*proceed as in Form No. 72 concerning the payment of the amount secured by the mortgage and the discharge of the mortgage by the recording officer.*]*

* In case the owner of the property can produce a certificate for discharge, the provision for the deposit of the amount due in court and the production of a receipt therefor is unnecessary. This provision is also

unnecessary where the petitioner shall make it appear to the satisfaction of the court that the principal sum and interest due upon the mortgage has been fully paid.

NO. 76.

COMPLAINT IN ACTION TO REDEEM. GRANTEE OF MORTGAGOR AGAINST MORTGAGEE IN POSSESSION.

[*Title of the action.*]

The plaintiff, by X. Y., his attorney, complaining against the defendant, alleges:

I. That heretofore E. F., being then the owner in fee of the premises hereinafter described, and M., his wife, executed to the above named defendant, C. D., a mortgage bearing date on the ——— day of ———, 19—, to secure the payment of the bond of said E. F., therein set forth and described, conditioned for the payment of the sum of [*set out condition*]. That said mortgage was, on the ——— day of ———, 19—, recorded in the office of the clerk of the county of ———, in Liber ——— of Mortgages, page ———, and that the mortgaged premises are therein described as follows: [*Insert description.*] *

II. That thereafter, and on or about the ——— day of ———, 19—, the said defendant entered into the possession of the said mortgaged premises, and into the receipt of the rents and profits thereof, and has ever since continued in such possession and receipt.

III. That heretofore the said E. F., and M., his wife, by their deed of conveyance, executed under their hands and seals, bearing date on the ——— day of ———, 19—, and recorded in said clerk's office, on the ——— day of ——— 19—, in Liber ——— of Conveyances, page ———, and for a valuable consideration, therein expressed, duly conveyed the said mortgaged premises to the plaintiff, subject to the said mortgage.

IV. The plaintiff further alleges upon information and belief, that the said mortgage has been either wholly or in great part satisfied and paid by the rents and profits of said mortgaged premises received by said defendant, and otherwise. That the plaintiff has desired and requested the defendant to come to an accounting with him as to the amount unpaid and owing upon said mortgage, but the said defendant refused, and still refuses so to do.

WHEREFORE, the plaintiff demands that an account may be taken of the amount due to the defendant for principal and interest on said mortgage, and that the plaintiff may be at liberty to redeem the said mortgaged premises upon payment of what, if anything, shall be found to be due; that the defendant upon payment thereof acknowledge satisfaction of said mortgage and discharge the same of record, and

that the plaintiff may have such other and further relief, or both, in the premises, as may be just.

X. Y.,

Plaintiff's Attorney.

[*Verification in the usual form.*]

NO. 77.

COMPLAINT IN ACTION TO REDEEM AND TO COMPEL AN ASSIGNMENT. JUNIOR INCUMBRANCER AGAINST MORTGAGEE.

[*As in Form No. 76 to the *.*]

That heretofore, on the ——— day of ———, 19—, the plaintiff duly recovered a judgment against the said E. F., in an action in the Supreme Court, in and for the county of ———, for the sum of ——— dollars damages and costs; that said judgment was on the ——— day of ———, 19—, duly docketed in the office of the clerk of the said county of ———, and then became and was a lien on the said mortgaged premises subject to said mortgage, and that no part of said judgment has been paid.

That the said mortgage held by the said defendant, C. D., became due and payable on the ——— day of ———, 19—; that thereafter this plaintiff offered and tendered to the said defendant the full amount due thereon for principal and interest, and requested an assignment thereof, but the said defendant refused to execute such assignment to the plaintiff.

That the said E. F., who is now the owner of the said mortgaged premises, has neglected and refused to pay the principal or interest secured by said mortgage, and that he remains in possession of the said mortgaged premises and of the rents and profits thereof; that the taxes on said mortgaged premises for the year 19— are unpaid, amounting to the sum of ——— dollars; that the said E. F., is insolvent; that the accumulation of interest on said mortgage and on said taxes seriously impairs the security and value of the plaintiff's aforesaid lien; and that the defendant and the said E. F. have combined and confederated together to allow the amount of said mortgage to reach the entire value of the property, and then to foreclose the same, with intent to deprive the plaintiff of any advantage of his said judgment lien.†

WHEREFORE, the plaintiff demands that an account may be taken

† It is necessary that it should be made to appear that an assignment is for some special reason essential to the protection of the equitable rights of the plaintiff. See *ante*, §§ 702 to 707.

of the amount due to the defendant for principal and interest on said mortgage, and that the plaintiff may be at liberty to redeem from the said mortgage upon payment of what shall be found to be due; that the defendant upon payment thereof, execute, acknowledge, and deliver to the plaintiff an assignment of the said bond and mortgage, and that he also deliver to the plaintiff all instruments in writing and papers in relation thereto, and that the plaintiff have such other and further relief, or both, in the premises as may be just.

X. Y.,

Plaintiff's Attorney.

[*Verification in the usual form.*]

NO. 78.

ORDER OF REFERENCE TO TAKE ACCOUNT OF AMOUNT DUE TO MORTGAGEE IN POSSESSION.

[*Recite proceedings, and then add:*]

It is ordered, that it be referred to M. N., Esq., of the city of ———, counselor at law, to take an account of what is due to the defendant for principal and interest on the bond and mortgage set forth in the complaint. And the said referee is also to take an account of the rents and profits of the said mortgaged premises which have come to the hands of the said defendant, or of any other person or persons by his order or for his use, or which he, without his wilful default, might have received. And what shall be coming on the said account of rents and profits, is to be deducted out of what shall be found due to the said defendant for principal, interest, and costs. And the said referee is also to allow the said defendant all sums paid out by him for taxes, or for permanent improvements, or for repairs, or for other purposes whenever, upon principles of equity, such payments ought to be allowed. And for the better taking of the said account, the said parties are to produce before and leave with the said referee, all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined on oath as the said referee may direct.

NO. 79.

JUDGMENT FOR REDEMPTION. ORDINARY FORM.

[*Recite the proceedings in the action, and then add:*]

Therefore it is adjudged that the plaintiff may redeem the said mortgaged premises from the mortgage held by the defendant, and which is mentioned and described in the complaint in this action,

upon paying to the said defendant the said sum of ——— dollars so found and reported due to the defendant, with interest thereon from the date of said report, and the further sum of ——— dollars adjudged to the defendant for his costs and charges in this action, with interest from the date hereof, within [six] months after the date of the entry of this judgment and service of notice thereof; and that, upon such payment being made, the said defendant do surrender the said mortgaged premises unto the said plaintiff, or unto such person or persons as he shall direct, free and clear of all incumbrances done by him, or any person claiming by, from, or under him, and deliver unto the said plaintiff, on oath, all deeds and writings in his custody or power, relating to the said mortgaged premises. And further, that the said defendant execute and acknowledge a certificate to cancel and discharge said mortgage of record. But in default of the said plaintiff making the said payment of principal, interest, and costs as aforesaid, it is ordered that the complaint of the said plaintiff do, from thenceforth, stand dismissed out of this court, with costs to be taxed.

NO. 80.

AFFIDAVIT OF MORTGAGEE, OF NON-PAYMENT OF MONEY.

[*Title of the action.*]

STATE OF NEW YORK, }
COUNTY OF ———, } ss.:

C. D., the above named defendant, being duly sworn, says, that he has not, nor has any person or persons in his behalf, at any time heretofore, received or been paid the amount of ——— dollars and interests thereon from the ——— day of ———, 19—, or any part thereof, which by the judgment made and entered in this action, on the ——— day of ———, 19—, was ordered and appointed to be paid to him, this deponent; but that the full amount which was found and adjudged by said judgment to be due and owing to this deponent on the bond and mortgage mentioned and described in the complaint, is still owing and unpaid thereon.

NO. 81.

FINAL ORDER DISMISSING COMPLAINT.

At a Special Term, etc.

[*Title of the action.*]

Upon the judgment entered in this action on the ——— day of ———, 19—, and on reading and filing notice of the entry of said

judgment, with due proof of the service thereof on the plaintiff, and the affidavit of the defendant sworn to the ——— day of ———, 19—, showing that the plaintiff has not paid the amount due to the defendant for principal, interest, and costs, or any part thereof, though more than six months have expired since the said service of notice of the entry of said judgment as aforesaid, and on due notice of this motion, with due proof of the service thereof, after hearing X. Y., attorney for the defendant, in support of the motion, and J. K., counsel for the plaintiff, in opposition thereto,

IT IS ORDERED, that the complaint of the said plaintiff do, from henceforth, stand dismissed out of this court, with ——— dollars costs to be taxed by the clerk of this court, including \$10 costs of this motion.

NO. 82.

COMPLAINT IN ACTION FOR STRICT FORECLOSURE.*

[Commence as in action to foreclose by a sale, following Form No. 11 to and including paragraph VIII., so far as that form may apply.]

IX. That thereafter the said [*the person who owned the mortgage which has been defectively foreclosed*] commenced an action in the ——— court, county of ———, against C. D., E. F., G. H., and I. K. and L., his wife, for the foreclosure of the said mortgage, and for the sale of the said mortgaged premises to satisfy and discharge said indebtedness, and such proceedings were had in said action, that on the ——— day of ———, 19—, it was duly ordered and adjudged by the said court, that the said mortgaged premises, or so much thereof as might be necessary to raise the amount then due to the said ———, for principal, interest, and costs, and which might be sold separately without material injury to the parties interested, be sold at public auction, in the county of ———, by or under the direction of ———, Esq., of ———, counselor at law, who was duly appointed referee. That subsequently to the entry of said judgment, and in pursuance thereof, the said referee duly sold said mortgaged prem-

* This form was prepared with special reference to a case where, by reason of a defect in a previous foreclosure, a lien upon the property has not been extinguished, and the strict foreclosure is made for the purpose of cutting it off. The general principles which control the rights of the parties, and the relief to which they

are entitled, are discussed *ante*, at §§ 1132 to 1139.

It should be borne in mind that under the wording of the Code of Civil Procedure, § 1626, it is extremely doubtful whether a strict foreclosure would be granted under any circumstances.

ises at public auction to this plaintiff, and this plaintiff duly paid to him the purchase money therefor, and received from him a deed of conveyance thereof, all of which will more fully appear by said deed of conveyance, which was, on the ——— day of ———, 19—, duly recorded in the office of the clerk of the county of ———, in Liber ——— of Conveyances, page ———; by the report of sale of said referee, which was duly filed in the office of said clerk, on the ——— day of ———, 19—, and by the order of said court confirming said report of sale, which was duly entered in said action on the ——— day of ———, 19—.*

X. That under said foreclosure and sale, and the said deed of conveyance of said referee, executed in pursuance of said judgment, the plaintiff entered into possession of said mortgaged premises, and the receipt of the rents and profits thereof, and that he has since continued, and still is, in possession. That he then believed that he had acquired, under said foreclosure proceedings, a perfect title to the said mortgaged premises, free from all liens and incumbrances, but that he has since been informed, and he believes, that the defendant ——— has, or claims to have, an interest in or lien upon the said premises by virtue of a certain mortgage executed [*describe it*], the lien of which mortgage was and is inferior, and subsequent to the lien of the mortgage under which said foreclosure and sale was had.

XI. That this plaintiff is advised that he has acquired by said foreclosure proceedings, the title to the said mortgage under which said sale was had [and also the right which I. K., and L., his wife, who were defendants in said action, had to redeem from the mortgage held or claimed by the defendant, the said I. K. being, at the time of the commencement of said foreclosure, the owner in fee of the title and equity of redemption of said premises].† That the amount which

* If the defective foreclosure has been by advertisement and sale under the statute, a simple allegation may be made that the mortgage was assigned to the plaintiff by the mortgagee, and it will not be necessary to set out the whole proceeding. The affidavits showing the defective foreclosure will then be admissible on the trial as evidence of the assignment. *Robinson v. Ryan*, 25 N. Y. 320. It would doubtless also be permissible to omit to set out the proceedings when the defective foreclosure has been by action, but in all cases a fuller form of statement is

preferable. If the title of the plaintiff to the mortgage is shown by alleging an assignment to him, a portion of paragraph X. would be inapplicable, and it should be averred simply that the plaintiff, on a certain day, entered into the possession of said premises, etc.

† The purchaser at a foreclosure sale acquires the rights of the plaintiff in the land, and also the rights of all of the defendants. As against a stranger to the action holding a junior lien, he may either enforce the lien of the mortgage foreclosed, or he may redeem. See *ante*, §§

was due and owing to the plaintiff in said action on the said mortgage, at the time of the entry of said judgment of foreclosure and sale, exclusive of the costs or expenses of said action or of said sale, was the sum of ——— dollars, and interest thereon from the ——— day of ———, 19—, no part of which has been paid, except as it was paid by the proceeds of said sale, under which this plaintiff claims.

XII. That the plaintiff has laid out and expended large sums for permanent improvements and repairs upon said premises, to wit: [*state the nature of the improvements, their cost and their value*]. And that the defendant has also paid large sums for taxes and assessments on said premises, to wit: [*state the amounts paid, the date of payment, and the nature of the tax or assessment.*]

XIII. That the rents and profits received by this plaintiff from said premises, have not been so great in amount as the annual interest on said mortgage, under which said foreclosure was had, and have not amounted to more than the sum of about ——— dollars. That the plaintiff claims that the amounts paid by him for taxes and assessments, and repairs, and the value of the permanent improvements made by him as aforesaid, should be allowed to him and added to the amount of said mortgage and interest thereon, and that there is now due and owing to him thereon, about the sum of ——— dollars.

XIV. That the plaintiff has applied to the said defendant ———, and requested him to pay the plaintiff the said sum so due on the said mortgage held by the plaintiff, or come to an accounting with him thereon, and after the proper charges and credits, pay to the said plaintiff what should appear to be due him on the said mortgage; or, in default thereof, to release his right and equity of redemption in the said mortgaged premises. But the said defendant has hitherto refused, and still refuses so to do, or to comply with any part of said plaintiff's request.

WHEREFORE, the plaintiff demands judgment:

1. That an account may be taken of what is due and owing to the plaintiff for principal and interest on said mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by the plaintiff, and also of the

1083 to 1087. It will not often be difficult to determine what to do, but where the value of the property or the amount or validity of the junior lien is doubtful, it will be permissible for the purchaser under the defective foreclosure, to insist upon all of his rights. The action may then be to cancel the junior lien if

it be void, or to have the amount due upon it ascertained if it be valid, and to foreclose it either by a sale or by a strict foreclosure. If a strict foreclosure is desired, see *ante*, §§ 1132 to 1139. The clause in brackets would be proper if the plaintiff desired to ask for any relief other than for foreclosure.

expenditures of the plaintiff for permanent improvements and repairs, and for taxes and assessments.

2. That said defendant pay to the plaintiff what may be due him on taking the said account, together with the costs of this action, by a short day to be appointed by the court for that purpose; or, in default thereof, that the said defendant and all persons claiming under him, be debarred and foreclosed of and from all right, title, and equity of redemption in and to the said mortgaged premises, and every part thereof.

3. That the plaintiff have such other or further relief, or both, in the premises, as may be just and equitable.

X. Y.,

Plaintiff's Attorney.

[Add verification in the usual form.]

NO. 83.

JUDGMENT FOR STRICT FORECLOSURE.

[Commence by reciting the proceedings in the action, which will be similar to Form No. 29. In all cases an affidavit under Rule 60, of the filing of a notice of the pendency of the action, must be furnished upon applying for judgment, and should be recited. The following will be the essential parts of the judgment:]

Therefore it is adjudged, that upon the defendant's paying unto the said plaintiff the amount which is so found and reported due to him as aforesaid, with interest from the date of said report,* together with the further sum of ——— dollars, and interest from this date, which is hereby adjudged to the plaintiff for costs and charges of this action, within [six] months after the entry of this judgment, and service of notice thereof upon the attorney for the defendant, said payment to be made at [the office of ———, Esq., attorney for the plaintiff, No. ——— street, in the city of ———, between the hours of 10 A. M. and 3 P. M., of any business day, on or before the expiration of said six months, and which said day shall have been named by the said defendant in a notice in writing to be served by him on said attorney for the plaintiff, not less than ten days prior to such day], the said plaintiff do then convey the said mortgaged premises to the said defendant ———, by a suitable and proper instrument of conveyance, to be approved by the court in case the parties cannot agree upon the form thereof, free and clear of all incumbrances,

* This will be the amount due to the plaintiff after all proper allowances have been made to him, and he has accounted for rents and profits.

done or suffered by him, or by any person claiming by, from, or under him [and with the usual covenants against his and their acts]; and that he deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said ———, or to whomsoever he may appoint to receive the same; and further, that the said plaintiff execute and acknowledge a certificate to cancel and discharge said mortgage of record. But in default of the said defendant's paying unto the plaintiff such principal, interest, and costs as aforesaid, by the time limited for that purpose, then it is adjudged that the said defendant ———, and all persons claiming under him, after the filing of the aforesaid notice of the pendency of this action, do stand and be forever barred and foreclosed of and from all right, title, interest, and equity of redemption in the said mortgaged premises, and every part thereof.

The following is a description of the said mortgaged premises hereinbefore mentioned: [*Insert description.*]

NO. 84.

ORDER EXTENDING TIME FOR REDEMPTION.

At a Special Term, *etc.*

[*Title of the action.*]

On reading and filing the affidavit of the defendant ———, and notice of this motion, and on all of the papers and proceedings herein, after hearing M. N., attorney for said defendant, and on his motion, and X. Y., attorney for the plaintiff, in opposition thereto,

IT IS ORDERED, that the time granted to the said defendant ———, in and by the judgment which was entered in this action on the ——— day of ———, 19—, and within which time he was required to redeem the mortgaged premises by paying the amount due to the plaintiff for principal, interest, and costs, or stand foreclosed, be and the same hereby is extended and enlarged for [one] month upon condition that the said defendant shall, within ten days after the entry of this order, pay to the plaintiff ten dollars, costs of this motion.

NO. 85.

FINAL ORDER IN ACTION FOR STRICT FORECLOSURE.

At a Special Term, *etc.*

[*Title of the action.*]

Upon the judgment entered in this action on the ——— day of ———, 19—, and on reading and filing notice of the entry of said

judgment, with due proof of the service thereof on the defendant, and the affidavit of the plaintiff showing that the defendant has not paid the amount due to the plaintiff for principal, interest, and costs, or any part thereof though more than six months have expired since the said service of notice of the entry of said judgment as aforesaid, and on due notice of this motion, with due proof of the service thereof; after hearing X. Y., attorney for the plaintiff, in support of the motion, and M. N., counsel for the defendant, in opposition thereto,

IT IS ORDERED, that the said defendant ———, and all persons claiming under him, after the filing of the notice of the pendency of this action, do stand and be forever barred and foreclosed of and from all right, title, interest, and equity of redemption in the mortgaged premises described in the said judgment, and every part thereof.

NO. 86.

NEW YORK STANDARD MORTGAGEE CLAUSE.

Loss or damage, if any, under this policy, shall be payable to ——— as ——— mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

Provided, also, that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee [or trustee], and unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee [or trustee] any

sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of ——— claim.

Dated, ———.

Attached to and forming part of Policy No. ———.

——— [*Signature for Company.*]

NO. 87.

NEW YORK STANDARD MORTGAGEE CLAUSE (WHEN OWNER HAS NO INTEREST IN THE INSURANCE).

It is hereby specially understood and agreed that this policy is for the benefit of the mortgagee [or trustee] only, the owner having no interest whatever therein.

And it is further agreed that whenever this Company shall pay the mortgagee any sum for loss under this policy this Company shall at once be legally subrogated to all the rights of the mortgagee [or trustee] under all the securities held as collateral to the mortgage debt to the extent of such payment, but such subrogation shall not impair the right of the mortgagee [or trustee] to recover the full amount of his claim.

Attached to and forming part of Policy No. ———.

——— [*Signature of Insured.*]

——— [*Signature for Company.*]

NO. 88.

NEW YORK STANDARD MORTGAGEE CLAUSE WITH FULL CONTRIBUTION.

Loss or damage, if any, under this policy, shall be payable to ——— as ——— mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by

any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

Provided, also that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of the said mortgagee [or trustee], and, unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

In case of any other insurance upon the within described property this Company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Whenever this Company shall pay this mortgagee [or trustee] any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of ——— claim.

Dated, ———.

Attached to and forming part of Policy No. ———.

———— [Signature for Company.]

NO. 89.

NOTICE OF SALE ON FORECLOSURE BY ADVERTISEMENT.*

WHEREAS, default has been made in the payment of the money secured by a mortgage dated the ——— day of ———, 19—, executed by A. B. and M., his wife, of ———, to C. D., of the same place, which mortgage was recorded in the office of the clerk of the county of ———, in Liber ——— of Mortgages, page ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon of that day; and which said mortgage was by the said C. D. assigned to E. F., who is now the owner and holder thereof;

AND WHEREAS the amount claimed to be due upon said mortgage at the time of the first publication of this notice is the sum of ——— dollars and ——— cents, to wit: the sum of ——— dollars principal, and the sum of ——— dollars and ——— cents the interest thereon from the ——— day of ———, 19—, which said sum of ——— dollars and ——— cents is the whole amount claimed to be unpaid on said mortgage:

Now, THEREFORE, notice is hereby given that, by virtue of the power of sale contained in said mortgage and duly recorded, as afore-said, and in pursuance of the statute in such case made and provided, the said mortgage will be foreclosed by a sale of the premises therein described at public auction, at ———, in the city of ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon on that day.

The said premises are described in said mortgage as follows: [*Insert description.*]

Dated, etc.

E. F.,
Assignee of Mortgage.

X. Y.,
Attorney for Assignee.

NO. 90.

THE SAME. A SHORT FORM.

MORTGAGE SALE.—Mortgagors A. B. and M., his wife; mortgagee C. D.; assignee E. F.; second assignee and present owner and holder G. H. Mortgage dated ———, 19—, and recorded in the office of the clerk of ——— county, ———, 19—, in Book No. ——— of Mortgages, page ———. The amount claimed to be due upon said

* Code of Civ. Pro. § 2391; ante, §§ 1173 to 1180.

mortgage, at the date of the first publication of this notice is the sum of \$_____.

Default having been made in the payment of the moneys secured by said mortgage, and no suit or proceeding at law or otherwise having been instituted to recover said mortgage debt or any part thereof: now, therefore, notice is hereby given, according to the statute in such case made and provided, that by virtue of the power of sale contained in said mortgage, and duly recorded therewith, as aforesaid, the said mortgage will be foreclosed by a sale of the premises therein described, by the subscriber, the assignee aforesaid, at public auction, on the _____ day of _____, 19____, at _____ in the _____ noon of that day, at _____, in the village of _____, in said county of _____.

Said premises are described in said mortgage as follows: [*Insert description.*]

Dated, etc.

G. H., Assignee.

X. Y., Attorney.

NO. 91.

AFFIDAVIT OF AFFIXING COPY OF NOTICE IN BOOK KEPT BY THE COUNTY CLERK.*

STATE OF NEW YORK, }
COUNTY OF _____ } ss.:

_____, being duly sworn, says, that he is the clerk of the said county of _____; that more than twelve weeks prior to the time therein specified for the sale, to wit, on the _____ day of _____, 19____, he received a printed copy of the annexed notice of sale, and that immediately, to wit, on said day, he affixed the same in a book prepared and kept by him for that purpose, and also entered a minute in said book at the bottom of such notice of the time of receiving and affixing the same, duly subscribed by him, the said clerk, and also indexed such notice to the name of the mortgagor.

Sworn, etc.

* Code of Civ. Pro. §§ 2390, 2396; *ante*, §§ 1166, 1202.

NO. 92.

**THE SAME. MADE BY ANY OTHER PERSON THAN THE
COUNTY CLERK.**

STATE OF NEW YORK, }
COUNTY OF _____ } ss.:

_____, being duly sworn, says, that he resides at _____ [and is one of the clerks employed by the clerk of the county of _____ in the office of said clerk]; that more than twelve weeks prior to the time therein specified for the sale, to wit, on the _____ day of _____, 19—, he saw a printed copy of the annexed notice of sale affixed in a book prepared and kept by the clerk of said county of _____ for that purpose; that there was then also entered in said book, at the bottom of such notice, the time of receiving and affixing the same, which was therein stated to be the _____ day of _____, 19—, duly subscribed by said clerk, and that said notice was also indexed to the name of the mortgagor.

Sworn, *etc.*

NO. 93.

**AFFIDAVIT OF AFFIXING THE NOTICE OF SALE ON THE
OUTER DOOR OF THE COURT HOUSE.***

STATE OF NEW YORK, }
COUNTY OF _____ } ss.:

_____, being duly sworn, says, that he resides at _____, and that, more than eighty-four days prior to the time therein specified for the sale, to wit, on the _____ day of _____, 19—, he fastened up a printed copy of the annexed printed notice of sale, on the outward door of the court house in the city [*or* village] of _____, that being the building which is nearest to the said mortgaged premises, and in which the county courts are directed to be held in the county of _____, where the said premises are situated.

He further says, that said notice was affixed and posted on the said outer door of said court house, in a conspicuous place and in a substantial manner.

Sworn, *etc.*

* Code of Civ. Pro. §§ 2388, 2396; *ante*, §§ 1167, 1202.

NO. 94.

AFFIDAVIT OF THE PUBLICATION OF THE NOTICE OF SALE.*

STATE OF NEW YORK, }
COUNTY OF _____ } ss.:

_____, being duly sworn, says, that he resides at _____, and that he is, and at the several times hereinafter mentioned he was, the printer [or the foreman of the printer, or the principal clerk of the printer] of the [Weekly Gazette], a newspaper printed and published at _____, in the county of _____; that the annexed notice of sale was published in the said newspaper for twelve weeks successively, once in each week, prior to the time therein specified for the sale, commencing on the _____ day of _____, 19—, and ending on the _____ day of _____, 19—, both days inclusive. [And, if there have been adjournments, add:] And he further says, that the notice of postponement annexed to and underneath said notice of sale, was also published in said newspaper on the _____ day of _____, 19—, and on the _____ day of _____, 19—, in the form shown in said annexed printed copy thereof.

Sworn, etc.

NO. 95.

AFFIDAVIT OF SERVING NOTICE OF SALE.†

STATE OF NEW YORK, }
COUNTY OF _____ } ss.:

_____, being duly sworn, says, that he resides at _____, and that he is of the age of _____ years;

That on the _____ day of _____, 19—, at _____, in the city of _____, he served a copy of the annexed notice of sale on _____, by delivering the same to and leaving it with him personally; that on the same day [or, on the _____ day of _____, 19—] at _____, he made a like service upon _____.

That on the _____ day of _____, 19—, he served a copy of said annexed notice of sale on _____, by leaving the same, which was legibly addressed to him, at his dwelling house at _____, in the city of _____, in charge of a person of full age, who received the same for him; that on the same day [or on the _____ day of _____, 19—] he made a like service upon _____, by leaving a copy of the said notice addressed to him, at his dwelling house at _____, in the city of _____, in charge of a person of full age, who received the same for him.

* Id.

† Code of Civ. Pro. §§ 2389, 2396.

That on the ——— day of ———, 19—, he served a copy of the said annexed notice upon each of the following named persons, by depositing the same in the post-office at the city of ———, folded, inclosed in sealed post-paid envelopes, and directed to each of the said persons at their several respective places of residence as follows: to ———, at ———; to ———, at ———; and to ———, at ———. That the postage on each of said notices was prepaid, and that the said persons were known to deponent to reside at the several places to which the notices to them were respectively directed.

Sworn, *etc.*

NO. 96.

AFFIDAVIT OF THE FACT OF THE SALE.*

STATE OF NEW YORK, }
COUNTY OF ——— } ss.:

———, being duly sworn, says, that he resides at ———, and that at ———, in the city of ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon of that day, he officiated as auctioneer at the sale of the mortgaged premises described in the notice of sale, a printed copy of which is hereunto annexed, pursuant to such notice and by virtue of the power of sale contained in the mortgage which is therein mentioned; that said sale took place at said time and place, and that the whole of said premises were then and there sold in one parcel to ———, of ———, for the sum of ——— dollars, he being the highest bidder therefor, and that being the highest sum bidden for the same.

Deponent further says, that said sale was made at public auction and in the daytime, and was, as deponent believes, honestly and fairly conducted.

Sworn, *etc.*

NO. 97.

PETITION IN SUMMARY PROCEEDING BY PURCHASER UNDER FORECLOSURE BY ADVERTISEMENT TO OBTAIN POSSESSION.†

To the county judge of the county of ———.

The petition of X. Y., of ———, in the county of ———, respectfully shows:

* Code of Civ. Pro. § 2396.

† See Code of Civil Pro. § 2232 *et seq.*; *ante*, §§ 1215, 1216. The method of procedure is not pointed out at length, but is the same as in

proceedings by landlords to obtain possession of demised premises for non-payment of rent, or for holding over after the expiration of a term.

That heretofore A. B., being the owner of the premises hereinafter described, and being indebted to C. D. in the sum of ——— dollars, upon his bond for that sum dated on the ——— day of ———, 19—, and payable in one year after that date, with interest thereon, payable semi-annually, the said A. B. and M., his wife, executed, acknowledged, and delivered to said C. D., a mortgage to secure the payment of said bond bearing even date therewith, and recorded in the office of the clerk of the county of ———, in Liber ——— of Mortgages, page ———, on the ——— day of ———, 19—, whereby they granted and conveyed unto the said C. D. the following described premises, to wit: [*Insert description.*] That said mortgage contained a like condition as the said bond, and that it also contained a power of sale, whereby in case of default in the payment of the said sum of money, the interest that might grow due thereon, or any part thereof, the said C. D., or his assigns, were duly empowered to sell the said mortgaged premises in due form of law, and out of the moneys arising from the sale, to pay the said sum of money and interest, with the costs and expenses of the proceedings thereupon, the surplus to be returned to the mortgagor; that thereafter the said C. D. duly assigned said bond and mortgage to E. F.; that thereafter default was made in the payment of the money secured by the said mortgage, whereupon the said E. F. commenced proceedings by virtue of the said power of sale contained in said mortgage, and in pursuance of the statute in such case made and provided, to foreclose the said mortgage by a sale of the premises therein described at public auction; that due notice was given of the time and place of such sale, in the manner required by law; and that thereafter, to wit, on the ——— day of ———, 19—, the said premises were under the said power of sale duly sold to and purchased by your petitioner for the price of ——— dollars, that being the highest sum bidden for the same; that the affidavits of publication and affixing the notice of sale, and of service of such notice, and of the circumstances of the sale, showing such foreclosure and the proceedings thereupon, and which affidavits are required by law to be made, were duly made, and that they were on the ——— day of ———, 19—, duly filed in the office of the clerk of the county of ———, that being the county where the said mortgaged premises were and are situated, and where said sale took place; and that they were also on that day duly recorded at length by such clerk in a book kept by him in his said office for the record of mortgages, to wit, in Book ——— of Mortgages commencing at page ———; that after the title to the said mortgaged premises had been fully perfected in this petitioner, by the filing and recording of the said affidavits as aforesaid, this petitioner demanded possession of the said premises from

said A. B., who was then and is now in possession thereof [*or* from M. N., who was then and who is now in possession thereof, claiming to hold the same by some right or title derived from the said A. B., the said mortgagor, subsequent to the execution and delivery of said mortgage], by virtue of said title under said foreclosure, and that the said A. B. [*or* M. N.] refused to surrender said possession, and that he holds over and continues in possession of the said premises after the perfection of said title under said foreclosure proceedings, and after such demand aforesaid, without permission of this petitioner, who is entitled to the possession thereof.

Your petitioner therefore prays for a final order to remove the said A. B. [*or* M. N.], and all persons holding under him, from the possession of said premises, and for such other or further relief as may be just, together with costs.

Dated, *etc.*

J. L., *Attorney for Petitioner.*

[*Add verification by petitioner in same form as verification to a complaint.*]

NO. 98.

PRECEPT TO BE ISSUED ON FOREGOING PETITION.

Before the county judge of ——— county.

X. Y., *Petitioner,*

against

A. B. and M. D., *Respondents.*

The People of the State of New York to A. B. and M. D. above named, and each and every person in possession of the premises hereinafter described:

You are hereby required forthwith to remove from the premises designated and described as follows: [*Take in description.*] Or to show cause before me, the county judge of the county of ———, at the county court house, in the village of ———, on the ——— day of ———, 19—, at ——— o'clock in the ——— noon of that day, why the possession of said premises should not be delivered to the said petitioner.

Dated, *etc.*

[*Signature of County Judge.*]

NO. 99.**INDORSEMENT ON FOREGOING PRECEPT IF SERVICE IS MADE OTHERWISE THAN PERSONALLY.**

Section 2241 of the Code of Civil Procedure.

SECTION 2241. "A person to whom a copy of a precept directed to another is delivered, as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city, or, if he cannot be so found, to his agent therein: and if neither can be so found after the exercise of reasonable diligence, before the time when the precept is returnable to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city. A person who wilfully violates any provision of this section is guilty of a misdemeanor: and if he is a tenant upon the property, forfeits to his landlord the value of three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept served otherwise than personally upon the person to whom it is directed."

NO. 100.**FINAL ORDER IN SUMMARY PROCEEDING.**

[Title as in precept.]

The petitioner, X. Y., appeared on the —— day of ——, 19—, and the precept was then returned, with due proof of service thereof, and the petitioner then demanded possession of the premises described in his petition, dated and verified on the —— day of ——, 19—.

The respondent, A. B., then also appeared by his attorney and filed his verified answer to the said petition, and the issue thus made having been duly tried before said county judge without a jury, who heard the allegations and proofs of the parties, the said county judge rendered his decision in favor of the petitioner.

On motion of T. L., attorney for the petitioner, final order is therefore hereby made in favor of said petitioner, awarding to the said petitioner the delivery of the premises described in said petition by reason of the facts therein alleged and set forth, together with —— dollars costs.

Dated, *etc.*

[Signature of County Judge.]

NO. 101.

WARRANT TO OBTAIN POSSESSION IN SUMMARY PROCEEDINGS.

To the sheriff of the county of ———, or to any constable of said county.

WHEREAS, X. Y., has heretofore presented to me his verified petition, alleging that heretofore A. B., being the owner of the premises hereinafter described, and being indebted to C. D. in the sum of ——— dollars, upon his bond for that sum, dated on the ——— day of ———, 19—, and payable in one year after said date, with interest thereon payable semi-annually, the said A. B. and M. his wife executed, acknowledged, and delivered to said C. D. a mortgage to secure the payment of said bond [*Following in the language substantially of the petition, Form No. 97.*]

Whereupon I issued a precept, requiring the said A. B. and M. N., and each and every person in possession thereof, forthwith to remove from the said premises, or show cause before me, at a certain time now past, why the possession of the said premises should not be delivered to the said ——— [*If an answer has been interposed and a trial had, here recite the proceedings*], and no good cause having been shown, or in any way appearing to the contrary, and due proof of the service of such precept having been made to me, and I having made a final order awarding the delivery of the possession of said premises to said petitioner with ——— dollars costs;

Therefore, in the name of the People of the State of New York, you are commanded to remove all persons from said premises, and put the said X. Y. into the full possession thereof.

In witness whereof I have subscribed to these presents this ——— day of ———, in the year one thousand nine hundred and ———,
[*Signature of County Judge.*]

NO. 102.

SHERIFF'S OR CONSTABLE'S RETURN UPON WARRANT.

Pursuant to the command of the within warrant, I have this day put the said ——— into the full possession of the premises therein mentioned.

Dated this ——— day of ———, 19—.

[*Signature of Sheriff or Constable.*]

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